

**\*\*\*Business Confidential Information Redacted on Pages i-ii, 35-39, 42-45, 47, 62, 68-69, 73-74, 86, 89-90, 92, 96-98, 101-102, 121-123, and 130\*\*\***

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

**(DS539)**

**FIRST WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA**

**BCI Redacted in Double Brackets (“[[ ]]”) on pages i-ii, 35-39, 42-45, 47, 62, 68-69, 73-74, 86, 89-90, 92, 96-98, 101-102, 121-123, and 130.**

**April 30, 2019**

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**EXHIBIT LIST**

<b>Exhibit No.</b>	<b>Description</b>	<b>BCI</b>
USA-1	<i>Certain Corrosion-Resistant Steel Products From Italy, India, the People’s Republic of China, the Republic of Korea, and Taiwan: Initiation of Less-Than-Fair-Value Investigations, 80 Fed. Reg. 37,228 (Dep’t of Commerce) (June 30, 2015)</i>	
USA-2	Respondent Selection for the Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products from the Republic of Korea (July 23, 2015)	BCI
USA-3	Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products (CORE) from the Republic of Korea (Korea): Extension to Respond to Sections B through D of the Initial Questionnaire (September 11, 2015)	
USA-4	Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products (CORE) from the Republic of Korea (Korea): Additional Guidance on Information Required to Substantiate Hyundai Steel Corporation’s Request for Alternative Calculation Method (September 16, 2015)	
USA-5	Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products (CORE) from the Republic of Korea (Korea): Second Supplemental Questionnaire to Sections B&C, and First Supplemental to Further Manufacturing (November 19, 2015)	BCI
USA-6	Certain Corrosion-Resistant Steel Products from Korea: Hyundai Steel’s Response to Sections B and C of the Department’s Supplemental Questionnaire (December 2, 2015)	BCI
USA-7	<i>Certain Corrosion-Resistant Steel Products From the Republic of Korea: Affirmative Preliminary Determination of Sales at Less than Fair Value and Postponement of Final</i>	

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USA-8	Decision Memorandum for the Preliminary Determination in the Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products from the Republic of Korea (PDM) (December 21, 2015)	
USA-9	Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products (CORE) from the Republic of Korea (Korea): Supplemental Questionnaire to Section E (3 <sup>rd</sup> ) (February 5, 2016)	
USA-10	Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products from the Republic of Korea: Supplemental Questionnaire to Section E (2 <sup>nd</sup> ) (December 15, 2015)	BCI
USA-11	Analysis for the Final Determination of the Less-Than-Fair Value Investigation of Certain Corrosion-Resistant Steel Products (CORE) from the Republic of Korea (Korea): Final Determination Margin Calculation for Hyundai Steel Company (Hyundai) (May 31, 2016)	BCI
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)	
USA-13	Respondent Selection for the Antidumping Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Republic of Korea (September 15, 2015)	BCI
USA-14	Cold-Rolled Steel Products From Korea: Hyundai Steel Section D Questionnaire Response (Part I) (November 5, 2015)	BCI

USA-15	Antidumping Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Supplemental Questionnaire for Sections B-C (January 19, 2016)	BCI
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USA-17	<i>Certain Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, the Republic of Korea, the Netherlands, the Republic of Turkey, and the United Kingdom: Initiation of Less-Than-Fair-Value Investigations</i> , 80 Fed. Reg. 54,261 (Dep’t of Commerce) (September 9, 2015)	
USA-18	Antidumping Duty Investigation of Certain Hot-Rolled Steel Flat Products from Korea: Respondent Selection Memorandum (October 1, 2015)	
USA-19	Antidumping Duty Investigation of Certain Hot-Rolled Steel Flat Products from Korea: Section D Supplemental Questionnaire (December 18, 2015)	BCI
USA-20	Antidumping Duty Investigation of Certain Hot-Rolled Steel Flat Products from Korea: Section A through C Supplemental Questionnaire (December 23, 2015)	BCI
USA-21	Letter from ABB., Large Power Transformers from the Republic of Korea – Request for Administrative Review (August 29, 2014)	
USA-22	Antidumping Duty Administrative Review of Large Power Transformers from the Republic of Korea: Respondent Selection Memorandum (November 18, 2014)	BCI
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USA-24	Antidumping Administrative Review of Large Power Transformers from Korea: Hyundai Response to Sections B and C Questionnaires (January 26, 2015)	BCI
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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-31	Antidumping Duty Administrative review of Large Power Transformers from the Republic of Korea: Respondent Selection Memorandum (December 2, 2015)	BCI
USA-32	Antidumping Duty Administrative review of Large Power Transformers from the Republic of Korea: Supplemental Questionnaire for Hyundai Heavy Industries Co., Ltd. and Hyundai Corporation USA’s Questionnaire Responses (October 7, 2016)	BCI

USA-33	Hyundai Heavy Industries Co., Ltd. Case Brief (January 5, 2017)	BCI
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USA-39	Antidumping Duty Administrative Review of Large Power Transformers from the Republic of Korea: Supplemental Questionnaire (July 11, 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 <sup>nd</sup> Supplemental Sales Response (Part II) (June 27, 2017)	BCI
USA-43	Analysis of Data/Questionnaire Responses Submitted by Hyundai Heavy Industries Co., Ltd. in the Preliminary Results of the 2015- 2016 Administrative Review of the Antidumping	

	Duty Order on Large Power Transformers from the Republic of Korea (August 31, 2017)	BCI
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
USA-45	Large Power Transformers from South Korea: Petitioner’s Comments on Hyosung’s Supplemental Section A Response (June 1, 2017)	BCI
USA-46	Department of Commerce Initial Anti-Dumping Questionnaire Hyosung (January 5, 2017)	
USA-47	Large Power Transformers from South Korea: Response to Petitioner’s Comments (August 11, 2017)	BCI
USA-48	19 CFR 351.302(d)	
USA-49	19 CFR 351.104(a)(2)	
USA-50	Petitions for the Imposition of Antidumping and Countervailing Duties: Certain Cold-Rolled Steel Flat Products from Brazil, the People's Republic of China, India, Japan, the Republic of Korea, Netherlands, Russia, and the United Kingdom (July 28, 2015)	
USA-51	Petitions for the Imposition of Antidumping and Countervailing Duties: Certain Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, the Republic of Korea, the Netherlands, Turkey, and the United Kingdom (August 11, 2015)	
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)	

**TABLE OF REPORTS**

<b>Short Title</b>	<b>Full Citation</b>
<i>Argentina – Import Measures (AB)</i>	Appellate Body Reports, <i>Measures Affecting the Importation of Goods</i> , WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015
<i>Canada – Welded Pipe (Panel)</i>	Panel Report, <i>Canada – Anti-Dumping Measures on Imports of Certain Carbon Steel Welded Pipe from The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu</i> , WT/DS482/R and WT/DS482/R/Add.1, adopted 25 January 2017
<i>China – Autos (US) (Panel)</i>	Panel Report, <i>China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States</i> , WT/DS440/R and Add.1, adopted 18 June 2014
<i>China – Broiler Products (Panel)</i>	Panel Report, <i>China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States</i> , WT/DS427/R and Add.1, adopted 25 September 2013
<i>China – GOES (Panel)</i>	Panel Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> , WT/DS414/R and Add.1, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R
<i>EC – Hormones (AB)</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
<i>EC – IT Products (Panel)</i>	Panel Reports, <i>European Communities and its member States – Tariff Treatment of Certain Information Technology Products</i> , WT/DS375/R / WT/DS376/R / WT/DS377/R, adopted 21 September 2010
<i>EC – Salmon (Norway) (Panel)</i>	Panel Report, <i>European Communities – Anti-Dumping Measure on Farmed Salmon from Norway</i> , WT/DS337/R, adopted 15 January 2008
<i>Mexico – Anti-Dumping Measures on Rice (AB)</i>	Appellate Body Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/AB/R, adopted 20 December 2005

<i>US – Anti-Dumping Methodologies (China) (AB)</i>	Appellate Body Report, <i>United States – Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China</i> , WT/DS471/AB/R, adopted 22 May 2017
<i>US – Carbon Steel (India) (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
<i>US – Continued Zeroing (AB)</i>	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R, adopted 19 February 2009
<i>US – Countervailing Duty Investigation on DRAMS (AB)</i>	Appellate Body Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea</i> , WT/DS296/AB/R, adopted 20 July 2005
<i>US – Countervailing Measures (China) (AB)</i>	Appellate Body Report, <i>United States – Countervailing Duty Measures on Certain Products from China</i> , WT/DS437/AB/R, adopted 16 January 2015
<i>US – Countervailing Measures on Certain EC Products (21.5 – EC)</i>	Panel Report, <i>United States – Countervailing Measures Concerning Certain Products from the European Communities – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS212/RW, adopted 27 September 2005
<i>US – Cotton Yarn (Panel)</i>	Panel Report, <i>United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan</i> , WT/DS192/R, adopted 5 November 2001, as modified by Appellate Body Report WT/DS192/AB/R
<i>US – Hot-Rolled Steel (AB)</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001
<i>US – Oil Country Tubular Goods Sunset Reviews (AB)</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004

<i>US – Steel Plate (Panel)</i>	Panel Report, <i>United States – Anti-Dumping and Countervailing Measures on Steel Plate from India</i> , WT/DS206/R and Corr.1, adopted 29 July 2002
<i>US – Supercalendered Paper (Panel)</i>	Panel Report, <i>United States – Countervailing Measures on Supercalendered Paper from Canada</i> , WT/DS505/R and Add. 1, circulated 5 July 2018
<i>US – Wool Shirts and Blouses (AB)</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr. 1

## INTRODUCTION

1. As reflected in the length of each Party's first written submission, Korea has chosen to launch a massive dispute to challenge disparate issues in six antidumping proceedings and two countervailing duty proceedings. Each one of these challenges involves unique facts and circumstances, and would have been better addressed in separate, more narrow disputes.
  2. To the extent that there is any relationship between the various issues raised by Korea, it is that in each case a sophisticated, well-represented Korean respondent made repeated decisions not to cooperate with clear and repeated requests for information from the United States Department of Commerce ("USDOC," "Commerce," or "the Department"), and as a result, the Korean companies were unsatisfied with the final results reached by USDOC in each of the proceedings.
  3. In essence, Korea is asking the panel to conduct a *de novo* review of each of the challenged determinations, in an attempt to attain modifications of objective and unbiased USDOC determinations. At best, this a questionable use of the WTO dispute settlement system. The WTO does not exist to excuse non-cooperation or to provide a *de novo* appeal of anti-dumping and countervailing duty investigations where a panel would re-weigh the evidence and arrive at its own conclusions.
  4. The Korean companies were well aware that refusal to cooperate in an administrative proceeding may have consequences. Indeed, Annex II of the Anti-Dumping Agreement explains that in cases of non-cooperation, the uncooperative party may not like the result:

It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate.
- Despite this, these companies apparently hope that seeking a second opinion might lead to a more favorable result. Korea's case is, in essence, a request for that second opinion. Under the WTO system, however, dispute settlement is not a forum for relitigating complex administrative proceedings. Rather, a Member must prove a specific breach of a specific WTO provision. As detailed in this submission, however, Korea has provided no basis for finding that the determinations at issue breached WTO rules.
5. Korea's panel request also purports to challenge unwritten measure as inconsistent "as such" with Article 6.8 and Annex II of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement. However, as explained in the U.S. preliminary ruling request, Korea's panel request failed to specify the unwritten measure Korea purports to challenge. Accordingly, no measure subject to an as such challenge is within the Panel's terms of reference. No subsequent submission can cure this deficiency.
  6. In any event, Korea's sprawling and incoherent first written submission did the opposite; it confirmed and compounded the deficiency. As a result, the United States is deprived of any reasonable opportunity to defend itself, as it is not even clear what alleged measure is in need of defending.



7. In the following submission, the United States demonstrates that Korea’s claims are meritless. Section I addresses the standard of review under Article 11 of the DSU, the rules of interpretation under Article 3.2 of the DSU, and the burden of proof that Korea bears.

8. Section II addresses Korea’s as applied claims under Article 6.8 and Annex II of the Anti-Dumping Agreement. Subsection A sets out the legal framework for Article 6.8 and Annex II of the Anti-Dumping Agreement. Subsections B-D address Korea’s specific claims under Article 6.8 and Annex II of the Anti-Dumping Agreement with respect to various investigations. Subsection E addresses Korea’s dependent claims under Articles 1, 9.3, and 18.1 of the Anti-Dumping Agreement.

9. Section III addresses Korea’s as applied claims related to Article 12.7 of the SCM Agreement. Subsection A provides the legal framework for Article 12.7. Subsection B addresses Korea’s specific claims under Article 12.7 of the SCM Agreement with respect to the cold-rolled steel (CRS) and hot-rolled steel (HRS) investigations raised by Korea. Subsection C addresses Korea’s dependent claims under Articles 10, 19.4, and 32.1 of the SCM Agreement.

10. In light of the U.S. showing that no unwritten measure challenged “as such” is properly within the Panel’s terms of reference, the United States is required to do nothing more in the way of rebuttal. Nevertheless, to the extent possible given the unknowable content of the alleged unwritten measure, Section IV discusses additional flaws in Korea’s reasoning and argumentation related to its purported “as such” claim.

## **I. STANDARD OF REVIEW, RULES OF INTERPRETATION, AND BURDEN OF PROOF**

11. As set out in Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”), the Panel is “to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements” by “mak{ing} an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.” Pursuant to the Panel’s terms of reference, as established by Article 7.1 of the DSU, the Panel is then to “make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for” in the covered agreements, as required by Article 19.1 of the DSU.

12. With respect to the specific standard of review for anti-dumping measures, Article 17.6 of the Anti-Dumping Agreement provides that:

- (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities’ establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;

(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

13. The Panel's task in this dispute then is to assess whether the USDOC properly established the facts and evaluated them in an unbiased and objective way.<sup>1</sup> The Panel's task is not to determine whether it would have reached the same results as the USDOC. Put differently, the Panel's task is to determine whether a reasonable, unbiased person, looking at the same evidentiary record as the USDOC, could have—not would have—reached the same conclusions that the USDOC reached.

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

15. In assessing the “applicability of and conformity with the covered agreements,” Article 3.2 of the DSU indicates that the Panel is to utilize customary rules of interpretation of public international law to discern the meaning of relevant provisions of the covered agreements. Previous WTO reports have recognized that Articles 31 and 32 of the Vienna Convention on the Law of Treaties (“Vienna Convention”) reflects such customary rules. Article 31 of the Vienna Convention provides that a “treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” A corollary of this customary rule of interpretation is that an “interpretation must give meaning and effect to all the terms of the treaty.”

16. The DSU does not assign precedential value to panel or Appellate Body reports adopted by the DSB or interpretations contained in those reports. Instead, it reserves such weight to “authoritative interpretations” adopted by WTO Members in a different body. The WTO Agreement states that the Ministerial Conference or General Council have the “exclusive

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<sup>1</sup> This is consistent with the findings in numerous panel and Appellate Body reports. *See, e.g., US – Countervailing Measures on Certain EC Products (21.5 – EC)*, para. 7.82 (referring to the Appellate Body report in *US – Cotton Yarn (Panel)*, as well as other reports concerning the Anti-Dumping Agreement, and observing that its role was to assess “whether the investigating authorities properly established the facts and evaluated them in an unbiased and objective manner.”). *See also ibid.*, paras. 7.78-7.83.

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

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

authority” to adopt interpretations, acting not by negative consensus (as in the DSB) but by positive consensus, and under different procedures that promote awareness and participation by Members.<sup>4</sup> The DSU explicitly notes that the dispute settlement system operates without prejudice to this interpretative authority reserved to Members.<sup>5</sup>

17. As noted, the DSU states that a panel is to apply customary rules of interpretation of public international law in assisting the DSB in determining whether a measure is inconsistent with a Member’s commitments under the covered agreements. Those rules of interpretation do not assign to interpretations given as part of dispute settlement a precedential value for purposes of discerning the meaning of agreement text. A panel is not permitted under its terms of reference as established by the DSB or under the DSU to ignore this task and instead simply treat prior panel or Appellate Body reports as binding “precedent.”<sup>6</sup>

18. Indeed, were a panel to decide to simply apply the reasoning in prior Appellate Body reports alone, it would fail to carry out its function, as established by the DSB, under DSU Articles 7.1, 11, and 3.2 to make findings on the applicability of existing provisions of the covered agreements, as understood objectively through customary rules of interpretation.

19. This does not mean that the United States considers a prior panel or Appellate Body interpretation to be without any value. To the extent that a panel finds prior Appellate Body or panel reasoning to be persuasive, a panel may refer to that reasoning in conducting its own objective assessment of the matter. But considering an interpretation in a prior panel or Appellate Body report is very different from a statement that the interpretation is controlling or “precedent” in a later dispute.

20. “The burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.”<sup>7</sup> Accordingly, Korea, as the complaining party, bears the burden of demonstrating that the U.S. measures within the Panel’s terms of reference are inconsistent with the Anti-Dumping Agreement or SCM Agreement. Korea must establish a *prima facie* case of inconsistency with a provision of a WTO covered

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<sup>4</sup> WTO Agreement, Art. IX:2 (“The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements.”).

<sup>5</sup> DSU Art. 3.9 (“The provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement.”).

<sup>6</sup> For a detailed elaboration of these provisions, see Statement by the United States on the Precedential Value of Panel or Appellate Body Reports Under the WTO Agreement and DSU, Meeting of the DSB on December 18, 2018, available at: [https://geneva.usmission.gov/wp-content/uploads/sites/290/Dec18.DSB\\_.Stmt\\_.as-deliv.fin\\_.public.pdf](https://geneva.usmission.gov/wp-content/uploads/sites/290/Dec18.DSB_.Stmt_.as-deliv.fin_.public.pdf).

<sup>7</sup> *US – Wool Shirts and Blouses (AB)*, p. 14. See also *China – Autos (US)*, para. 7.6.

agreement before the burden shifts to the United States, as the party complained against, to rebut Korea's *prima facie* case.<sup>8</sup>

**II. KOREA HAS FAILED TO ESTABLISH THAT USDOC'S APPLICATION OF FACTS AVAILABLE WAS INCONSISTENT WITH ARTICLE 6.8 AND PARAGRAPHS 1, 3, 5, 6 AND 7 OF ANNEX II OF THE ANTI-DUMPING AGREEMENT.**

21. Korea argues that USDOC's use of facts available in its calculations of antidumping duty margins in the Cold-Rolled Steel, Hot-Rolled Steel, and Corrosion-Resistant Steel investigations, and Large Power Transformers administrative reviews was inconsistent with Article 6.8 or Annex II of the Anti-Dumping Agreement.<sup>9</sup>

22. Below, we describe the legal framework of Article 6.8 and Annex II of the Anti-Dumping Agreement. We then (1) describe USDOC's findings and (2) demonstrate that Korea's claims are without merit with respect to each of the proceedings at issue. In each proceeding, USDOC acted in accordance with Article 6.8 and Annex II of the Anti-Dumping Agreement by selecting a reasonable replacement for necessary information that was missing from the record due to the responding companies' failure to cooperate.

**A. Legal Framework: Article 6.8 and Annex II of the Anti-Dumping Agreement**

23. Article 6.8 of the Anti-Dumping Agreement provides for determinations by administering authorities that are based upon the facts available. Article 6.8 states:

In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph.

Article 6.8 thus enables investigating authorities to make determinations on the basis of facts available when any interested party has refused or failed to provide necessary information, or has otherwise significantly impeded the investigation or review in question.

24. Article 6.8, as informed by the guidance in Annex II, "permits an investigating authority, under certain circumstances, to fill in gaps in the information necessary to arrive at a conclusion

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<sup>8</sup> *EC – Hormones (AB)*, para. 109 (citing *US – Wool Shirts and Blouses (AB)*, pp. 14-16). See also *China – Broiler Products*, para. 7.6.

<sup>9</sup> Korea First Written Submission, paras. 86, 207, 458, 659.

as to . . . dumping and injury.”<sup>10</sup> The ability to rely on the facts available in these circumstances “is intended to ensure that the failure of an interested party to provide necessary information does not hinder an agency’s investigation.”<sup>11</sup>

25. The “facts available” refer “to those facts that are in the possession of the investigating authority and on its written record.”<sup>12</sup> The extent to which the investigating authority must evaluate the possible facts available, and the form that evaluation may take, “depend{s} on the particular circumstances of a given case, including the nature, quality, and amount of the evidence on the record, and the particular determinations to be made in the course of an investigation.”<sup>13</sup>

26. Annex II of the Anti-Dumping Agreement contains relevant guidance with respect to the application of facts available. However, “{n}either Article 6.8 nor Annex II specify what form the request for information should take or how the authority should communicate its request to the interested party concerned.”<sup>14</sup> And, in the absence of a specific obligation in the text of the Anti-Dumping Agreement, a complaining party cannot make out a *prima facie* case simply by arguing that, in the view of the complaining party, the investigating authority should have responded differently to a failure of a respondent to provide necessary information.

27. Paragraph 1 of Annex II provides that an investigating authority should “specify in detail the information required from any interested party,” that interested parties “shall be given notice of the information which the authorities require,” and that interested parties be made aware that

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<sup>10</sup> *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 291. Although the Appellate Body focused on Article 12.7 of the SCM Agreement, the Appellate Body has found that “{g}iven the similarities between the text of Article 12.7 of the {SCM Agreement} and Article 6.8 of the {Anti-Dumping} Agreement and that both provisions permit an investigating authority, under certain circumstances, to fill in gaps in the information necessary to arrive at a conclusion as to dumping or subsidization and injury, {it} consider{s} {} the interpretation of Article 12.7 of the SCM Agreement developed by the Appellate Body in *Mexico – Anti-Dumping Measures on Rice* and *U.S. – Carbon Steel (India)(AB)* {} relevant to the understanding of the legal standard applied under Article 6.8 and paragraph 7 of Annex II to the {Anti-Dumping} Agreement.”; *US – Anti-Dumping Methodologies (China)(AB)*, para. 5.172, n.502. When evaluating the “facts available” determinations at issue in *Mexico – Anti-Dumping Measures on Rice (AB)*, the Appellate Body acknowledged that Article 6.8 of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement contain similar obligations and explained that “it would be anomalous if Article 12.7 of the SCM Agreement were to permit the use of ‘facts available’ in countervailing duty investigations in a manner markedly different from that in anti-dumping investigations.”; *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 295.

<sup>11</sup> *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 293; *see also China – GOES (Panel)*, para. 7.296 (“{T}he work of an investigating authority should not be frustrated or hampered by non-cooperation on the part of interested parties.”).

<sup>12</sup> *US – Carbon Steel (India) (AB)*, para. 4.417.

<sup>13</sup> *US – Carbon Steel (India) (AB)*, para. 4.421 (The “nature and extent” of the explanation and analysis of a particular “facts available” determination “will necessarily vary from determination to determination.”).

<sup>14</sup> *China – Broiler Products*, para. 7.301.

“if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry.”<sup>15</sup>

28. Paragraph 3 of Annex II requires that an authority should take into account “{a}ll information which is verifiable, {and} which is appropriately submitted so that it can be used in the investigation without undue difficulties.”

29. Paragraph 5 of Annex II further requires that, “provided the interested party has acted to the best of its ability,” the fact that certain information submitted “may not be ideal in all respects... should not justify the authorities from disregarding it.”

30. Paragraph 6 of Annex II provides that where information is not accepted, the supplying party should be made aware of the reasons therefor and should be provided with an opportunity to provide further explanations.<sup>16</sup> Where such explanations are not satisfactory, the reasons for the rejection of such evidence should be given in any published determinations.<sup>17</sup>

31. Paragraph 7 states that reliance on information from secondary sources should be done “with special circumspection,” and indicates that, “where practicable” secondary information should be checked using information from independent sources at the authority’s disposal. Paragraph 7 concludes with the following:

It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate.

32. Moreover, the Appellate Body has observed that paragraph 1 of Annex II of the Anti-Dumping Agreement

makes a connection between the “awareness” of an interested party, and the ability for an investigating authority to have recourse to the “facts available” under Article 6.8. This suggests that the knowledge of a non-cooperating party of the consequences of failing to provide information can be taken into account by an investigating authority, along with other procedural circumstances in which information is missing, in ascertaining those “facts available” on which to base a determination and in explaining the selection of facts..<sup>18</sup>

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<sup>15</sup> Anti-Dumping Agreement, Annex II, para. 1; *China – GOES (Panel)*, para. 7.384.

<sup>16</sup> Anti-Dumping Agreement, Annex II, para. 6.

<sup>17</sup> Anti-Dumping Agreement, Annex II, para. 6.

<sup>18</sup> *US – Carbon Steel (India) (AB)*, para. 4.426.

33. Thus, not only does the Anti-Dumping Agreement not prohibit an investigating authority from considering the fact of a party’s non-cooperation, it acknowledges the validity of such consideration.<sup>19</sup>

34. Finally, the United States notes that Korea repeatedly relies on the phrase “comparative evaluation” as if it is text from the covered agreements.<sup>20</sup> However, neither Article 6.8 nor Annex II of the Anti-Dumping Agreement contains the term “comparative evaluation.” The Appellate Body has reasoned that “the extent to which an ‘evaluation’ of the ‘facts available’ is required under Article 12.7, and the form it should take, depend on the particular circumstances of a given case, including the quantity and quality of the available facts on the record, and the types of determinations to be made in a given investigation.”<sup>21</sup> For example, as the Appellate Body noted, “a comparative approach to the evaluation required would not be feasible where there is only one set of reliable information on the record that is relevant to a particular issue and may thus serve as a factual basis for a determination.”<sup>22</sup>

35. The Appellate Body concluded: “Thus, we do not accept {the} argument that Article 12.7 of the SCM Agreement requires a comparative evaluation of the ‘facts available’ in every case.”<sup>23</sup> It continued:

We instead find that Article 12.7 requires an investigating authority to use “facts available” that reasonably replace the missing “necessary information”, with a view to arriving at an accurate determination, which calls for a process of evaluation of available evidence, the extent and nature of which depends on the particular circumstances of a given case.<sup>24</sup>

The Appellate Body’s reasoning applies with equal force to use of facts available for purposes of anti-dumping investigation.

**B. Korea Has No Basis for Asserting that USDOC’s Application of Facts Available in the LTFV Investigation of Certain Corrosion-Resistant Steel Products (CORE)**

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<sup>19</sup> See *US – Carbon Steel (India) (AB)*, para. 4.426.

<sup>20</sup> See, e.g., Korea First Written Submission, paras. 71, 76, 193, 196, 198, 210, 311, 322, 461, 485, 528, 662, 766, 859, 880-881, 924, 974, 1005.

<sup>21</sup> *India – Carbon Steel (AB)*, para. 4.434.

<sup>22</sup> *India – Carbon Steel (AB)*, para. 4.434.

<sup>23</sup> *India – Carbon Steel (AB)*, para. 4.434.

<sup>24</sup> *India – Carbon Steel (AB)*, para. 4.435.

**(A-580-878) Was Inconsistent with Obligations under the Anti-Dumping Agreement.**

36. As explained in detail below, Korea fails to demonstrate that USDOC’s application of facts available in the LTFV Investigation of CORE was inconsistent with Article 6.8 or Annex II of the Anti-Dumping Agreement. USDOC provided Hyundai Steel multiple opportunities to respond adequately to its requests for information, relied on facts available where necessary information was missing from the record, and selected reasonable replacements from among Hyundai Steel’s own reported information. Thus, Korea has no basis for arguing that USDOC’s application of facts available thus was inconsistent with Article 6.8 and Annex II.

37. In subsection 1, we present the facts regarding USDOC’s application of facts available with respect to Hyundai Steel, as supported by the evidence on the record in this dispute. Subsection 2 demonstrates how USDOC’s application of facts available was consistent with Article 6.8 and Annex II of the Anti-Dumping Agreement and that Korea has failed to establish a breach.

**1. *Hyundai Steel Failed to Provide Requested Information and USDOC’s Subsequent Application of Facts Available.***

38. In this subsection, we provide the relevant facts regarding USDOC’s application of facts available against Hyundai Steel in the CORE investigation. As the record shows, Hyundai failed to provide requested information and as a result, necessary information was missing from the record. By failing to provide requested information and failing to provide requested information by the required deadline, Hyundai impeded this investigation, resulting in USDOC applying facts available. Therefore, USDOC reasonably replaced the missing information with information from the petition.

39. In June 2015, domestic producers, United States Steel Corporation and others, filed a petition with USDOC alleging that imports of CORE from Korea were being sold in the United States at less than fair value.<sup>25</sup> Accordingly, USDOC initiated a LTFV investigation.<sup>26</sup>

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<sup>25</sup> *Certain Corrosion-Resistant Steel Products From Italy, India, the People’s Republic of China, the Republic of Korea, and Taiwan: Initiation of Less-Than-Fair-Value Investigations*, 80 Fed. Reg. 37,228, 37,234 (Dep’t of Commerce) (June 30, 2015) (Exhibit USA-1).

<sup>26</sup> *Certain Corrosion-Resistant Steel Products From Italy, India, the People’s Republic of China, the Republic of Korea, and Taiwan: Initiation of Less-Than-Fair-Value Investigations*, 80 Fed. Reg. 37,228, 37,234 (Dep’t of Commerce) (June 30, 2015) (Exhibit USA-1).



40. USDOC selected Hyundai as one of its mandatory respondents in the investigation.<sup>27</sup> USDOC issued its initial antidumping questionnaire to Hyundai on July 27, 2015.<sup>28</sup> In its initial questionnaire, USDOC explained that Hyundai was not *yet* required to provide information about its further-manufactured merchandise, but that USDOC might require such information, as it would be necessary to its calculations:

You are not currently required to respond to section E (Cost of Further Manufacturing or Assembly Performed in the United States). However, we may request a response to this section if we determine, based on your response to section A, that we require the information to account for further-processing expenses incurred in the United States.<sup>29</sup>

41. Prior to submitting a response to section A of the questionnaire, and thus prior to giving USDOC an opportunity to determine whether it was necessary for Hyundai to respond to section E, Hyundai requested that USDOC “confirm” Hyundai was not required to respond to section E and for USDOC to apply the “special rule”<sup>30</sup> in valuing Hyundai’s sales of further manufactured products, for the purpose of calculating constructed export price (CEP).<sup>31</sup> In making its request, Hyundai asserted: (1) that it was experiencing difficulties responding to the questionnaire; (2) the value added by the further manufacturing exceeded 65 percent of the value of the subject merchandise; (3) and that other means were available for calculating CEP.<sup>32</sup>

42. Hyundai explained that further manufactured CORE is first sold to Hyundai’s U.S. affiliate, Hyundai Steel America, Inc. (HSA).<sup>33</sup> Hyundai further explained that, after receiving

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<sup>27</sup> Respondent Selection for the Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products from the Republic of Korea (July 23, 2015) (Exhibit USA-2 (BCI)).

<sup>28</sup> Antidumping Questionnaire to Hyundai Steel (July 27, 2015) (Exhibit KOR-6).

<sup>29</sup> Antidumping Questionnaire to Hyundai Steel (July 27, 2015) (Exhibit KOR-6) at 2.

<sup>30</sup> The “special rule” refers to a scenario in which Commerce is seeking to determine the CEP of products imported by the exporter or producer’s affiliate and with value added to the imported product in the United States. *See* 19 U.S.C. § 1677a(e). If the value added by the affiliate “is likely to exceed substantially” the value of the product upon importation, then Commerce “shall determine” the CEP by using either (1) “{t}he price of identical {products} sold by the exporter or producer to an unaffiliated person,” or (2) “{t}he price of other {products} sold by the exporter or producer to an unaffiliated person.” 19 U.S.C. § 1677a(e)(1)-(2). This requires a “sufficient quantity of sales to provide a reasonable basis for comparison” and that USDOC determines that the use of such sales is appropriate. 19 U.S.C. § 1677a(e) (Exhibit KOR-3).

<sup>31</sup> Corrosion-Resistant Steel Products from Korea: Notice of Difficulty in Responding to Questionnaire and Request for Alternative Calculation Method by Hyundai Steel (August 17, 2015) (Exhibit KOR-7 (BCI)).

<sup>32</sup> Corrosion-Resistant Steel Products from Korea: Notice of Difficulty in Responding to Questionnaire and Request for Alternative Calculation Method by Hyundai Steel (August 17, 2015) (Exhibit KOR-7 (BCI)).

<sup>33</sup> Corrosion-Resistant Steel Products from Korea: Notice of Difficulty in Responding to Questionnaire and Request for Alternative Calculation Method by Hyundai Steel (August 17, 2015) (Exhibit KOR-7 (BCI)) at 2-3.

subject CORE from Hyundai, HSA does one of three things: (1) resells the CORE as coil to an affiliated or unaffiliated processor; (2) performs minor processing, such as slitting or shearing, and resells the resulting product as skelp, sheet, or blanks; or (3) manufactures tailor welded blanks (TWBs) for sale.<sup>34</sup> Nearly all CORE sold through HSA was ultimately consumed in the production of automobiles by two Hyundai affiliates, Hyundai Motor Manufacturing Alabama and Kia Motor Manufacturing Georgia.<sup>35</sup> Hyundai also asserted that there were several different sub-channels involved in producing these automobiles, channels involving both affiliated and unaffiliated parties that perform intermediate further-manufacturing processes as the CORE transitions from a raw material to components of a finished automobile.<sup>36</sup> To support its assertion that the value added by the further manufacturing exceeded 65 percent of the value of the subject merchandise, Hyundai compared an invoice of a 2015 Hyundai Sonata (a personal automobile sold by Hyundai) to the average gross unit price of a coil of imported CORE purchased by HSA during the period of investigation.<sup>37</sup> Finally, Hyundai suggested a CEP sales reporting methodology for USDOC to use for calculating CEP for further manufactured sales.<sup>38</sup> On August 12, 2015, Hyundai met with USDOC officials to discuss its request.<sup>39</sup>

43. On September 11, 2015, USDOC requested additional information from Hyundai.<sup>40</sup> USDOC explained that it was still evaluating Hyundai's request.<sup>41</sup> USDOC also explained that "at this time, {it was} not requir{ing} that Hyundai report further-manufactured sales" for which

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<sup>34</sup> Corrosion-Resistant Steel Products from Korea: Notice of Difficulty in Responding to Questionnaire and Request for Alternative Calculation Method by Hyundai Steel (August 17, 2015) (Exhibit KOR-7(BCI)) at 2-3.

<sup>35</sup> Corrosion-Resistant Steel Products from Korea: Notice of Difficulty in Responding to Questionnaire and Request for Alternative Calculation Method by Hyundai Steel (August 17, 2015) (Exhibit KOR-7 (BCI)) at 3.

<sup>36</sup> Corrosion-Resistant Steel Products from Korea: Notice of Difficulty in Responding to Questionnaire and Request for Alternative Calculation Method by Hyundai Steel (August 17, 2015) (Exhibit KOR-7 (BCI)) at 3.

<sup>37</sup> Corrosion-Resistant Steel Products from Korea: Notice of Difficulty in Responding to Questionnaire and Request for Alternative Calculation Method by Hyundai Steel (August 17, 2015) (Exhibit KOR-7 (BCI)) at 8-9.

<sup>38</sup> Corrosion-Resistant Steel Products from Korea: Notice of Difficulty in Responding to Questionnaire and Request for Alternative Calculation Method by Hyundai Steel (August 17, 2015) (Exhibit KOR-7 (BCI)) at 15-18.

<sup>39</sup> Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products from the Republic of Korea: Ex Parte Meeting with Hyundai Steel Company (August 21, 2015) (Exhibit KOR-8) at 1.

<sup>40</sup> Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products (CORE) from the Republic of Korea (Korea): Extension to Respond to Sections B through D of the Initial Questionnaire (September 11, 2015) (Exhibit USA-3) at 2.

<sup>41</sup> Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products (CORE) from the Republic of Korea (Korea): Extension to Respond to Sections B through D of the Initial Questionnaire (September 11, 2015) (Exhibit USA-3) at 2.

the first sale to “an unaffiliated party {was} of a completed automobile,” but that USDOC “may ask for these sales in the future.”<sup>42</sup>

44. After receiving USDOC’s additional request for information, Hyundai asserted in a teleconference with USDOC that it was unclear to the company what additional information USDOC was requesting in its September 11, 2015, request.<sup>43</sup> On September 16, 2015, USDOC responded with additional guidance, detailing the information required to substantiate Hyundai’s request for exemption.<sup>44</sup> Specifically, USDOC requested that, for each product group that contained merchandise under consideration, such as skelp, sheet, blanks, and TWBs, Hyundai provide the following: (1) “schedules that show the period of investigation (POI) quantity and value of Hyundai Steel America (HSA) sales to each unaffiliated vendor” and, for products that were resold by affiliated vendors directly to unaffiliated customers, such schedules; (2) “calculation{s} of the percentage of the value added to the imported merchandise under consideration after importation and prior to sale to the unaffiliated vendor (*i.e.*, the value added by HSA or, in the case of products sold to affiliated vendors, the value added by HSA and the value added by the affiliated vendor;” (3) “supporting documentation for each element of the calculations” with “clear{} reference{s} {to} each element to which each supporting document relates;” and (4) a narrative identifying “the product groups, by vendor, that Hyundai believes qualify for the special rule {stating} the rationale for why exclusion should be granted.”<sup>45</sup>

45. On September 25, 2015, Hyundai responded to USDOC’s letters and provided value-added calculations for its sales of TWBs and auto parts.<sup>46</sup> Hyundai also offered further explanation as to the nature of the difficulties it claimed to have in reporting the requested information and, by its own admission, reports that what it has provided remains incomplete,

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<sup>42</sup> Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products (CORE) from the Republic of Korea (Korea): Extension to Respond to Sections B through D of the Initial Questionnaire (September 11, 2015) (Exhibit USA-3) at 2.

<sup>43</sup> 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).

<sup>44</sup> Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products (CORE) from the Republic of Korea (Korea): Additional Guidance on Information Required to Substantiate Hyundai Steel Corporation’s Request for Alternative Calculation Method at Attachment 1 (September 16, 2015) (Exhibit USA-4).

<sup>45</sup> Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products (CORE) from the Republic of Korea (Korea): Additional Guidance on Information Required to Substantiate Hyundai Steel Corporation’s Request for Alternative Calculation Method at Attachment 1 (September 16, 2015) (Exhibit USA-4).

<sup>46</sup> Certain Corrosion-Resistant Steel Products From Korea: Response to the Department’s Request for Additional Information (September 28, 2015) (Exhibit KOR-10 (BCI)).

noting that it “has been able to identify through electronic means the second source coil used in production for most, but not all production during the POI.”<sup>47</sup>

46. On October 15, 2015, USDOC informed Hyundai that its September 25, 2015, submission had “failed to demonstrate, in accordance with 19 CFR § 351.402(c), that the value added in the United States is equal to or greater than 65 percent of the value of the imported coil with respect to Hyundai’s further manufactured sales of certain auto parts, tailor welded blanks (TWBs), and further processed TWB (*i.e.*, after-service auto parts).”<sup>48</sup> USDOC thus instructed Hyundai to revise its U.S. sales database to include all sales of further-manufactured merchandise sold by HSA or any other Hyundai affiliate to the first unaffiliated customer in the United States and to provide a section E response for these data. This was consistent with USDOC’s repeated indications throughout the proceeding that a section E response might be required.<sup>49</sup>

47. On October 22, 2015, Hyundai responded to USDOC’s request for information regarding Hyundai’s further manufactured sales and asserted that it was unclear how it should report auto parts and TWBs, and requested an additional meeting with USDOC officials.<sup>50</sup> USDOC officials met with Hyundai on October 27, 2015, to discuss Hyundai’s questions.<sup>51</sup> USDOC officials met with Hyundai again on November 24, 2015, to discuss Hyundai’s further manufactured sales.<sup>52</sup>

48. Hyundai submitted its first section E response on November 2, 2015.<sup>53</sup> After reviewing Hyundai’s response, USDOC identified multiple deficiencies with Hyundai’s further manufactured sales databases.

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<sup>47</sup> Certain Corrosion-Resistant Steel Products From Korea: Response to the Department’s Request for Additional Information (September 28, 2015) (Exhibit KOR-10 (BCI)) at 3-4.

<sup>48</sup> Certain Corrosion-Resistant Steel Products (CORE) from the Republic of Korea (Korea): Hyundai Steel Company’s Exclusion Request (October 15, 2015) (Exhibit KOR-11).

<sup>49</sup> Certain Corrosion-Resistant Steel Products (CORE) from the Republic of Korea (Korea): Hyundai Steel Company’s Exclusion Request (October 15, 2015) (Exhibit KOR-11).

<sup>50</sup> 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).

<sup>51</sup> Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products from the Republic of Korea (Korea): Meeting with Counsel to Hyundai Steel Company (Hyundai) (October 27, 2015) (Exhibit KOR-14).

<sup>52</sup> Certain Corrosion-Resistant Steel Products from the Republic of Korea: Meeting with Counsel to Hyundai Steel Company (November 27, 2015) (Exhibit KOR-16).

<sup>53</sup> 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)).

49. On November 19, 2015, USDOC notified Hyundai of these discrepancies and instructed Hyundai to submit revised, usable databases.<sup>54</sup> On November 30, 2015, and December 2, 2015, respectively, Hyundai submitted revised cost and sales databases in response to USDOC's supplemental questionnaires that contained certain unexplained and unsolicited changes or downward reductions in the cost of manufacturing reported for the production of TWBs.<sup>55</sup>

50. On December 15, 2015, USDOC issued a second supplemental section E questionnaire seeking explanation of the unexplained and unsolicited changes reported in Hyundai's supplemental response of November 30, 2015.<sup>56</sup> Hyundai responded to this questionnaire on December 29, 2015.<sup>57</sup>

51. USDOC issued its preliminary determination on December 21, 2015.<sup>58</sup> In its preliminary determination, USDOC explained that a review of Hyundai's supplemental questionnaire responses "indicat{ed} that significant issues continued to exist in how Hyundai reported its sales of further manufactured products in {its} databases and that {those} issues potentially affect all of Hyundai's sales of further manufactured merchandise."<sup>59</sup> In particular, USDOC noted that it had identified "issues with Hyundai's basis for certain adjustments made to the prices of {further manufactured sales} which potentially affects the comparison of those prices to the prices of Hyundai's sales of non-further manufactured products as part of the Department's differential pricing analysis."<sup>60</sup> Specifically, Hyundai reported:

For each newly-created line item observation, Hyundai Steel has included an additional field variable called 'FURMANQTYU' reporting specific CONNUM

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<sup>54</sup> Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products (CORE) from the Republic of Korea (Korea): Second Supplemental Questionnaire to Sections B&C, and First Supplemental to Further Manufacturing (November 19, 2015) (Exhibit USA-5 (BCI)).

<sup>55</sup> Certain Corrosion-Resistant Steel Products from Korea: Hyundai Steel's Response to the Department's Section E and Further Manufactured Sales Supplemental Questionnaire (November 30, 2015) (Exhibit KOR-18 (BCI)); Certain Corrosion-Resistant Steel Products from Korea: Hyundai Steel's Response to Sections B and C of the Department's Supplemental Questionnaire (December 2, 2015) (Exhibit USA-6 (BCI)).

<sup>56</sup> Antidumping Duty Less Than Fair Value Investigation of Certain Corrosion-Resistant Steel Products from the Republic of Korea: Second Supplemental Section E Questionnaire (December 15, 2015) (Exhibit KOR-24).

<sup>57</sup> Certain Corrosion-Resistant Steel Products from Korea: Hyundai Steel's Response to the Department's Second Supplemental Section E Questionnaire (December 29, 2015) (Exhibit KOR-19 (BCI)).

<sup>58</sup> *Certain Corrosion-Resistant Steel Products From the Republic of Korea: Affirmative Preliminary Determination of Sales at Less than Fair Value and Postponement of Final Determination*, 81 Fed. Reg. 78 (Dep't of Commerce) (January 4, 2016) (Exhibit USA-7), and the accompanying CORE I&D Memo (PDM) (December 21, 2015) (Exhibit USA-8).

<sup>59</sup> CORE I&D Memo (PDM) (December 21, 2015) (Exhibit USA-8) at 12.

<sup>60</sup> CORE I&D Memo (PDM) (December 21, 2015) (Exhibit USA-8) at 12. .

MT quantity of CORE that was used to produce the single further manufactured product (e.g., TWB). This value also represents the MT sales quantity of the specific CONNUM in question (reported in the field QTY2U).<sup>61</sup>

Thus, based on Hyundai's explanation, the quantity in FURMANQTYU and QTY2U should be the same; however, Hyundai reported different quantities in the FURMANQTYU and QTY2U fields for the vast majority of further manufactured sales.<sup>62</sup> Hyundai did not explain these differences in its narrative questionnaire response. Similarly, Hyundai revised certain cost data in its December 2 submission, yet provided no explanation for the revisions.<sup>63</sup>

52. 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.<sup>64</sup> USDOC noted that the response and database submitted by Hyundai on November 2, 2015 were deficient and unusable. USDOC further explained that while it was still analyzing the data and response submitted on December 2, 2015, 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.<sup>65</sup> 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 application of an alternative comparison method.<sup>66</sup> 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 warranted.<sup>67</sup>

53. As facts available, USDOC preliminarily determined to apply the average-to-transaction comparison methodology to all of Hyundai's sales used in calculating its weighted-average dumping margin and applied the weighted-average positive margins derived from Hyundai's ordinary sales to Hyundai's further-manufactured sales.<sup>68</sup> In doing so, USDOC noted that, given the timing of Hyundai's supplemental submission on December 2, it was not practicable for the agency to provide Hyundai with an opportunity to remedy its further-manufactured sales

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<sup>61</sup> See Certain Corrosion-Resistant Steel Products from Korea: Hyundai Steel's Response to the Department's Section E and Further Manufactured Sales Supplemental Questionnaire (November 30, 2015) (Exhibit KOR-18 (BCI)) at S-13.

<sup>62</sup> CORE I&D Memo (PDM) (December 21, 2015) (Exhibit USA-8) at 12.

<sup>63</sup> CORE I&D Memo (PDM) (December 21, 2015) (Exhibit USA-8) at 13.

<sup>64</sup> CORE I&D Memo (PDM) (December 21, 2015) (Exhibit USA-8) at 13.

<sup>65</sup> CORE I&D Memo (PDM) (December 21, 2015) (Exhibit USA-8) at 13.

<sup>66</sup> CORE I&D Memo (PDM) (December 21, 2015) (Exhibit USA-8) at 13.

<sup>67</sup> CORE I&D Memo (PDM) (December 21, 2015) (Exhibit USA-8) at 14.

<sup>68</sup> CORE I&D Memo (PDM) (December 21, 2015) (Exhibit USA-8) at 14.

responses prior to the preliminary determination, but that it would provide Hyundai with an opportunity to do so after the preliminary determination.<sup>69</sup>

54. Shortly after USDOC issued its preliminary determination, Hyundai submitted its response to USDOC's second supplemental Section E questionnaire.<sup>70</sup> However, Hyundai's response did not address the issues raised with Hyundai's reporting in the preliminary determination, as explained above, or in the Section E second supplemental questionnaire related to cost.<sup>71</sup>

55. Accordingly, on February 5, 2016, USDOC issued a third supplemental Section E questionnaire to enable Hyundai to explain its submission and correct various deficiencies.<sup>72</sup> USDOC specifically requested that Hyundai "explain and document" discrepancies in the reported quantity values reported in QTY2U and FURMANQTYU – the same issue identified by USDOC in its preliminary determination.<sup>73</sup> On February 10, 2016, Hyundai responded to this questionnaire, explaining again that in, Hyundai's view, it was complex to provide the requested data, and that the "perceived inconsistencies in the data" stem from the nature of the products and the need to convert the reporting basis to comply with USDOC's requests.<sup>74</sup>

56. On March 8, 2016, USDOC informed Hyundai that it had examined and evaluated Hyundai's December 29, 2015 and February 10, 2016 submissions and had determined that Hyundai's further-manufactured sales data was "unverifiable and deficient."<sup>75</sup> USDOC found that Hyundai's further-manufactured sales and cost databases showed inconsistencies, and multiple unexplained, or insufficiently explained, changes that were unrelated to the questions

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<sup>69</sup> CORE I&D Memo (PDM) (December 21, 2015) (Exhibit USA-8) at 13.

<sup>70</sup> Certain Corrosion-Resistant Steel Products from Korea: Hyundai Steel's Response to the Department's Second Supplemental Section E Questionnaire (December 29, 2015) (Exhibit KOR-19 (BCI)).

<sup>71</sup> CORE I&D Memo (May 24, 2016) (Exhibit KOR-5) at 14; Certain Corrosion-Resistant Steel Products (CORE) from the Republic of Korea (Korea): Certain Corrosion-Resistant Steel Products from Korea: Cancellation of Hyundai Steel Company's Constructed Export Price (CEP) Verification of Further Manufactured Sales (March 8, 2016) (Exhibit KOR-20).

<sup>72</sup> Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products (CORE) from the Republic of Korea (Korea): Third Supplemental Questionnaire to Section E (February 5, 2016) (Exhibit USA-9).

<sup>73</sup> Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products (CORE) from the Republic of Korea (Korea): Third Supplemental Questionnaire to Section E (February 5, 2016) (Exhibit USA-9).

<sup>74</sup> Certain Corrosion-Resistant Steel Products from Korea: Hyundai Steel Third Supplemental Section E Questionnaire Response (February 10, 2016) (Exhibit KOR-17 (BCI)).

<sup>75</sup> Certain Corrosion-Resistant Steel Products from Korea: Cancellation of Hyundai Steel Company's Constructed Export Price (CEP) Verification of Further Manufactured Sales (March 8, 2016) (Exhibit KOR-20) at 1.

posed in USDOC’s supplemental questionnaires.<sup>76</sup> The vast majority of these changes were not related to USDOC’s second supplemental section E questionnaire and the changes were not explained. As a result, USDOC indicated that it was canceling the CEP verification of Hyundai’s further-manufactured sales.<sup>77</sup>

57. On May 24, 2016, USDOC issued its final determination and determined to use facts available with respect to Hyundai’s further-manufactured sales.<sup>78</sup> USDOC determined that necessary information pertaining to these sales was missing from the record, that Hyundai had failed to provide certain requested information by the required deadline, and that Hyundai had significantly impeded the proceeding through delays in its reporting and the repeated submission of unusable and unsolicited information.<sup>79</sup> USDOC also determined to use an adverse inference in selecting from the facts available because Hyundai had failed to cooperate to the best of its ability in its responses to USDOC’s requests for information.<sup>80</sup> As explained above, USDOC cited various inconsistencies, deficiencies, and delays from Hyundai in supporting this conclusion.<sup>81</sup> Thus, as facts available, USDOC reasonably replaced the missing information with the highest rate alleged in the petition.<sup>82</sup>

58. Because this information was from a secondary source, USDOC used special circumspection in using this information by explaining how the secondary information was reliable and relevant to the calculation at hand. USDOC explained that it had examined evidence supporting the calculations in the petition to determine the probative value of the margins alleged in the petition for use as adverse facts available.<sup>83</sup> USDOC explained that prior to initiation it had examined key elements of the export price and normal value calculations used in the petition as well as information (to the extent that such information was available) from various independent sources provided in the petition, or its supplements, that corroborates some of the elements of the export price, normal value, and constructed value calculations in the petition.<sup>84</sup> As a result of this examination, USDOC found these calculations to be reliable.<sup>85</sup> Additionally,

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<sup>76</sup> Certain Corrosion-Resistant Steel Products from Korea: Cancellation of Hyundai Steel Company’s Constructed Export Price (CEP) Verification of Further Manufactured Sales (March 8, 2016) (Exhibit KOR-20).

<sup>77</sup> Certain Corrosion-Resistant Steel Products from Korea: Cancellation of Hyundai Steel Company’s Constructed Export Price (CEP) Verification of Further Manufactured Sales (March 8, 2016) (Exhibit KOR-20) at 2.

<sup>78</sup> CORE I&D Memo (May 24, 2016) (Exhibit KOR-5) at 14.

<sup>79</sup> CORE I&D Memo (May 24, 2016) (Exhibit KOR-5) at 14.

<sup>80</sup> CORE I&D Memo (May 24, 2016) (Exhibit KOR-5) at 16-17.

<sup>81</sup> CORE I&D Memo (May 24, 2016) (Exhibit KOR-5) at 15-16.

<sup>82</sup> CORE I&D Memo (May 24, 2016) (Exhibit KOR-5) at 17.

<sup>83</sup> CORE I&D Memo (May 24, 2016) (Exhibit KOR-5) at 18.

<sup>84</sup> CORE I&D Memo (May 24, 2016) (Exhibit KOR-5) at 18.

<sup>85</sup> CORE I&D Memo (May 24, 2016) (Exhibit KOR-5) at 18.



USDOC explained that no other information had been submitted that would question the validity of these calculations.<sup>86</sup>

59. Further, USDOC noted that the replacement rates were derived from information related to aggregate data involving the CORE industry.<sup>87</sup> USDOC found this information relevant to the respondents because the U.S. price in the petition was based on price quotes/offers for sales of CORE produced in, and exported from, Korea.<sup>88</sup> USDOC explained that the rates used reflected deductions from the U.S. price for movement expenses consistent with the delivery terms, adjustments for known differences between the U.S. and Korean industry, and financial ratios based on Korean producers of comparable merchandise.<sup>89</sup> Lastly, USDOC analyzed Hyundai's margin program output and found product-specific margins for coil at or above the petition rate in USDOC's margin calculation for export price and constructed export price sales of coils, finding the rate alleged to be within range of Hyundai's product-specific margins.<sup>90</sup> Based on the above, USDOC found the replacement rates selected to be reliable for purposes of corroboration in resorting to the use of facts available.<sup>91</sup>

***2. Korea Has Not Shown That USDOC's Use of Facts Available Was Inconsistent with Article 6.8 and Paragraphs 1, 3, 5, 6, and 7 of Annex II of the Anti-Dumping Agreement.***

60. Korea alleges (1) that USDOC's determination to rely on facts available is inconsistent Article 6.8 of the Anti-Dumping Agreement, as the conditions for resorting to facts available were not met;<sup>92</sup> (2) that USDOC acted inconsistently with Article 6.8 and paragraphs 1 and 6 of Annex II of the Anti-Dumping Agreement for failing to specify in detail the information required as soon as possible to allow reasonable time to provide such information, and to specify why record evidence was rejected;<sup>93</sup> (3) that USDOC acted inconsistently with Article 6.8 and paragraphs 3 and 5 of Annex II of the Anti-Dumping Agreement for disregarding verifiable information appropriately submitted by Hyundai Steel and submitted to the best of Hyundai Steel's ability;<sup>94</sup> (4) that USDOC acted inconsistently with Article 6.8 and paragraph 7 of Annex II of the Anti-Dumping Agreement in its selection of facts available; and (5) that USDOC failed

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<sup>86</sup> CORE I&D Memo (May 24, 2016) (Exhibit KOR-5) at 18.

<sup>87</sup> CORE I&D Memo (May 24, 2016) (Exhibit KOR-5) at 18.

<sup>88</sup> CORE I&D Memo (May 24, 2016) (Exhibit KOR-5) at 18.

<sup>89</sup> CORE I&D Memo (May 24, 2016) (Exhibit KOR-5) at 18-19.

<sup>90</sup> CORE I&D Memo (May 24, 2016) (Exhibit KOR-5) at 18-19.

<sup>91</sup> CORE I&D Memo (May 24, 2016) (Exhibit KOR-5) at 18-19.

<sup>92</sup> Korea First Written Submission, para. 129.

<sup>93</sup> Korea First Written Submission, para. 150.

<sup>94</sup> Korea First Written Submission, paras. 163-181.

to engage in the requisite comparative analysis of available information to arrive at an accurate determination, and that it relied on secondary information without using special circumspection and without corroboration.<sup>95</sup> As explained below, each of these claims is without merit.

61. In addition to these claims, Korea argues that USDOC’s decision to use an adverse inference when relying on the facts available was made with a view to ensuring a less favorable result and not on making an accurate determination.<sup>96</sup> Korea further alleges that USDOC’s application of facts available was somehow punitive.<sup>97</sup> As explained below, these assertions are not supported by the extensive factual record.

62. Korea’s arguments are unsupported by the record evidence and fail to demonstrate inconsistency with Article 6.8 and Annex II of the Anti-Dumping Agreement. We address each of Korea’s arguments in turn below and demonstrate Korea’s failure to establish that the United States acted inconsistently with Article 6.8 and Annex II of the Anti-Dumping Agreement in resorting to facts available.

*a. USDOC’s Analysis Met the Conditions For Resorting to Facts Available.*

63. Korea claims that the conditions for resorting to the facts available were not met,<sup>98</sup> but this claim is not substantiated by the record evidence. USDOC complied with Article 6.8 and paragraphs 1 and 6 of Annex II of the Anti-Dumping Agreement when resorting to the facts available, as we will demonstrate below.

*i. Necessary Information Was Missing From the Record.*

64. Korea’s claim that the information on further-manufactured sales requested by USDOC was not “necessary” to the margin calculation for the investigation is unsupported by the record.<sup>99</sup> Hyundai argues there was no “necessary” information missing from the record because Hyundai Steel had submitted all the relevant data to “permit the USDOC to apply the alternative methodology it had proposed, should the USOC have elected to do so.”<sup>100</sup> However, this argument ignores that USDOC specifically considered and rejected Hyundai’s “alternative methodology.” Specifically, USDOC rejected Hyundai’s request to exclude further manufactured products and apply an alternative methodology, as it determined that, with respect Hyundai’s further manufactured sales, “Hyundai failed to demonstrate, in accordance with 19

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<sup>95</sup> Korea First Written Submission, para. 88.

<sup>96</sup> Korea First Written Submission, para. 88.

<sup>97</sup> Korea First Written Submission, para. 88.

<sup>98</sup> Korea First Written Submission, paras. 129-162.

<sup>99</sup> Korea First Written Submission, paras. 87, 126, 130-133.

<sup>100</sup> Korea First Written Submission, para. 132.

CFR 351.402(c) that the value added in the United States is equal to or greater than 65 percent of the imported coil.”<sup>101</sup>

65. Moreover, USDOC determined that Hyundai’s calculations for applying the alternative methodology for further manufactured sales were flawed,<sup>102</sup> and Korea has not disputed this. In other words, Korea’s argument would appear to be premised on Korea’s belief that USDOC’s decision to reject Hyundai’s request to exclude further manufactured products and apply an alternative methodology is flawed, but Korea makes no such argument.

66. Moreover, data on further manufactured sales, as Hyundai’s argument appears to acknowledge, is necessary for USDOC’s margin calculation. As USDOC explained in its preliminary determination, without such data, it is unable “to reliably assess whether these sales would contribute to a pattern of differential pricing.”<sup>103</sup> Similarly, in its final determination, USDOC notes that without the data, it is “impossible for the Department to conduct its margin analysis of Hyundai’s further manufactured sales.”<sup>104</sup> In sum, because the information regarding Hyundai’s further manufactured sales was necessary to USDOC’s margin calculation, after denying Hyundai’s request to exclude further manufactured products and apply an alternative methodology, USDOC instructed Hyundai to revise its sales database to include all products and to provide a section E response.<sup>105</sup> Nevertheless, despite multiple opportunities, Hyundai failed to provide the requested necessary information.

ii. *Hyundai Failed to Provide Necessary Information Within a Reasonable Period and Significantly Impeded the Proceeding.*

67. Korea asserts next that Hyundai did not significantly impede the investigation or refuse access to necessary information, but rather Hyundai “had a hard time making sense of the unguided request to present the information” and USDOC provided no guidance.<sup>106</sup> To start, USDOC never found that Hyundai had “refused access” to necessary information. Rather, the USDOC found that “Hyundai significantly impeded the proceeding through the delays it caused in reporting its further manufactured information and because it consistently provided unusable

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<sup>101</sup> Certain Corrosion-Resistant Steel Products (CORE) from the Republic of Korea (Korea): Hyundai Steel Company’s Exclusion Request (October 15, 2015) (Exhibit KOR-11).

<sup>102</sup> CORE I&D Memo (May 24, 2016) (Exhibit KOR-5) at 13.

<sup>103</sup> CORE I&D Memo (PDM) (December 21, 2015) (Exhibit USA-8) at 13.

<sup>104</sup> CORE I&D Memo (May 24, 2016) (Exhibit KOR-5) at 14.

<sup>105</sup> Certain Corrosion-Resistant Steel Products (CORE) from the Republic of Korea (Korea): Hyundai Steel Company’s Exclusion Request (October 15, 2015) (Exhibit KOR-11).

<sup>106</sup> Korea First Written Submission, paras. 87, 126, 130-148.

information.”<sup>107</sup> While Korea argues that it struggled to complete USDOC’s questionnaire and USDOC provided no guidance, the record does not support this assertion.

68. On October 15, 2015, Commerce rejected Hyundai’s exclusion request and instructed Hyundai to revise its U.S. sales database to include all sales of further-manufactured merchandise sold by HSA or any other Hyundai affiliate to the first unaffiliated customer in the United States and to provide a section E response for these data.<sup>108</sup> Following Hyundai’s request for guidance on October 22, 2015,<sup>109</sup> USDOC officials met with Hyundai on October 27, 2015, to discuss Hyundai’s questions.<sup>110</sup> Hyundai submitted its first section E response on November 2, 2015, and on November 24, 2015, USDOC officials met with Hyundai again to discuss Hyundai’s questions. Following Hyundai’s initial response, USDOC issued three supplemental questionnaires, identifying deficiencies with Hyundai’s responses.

69. Despite three opportunities to correct deficiencies, and multiple opportunities to meet with USDOC, the information ultimately reported was unusable because of the inconsistencies, multiple unexplained or insufficiently explained changes, and unsolicited changes found in the reported databases.<sup>111</sup> Specifically, Hyundai did not respond to several issues identified by USDOC in its second supplemental questionnaire, and did not address issues raised by USDOC in its preliminary determination.<sup>112</sup> Further, Hyundai failed to provide information regarding its value-added calculations despite receiving specific and detailed requests for such information, and despite having been requested to provide the information at least six times.<sup>113</sup> Hyundai’s

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<sup>107</sup> CORE I&D Memo (May 24, 2016) (Exhibit KOR-5) at 14.

<sup>108</sup> Certain Corrosion-Resistant Steel Products (CORE) from the Republic of Korea (Korea): Hyundai Steel Company’s Exclusion Request (October 15, 2015) (Exhibit KOR-11).

<sup>109</sup> 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).

<sup>110</sup> Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products from the Republic of Korea (Korea): Meeting with Counsel to Hyundai Steel Company (Hyundai) (October 27, 2015) (Exhibit KOR-14).

<sup>111</sup> Certain Corrosion-Resistant Steel Products from Korea: Cancellation of Hyundai Steel Company’s Constructed Export Price (CEP) Verification of Further Manufactured Sales (March 8, 2016) (Exhibit KOR-20); CORE I&D Memo (May 24, 2016) (Exhibit KOR-5) at 14.

<sup>112</sup> Certain Corrosion-Resistant Steel Products from Korea: Cancellation of Hyundai Steel Company’s Constructed Export Price (CEP) Verification of Further Manufactured Sales (March 8, 2016) (Exhibit KOR-20); CORE I&D Memo (May 24, 2016) (Exhibit KOR-5) at 14.

<sup>113</sup> Corrosion-Resistant Steel Products from Korea: Notice of Difficulty in Responding to Questionnaire and Request for Alternate Calculation Method by Hyundai Steel (August 17, 2015) (Exhibit KOR-7 (BCI)); Certain Corrosion-Resistant Steel Products From Korea: Response to the Department’s Request for Additional Information (September 28, 2015) (Exhibit KOR-10 (BCI)); 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)); Certain Corrosion-Resistant Steel Products from Korea: Hyundai Steel’s Response to the Department’s Section E and Further Manufactured Sales Supplemental Questionnaire (November 30, 2015) (Exhibit

eventual response was insufficient and did not adequately explain why it was unable to fully comply with USDOC's request for the information.<sup>114</sup> Furthermore, in the same response, Hyundai significantly impeded the investigation by complicating the reporting process, in part, by claiming Hyundai could not track certain pieces of CORE based on CONNUM and providing unsolicited and incomplete changes to other previously reported information.<sup>115</sup>

70. Hyundai's troubled reporting rose to the level of impeding the proceeding, as documented by USDOC, because of the delays it caused in reporting the information and because it consistently provided unusable information.<sup>116</sup>

71. Accordingly, USDOC explained in its final determination that numerous inconsistencies marred Hyundai's latest reporting of further manufactured sales, which rendered Hyundai's reporting of further manufactured sales information unverifiable and unreliable.<sup>117</sup> USDOC thus properly determined that Hyundai both failed to provide necessary requested information on multiple occasions and significantly impeded the progress of the investigation.<sup>118</sup> Under Article 6.8 of the Anti-Dumping Agreement, such determinations justified the resort to use facts available, as USDOC properly did here.

*iii. USDOC Specified in Detail the Necessary Information As Soon As Possible Following Initiation and Provided A Reasonable Period of Time for Hyundai to Respond.*

72. Korea claims that USDOC "did not specify in detail the information required as soon as possible after initiation," and that USDOC did not provide a reasonable period of time for Hyundai to respond to its requests for information.<sup>119</sup> Specifically, Korea alleges that USDOC failed to specify the requested information within the guidelines established by Article 6.8 and paragraph 1 of Annex II. Korea alleges that Hyundai was "suddenly" required to provide a

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KOR-18 (BCI)); Certain Corrosion-Resistant Steel Products From Korea: Hyundai Steel's Response to the Department's Supplemental Section E Questionnaire (2<sup>nd</sup>) (December 29, 2015) (Exhibit KOR-19 (BCI)), Certain Corrosion-Resistant Steel Products from Korea: Hyundai Steel Third Supp. Section E Questionnaire Response (February 10, 2016) (Exhibit KOR-17 (BCI)).

<sup>114</sup> CORE I&D Memo (May 24, 2016) (Exhibit KOR-5) at 12-14.

<sup>115</sup> CORE I&D Memo (May 24, 2016) (Exhibit KOR-5) at 12-14.

<sup>116</sup> CORE I&D Memo (May 24, 2016) (Exhibit KOR-5) at 7-17, 14.

<sup>117</sup> CORE I&D Memo (May 24, 2016) (Exhibit KOR-5) at 14; *see also* Certain Corrosion-Resistant Steel Products from Korea: Cancellation of Hyundai Steel Company's Constructed Export Price (CEP) Verification of Further Manufactured Sales (March 8, 2016) (Exhibit KOR-20).

<sup>118</sup> CORE I&D Memo (May 24, 2016) (Exhibit KOR-5) at 14.

<sup>119</sup> Korea First Written Submission, paras. 150-55.

section E response and that USDOC had told “Hyundai Steel not to reply to Section E” or had “indicated it was not needed.”<sup>120</sup> These arguments grossly mischaracterize the record facts.

73. Since the time of the issuance of the initial questionnaire, Hyundai had been aware that a section E response may be necessary. While USDOC did not initially require Hyundai to respond to section E of the questionnaire, it did alert Hyundai to the possibility of requiring such information in the future, depending on Hyundai’s section A response.<sup>121</sup> Thus, USDOC specified that Hyundai may be required to provide the further-manufactured information as soon as possible after initiation, *i.e.*, at the issuance of its initial questionnaire.<sup>122</sup> Indeed, USDOC’s request for Hyundai to respond to section E came as soon as USDOC completed its consideration of Hyundai’s request for exemption and its review of Hyundai’s response to section A of the questionnaire, which had been delayed due to an extension request by Hyundai. Moreover, in its initial request to Hyundai, and in three supplemental requests, USDOC specified precisely, in great detail and pursuant to paragraph 1 of Annex II of the Anti-Dumping Agreement, the information it required from Hyundai relating to the further-manufactured sales.<sup>123</sup>

74. Additionally, USDOC’s request for Hyundai to provide a response to section E was only after a lengthy engagement with Hyundai as to whether USDOC would exempt Hyundai from having to report sales of affiliated sales of further manufactured products and provide a section E.<sup>124</sup> USDOC provided Hyundai at least six opportunities prior to the final determination to demonstrate that the value added exceeded 65 percent or, later, to provide the requested information regarding further manufactured merchandise.<sup>125</sup> Further, USDOC specified in detail

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<sup>120</sup> Korea First Written Submission, paras. 107, 151, 158.

<sup>121</sup> Antidumping Questionnaire to Hyundai Steel (July 27, 2015) (Exhibit KOR-6).

<sup>122</sup> Antidumping Questionnaire to Hyundai Steel (July 27, 2015) (Exhibit KOR-6).

<sup>123</sup> Certain Corrosion-Resistant Steel Products (CORE) from the Republic of Korea (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 (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 (2<sup>nd</sup>) (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 (3<sup>rd</sup>) (February 5, 2016) (Exhibit USA-9).

<sup>124</sup> Certain Corrosion-Resistant Steel Products (CORE) from the Republic of Korea (Korea): Hyundai Steel Company’s Exclusion Request (October 15, 2015) (Exhibit KOR-11).

<sup>125</sup> Corrosion-Resistant Steel Products from Korea: Notice of Difficulty in Responding to Questionnaire and Request for Alternate Calculation Method by Hyundai Steel (August 17, 2015) (Exhibit KOR-7 (BCI)); Certain Corrosion-Resistant Steel Products From Korea: Response to the Department’s Request for Additional Information (September 28, 2015) (Exhibit KOR-10 (BCI)); 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)); Certain Corrosion-Resistant Steel Products from Korea: Hyundai Steel’s Response to the Department’s Section E and Further Manufactured Sales Supplemental Questionnaire (November 30, 2015) (Exhibit

the necessary information it was requesting and provided Hyundai with both written and oral clarifications of the requested information. This easily satisfies paragraph 1 of Annex II of the Anti-Dumping Agreement.<sup>126</sup>

75. Korea claims that USDOC did not provide a reasonable period of time for Hyundai to respond, in contravention of paragraph 1 of Annex II of the Anti-Dumping Agreement.<sup>127</sup> Again, the record evidence demonstrates that this claim is unfounded. USDOC provided Hyundai with several months and multiple opportunities over an extended period to respond. Thus, USDOC's investigation was fully in accordance with paragraph 1 of Annex II.

76. After putting Hyundai on notice in July 2015 that it might require further-manufactured information at a later date in its initial questionnaire,<sup>128</sup> USDOC provided Hyundai multiple opportunities over the course of almost five months—from September 11, 2015 until February 20, 2016—to respond adequately to USDOC's requests for the further-manufactured information, including issuing a total of five supplemental requests for the same information.<sup>129</sup>

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KOR-18 (BCI)); Certain Corrosion-Resistant Steel Products From Korea: Hyundai Steel's Response to the Department's Supplemental Section E Questionnaire (2<sup>nd</sup>) (December 29, 2015) (Exhibit KOR-19 (BCI)), Certain Corrosion-Resistant Steel Products from Korea: Hyundai Steel Third Supp. Section E Questionnaire Response (February 10, 2016) (Exhibit KOR-17 (BCI)).

<sup>126</sup> Corrosion-Resistant Steel Products from Korea: Notice of Difficulty in Responding to Questionnaire and Request for Alternate Calculation Method by Hyundai Steel (August 17, 2015) (Exhibit KOR-7 (BCI)); Certain Corrosion-Resistant Steel Products From Korea: Response to the Department's Request for Additional Information (September 28, 2015) (Exhibit KOR-10 (BCI)); 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)); Certain Corrosion-Resistant Steel Products from Korea: Hyundai Steel's Response to the Department's Section E and Further Manufactured Sales Supplemental Questionnaire (November 30, 2015) (Exhibit KOR-18 (BCI)); Certain Corrosion-Resistant Steel Products From Korea: Hyundai Steel's Response to the Department's Supplemental Section E Questionnaire (2<sup>nd</sup>) (December 29, 2015) (Exhibit KOR-19 (BCI)), Certain Corrosion-Resistant Steel Products from Korea: Hyundai Steel Third Supp. Section E Questionnaire Response (February 10, 2016) (Exhibit KOR-17 (BCI)). Certain Corrosion-Resistant Steel Products (CORE) from the Republic of Korea (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 (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 (2<sup>nd</sup>) (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 (3<sup>rd</sup>) (February 5, 2016) (Exhibit USA-9).

<sup>127</sup> Korea First Written Submission, para. 157-59.

<sup>128</sup> Antidumping Questionnaire to Hyundai Steel (July 27, 2015) (Exhibit KOR-6).

<sup>129</sup> Antidumping duty Investigation of Certain Corrosion-Resistant Steel Products (CORE) from the Republic of Korea (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

USDOC took into account the difficulties raised by Hyundai in reporting the information and provided guidance and several opportunities for Hyundai to sufficiently respond.<sup>130</sup> Thus, USDOC provided Hyundai a reasonable period of time to respond to its requests for information. Accordingly, Korea has failed to demonstrate any inconsistency with Article 6.8 or paragraph 1 of Annex II of the Anti-Dumping Agreement.

77. Korea claims that USDOC did not provide any guidance to Hyundai as to how to report its further-manufactured sales.,<sup>131</sup> But again, the record evidence demonstrates the contrary: USDOC specifically provided guidance as to how to report its sales in its letter to Hyundai entitled, “Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products (CORE) from the Republic of Korea (Korea): Additional Guidance on information required to substantiate Hyundai Steel Corporation’s Request for Alternative Calculation Method” and the attachment thereto,<sup>132</sup> and in addition, when it discovered discrepancies in the responses provided, it asked pointed follow-up questions to Hyundai for further explanation regarding the discrepancies.<sup>133</sup>

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(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 (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 (2<sup>nd</sup>) (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 (3<sup>rd</sup>) (February 5, 2016) (Exhibit USA-9).

<sup>130</sup> Antidumping duty Investigation of Certain Corrosion-Resistant Steel Products (CORE) from the Republic of Korea (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 (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 (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 (2<sup>nd</sup>) (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 (3<sup>rd</sup>) (February 5, 2016) (Exhibit USA-9).

<sup>131</sup> Korea First Written Submission, para. 153.

<sup>132</sup> Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products (CORE) from the Republic of Korea (Korea): Additional Guidance on Information Required to Substantiate Hyundai Steel Corporation’s Request for Alternative Calculation Method at Attachment 1 (September 16, 2015) (Exhibit USA-4).

<sup>133</sup> Certain Corrosion-Resistant Steel Products (CORE) from the Republic of Korea (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 (Korea): Second Supplemental Questionnaire to Sections B&C, and First Supplemental to Further Manufacturing (November 19, 2015) (Exhibit



78. In sum, contrary to Korea's arguments, the record demonstrates that USDOC informed Hyundai as soon as possible that a response may be necessary, specified in detail the necessary information it was requesting, provided Hyundai with clarifications and additional guidance, and provided Hyundai with a reasonable period of time to respond.

*iv. USDOC Provided Meaningful Opportunities for Hyundai to Provide Further Explanations and Clearly Detailed its Reasons for Rejecting the Responses.*

79. Korea also claims that USDOC failed to provide a meaningful opportunity to provide further explanations and failed to give reasons for rejecting the information provided.<sup>134</sup> These claims have no merit based on the record evidence: USDOC provided Hyundai with multiple meaningful opportunities to provide further explanations, and its final determination memorandum and incorporated memoranda provide explicit reasons for why it rejected Hyundai's proffered information.<sup>135</sup>

80. Paragraph 6 of Annex II of the Anti-Dumping Agreement provides that where information is not accepted, the supplying party should be made aware of the reasons therefor and should be provided with an opportunity to provide further explanations.<sup>136</sup> Where such information is rejected and the explanations provided are not satisfactory, the reasons for the rejection should be given in any published determinations.<sup>137</sup> USDOC complied with these requirements.

81. The I&D Memorandum detailed the many deficiencies and inconsistencies in Hyundai's reporting that made it impossible for USDOC to conduct its margin analysis of Hyundai's further manufactured sales using Hyundai's reported information.<sup>138</sup> In addition, in the letter cancelling verification of the CEP further-manufactured sales, USDOC informed Hyundai that its information was not able to be verified.<sup>139</sup> Therein, USDOC explained that Hyundai's December

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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 (2<sup>nd</sup>) (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 (3<sup>rd</sup>) (February 5, 2016) (Exhibit USA-9).

<sup>134</sup> Korea First Written Submission, paras. 156-62.

<sup>135</sup> CORE I&D Memo (May 24, 2016) (Exhibit KOR-5) at 7-14; see also Certain Corrosion-Resistant Steel Products from Korea: Cancellation of Hyundai Steel Company's Constructed Export Price (CEP) Verification of Further Manufactured Sales (March 8, 2016) (Exhibit KOR-20).

<sup>136</sup> Anti-Dumping Agreement, Annex II, para. 6.

<sup>137</sup> Anti-Dumping Agreement, Annex II, para. 6.

<sup>138</sup> CORE I&D Memo (May 24, 2016) (Exhibit KOR-5) at 14.

<sup>139</sup> Certain Corrosion-Resistant Steel Products from Korea: Cancellation of Hyundai Steel Company's Constructed Export Price (CEP) Verification of Further Manufactured Sales (March 8, 2016) (Exhibit KOR-20); see

29 and February 10 responses were deficient and unverifiable because it submitted an unsolicited revised U.S. sales database, made unexplained changes to its cost of manufacture for several types of merchandise, failed to report certain costs associated with shearing, failed to provide a mathematically correct proposed allocation methodology for deriving the actual quantity of subject merchandise CONNUMs used in the finished non-subject further manufactured product, and failed to provide explanations for inconsistencies relating to certain reported line items.<sup>140</sup>

82. For these reasons, USDOC determined that the reported further-manufactured information was not usable and was unverifiable, and therefore did not rely on that information for its final determination.<sup>141</sup> Korea fails to demonstrate that such detailed information did not satisfy the requirements of paragraph 6 of Annex II of the Anti-Dumping Agreement, and thus the Panel should reject this claim.

83. The many requests for additional information and supplemental questionnaires, six in total, issued to Hyundai requesting first, information related to Hyundai's request for an exclusion from reporting data on further manufactured sales and later, additional explanation for discrepancies in Hyundai's reported data, demonstrate USDOC's offer of many meaningful opportunities for Hyundai to provide further explanations.

84. Korea's argument on this point focuses on USDOC's "sudden" requests, but, as detailed above, USDOC did not surprise Korea with its request. Rather, USDOC, after reasoned analysis, rejected Hyundai's exclusion request, required Hyundai to provide a section E questionnaire response, and gave Hyundai four opportunities to provide such a response. Paragraph 6 of Annex II requires nothing more.

85. In sum, the conditions for resorting to the facts available were met and are demonstrated by the facts on the record. USDOC determined and communicated to Hyundai that necessary information was missing from the record. Hyundai both failed to provide necessary information within a reasonable period and significantly impeded the proceeding. Moreover, USDOC specified in detail the necessary information as soon as possible following initiation, provided a reasonable period of time for Hyundai to respond to USDOC's requests for information, and provided meaningful opportunities for Hyundai to provide further explanations and clearly detailed its reasons for rejecting the responses. Thus, Korea fails to demonstrate that USDOC's resort to the facts available breached Article 6.8 and paragraphs 1 and 6 of Annex II of the Anti-Dumping Agreement.

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*also* Korea First Written Submission, para. 112 (detailing the issues raised by USDOC in evaluating Hyundai's responses).

<sup>140</sup> Certain Corrosion-Resistant Steel Products from Korea: Cancellation of Hyundai Steel Company's Constructed Export Price (CEP) Verification of Further Manufactured Sales (March 8, 2016) (Exhibit KOR-20).

<sup>141</sup> CORE I&D Memo (May 24, 2016) (Exhibit KOR-5) at 14.

*b. USDOC Properly Determined It Could Not Verify Hyundai’s Information and Was Justified In Disregarding It.*

86. Korea claims that USDOC disregarded verifiable information that was appropriately submitted, contravening paragraph 3 of Annex II of the Anti-Dumping Agreement,<sup>142</sup> and that USDOC improperly disregarded information provided by Hyundai, in contravention of paragraph 5 of Annex II of the Anti-Dumping Agreement.<sup>143</sup> The record does not support such an argument.

87. After analyzing the various responses given to USDOC’s multiple information requests, USDOC properly determined that the further-manufactured information could not be verified, and therefore disregarded the information when determining Hyundai’s final antidumping margin, in accordance with both paragraph 3 and paragraph 5 of Annex II of the Anti-Dumping Agreement.<sup>144</sup>

*i. USDOC Properly Determined It Could Not Verify or Use Hyundai’s Reported Further-Manufactured Sales Information.*

88. Paragraph 3 of Annex II provides, in relevant part, that “all information which is verifiable,” when timely and appropriately submitted, “should be taken into account when determinations are made.”<sup>145</sup>

89. As recognized by other panels, paragraph 3 of Annex II sets out specific criteria that an investigating authority must apply before rejecting information submitted to it and resorting to the facts available.<sup>146</sup> The information must be verifiable.<sup>147</sup> Information is verifiable when an objective process of examination can assess the accuracy and reliability of the information.<sup>148</sup> The information must be “appropriately submitted so that it can be used in the investigation without undue difficulties.”<sup>149</sup> There is no single, *a priori* test for determining whether this criterion will be satisfied. Rather, the evaluation must take account of the particular facts and

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<sup>142</sup> Korea First Written Submission, paras. 163-169.

<sup>143</sup> Korea First Written Submission, paras. 170-181.

<sup>144</sup> Certain Corrosion-Resistant Steel Products from Korea: Cancellation of Hyundai Steel Company’s Constructed Export Price (CEP) Verification of Further Manufactured Sales (March 8, 2016) (Exhibit KOR-20); CORE I&D Memo (May 24, 2016) (Exhibit KOR-5) at 13-14.

<sup>145</sup> Anti-Dumping Agreement, Annex II, para. 3.

<sup>146</sup> *E.g., China – Broiler Products*, para. 7.342.

<sup>147</sup> Anti-Dumping Agreement, Annex II, para. 3.

<sup>148</sup> *US – Steel Plate*, para. 7.71; *EC – Salmon (Norway)*, para. 7.357.

<sup>149</sup> Anti-Dumping Agreement, Annex II, para. 3.

circumstances.<sup>150</sup> Finally, the information must be supplied in a timely fashion, that is, submitted within a reasonable period of time.<sup>151</sup>

90. Korea argues that USDOC disregarded verifiable information appropriately submitted by Hyundai. It claims that “{t}his data was clearly verifiable, as it could have been verified had the USDOC not cancelled the planned verification.”<sup>152</sup> This argument is circular, and demonstrates the lack of support found in the record for Korea’s position. Korea then argues that the information was appropriately submitted and in a timely fashion. Neither of these arguments find support in the record.

91. On November 19, 2015, USDOC notified Hyundai that its initial section E response from November 2, 2015 was deficient and issued its first supplemental questionnaire.<sup>153</sup> USDOC then provided Hyundai with multiple opportunities to remedy the deficient information it received in each subsequent submission. After analyzing the universe of information received in the six responses from Hyundai on its further-manufactured sales, USDOC determined that Hyundai’s December 15, 2015 and February 10, 2016 responses were unverifiable and deficient, such that it would not be able to verify or use the information in its margin calculation.<sup>154</sup>

92. USDOC also determined that the information was not useable “without undue difficulties.” It identified issues with Hyundai’s allocation methodology, numerous deficiencies with Hyundai’s November 2, 2015 further manufactured sales and cost response and further identified grave deficiencies and unsolicited information in Hyundai’s revised responses and databases on November 30, 2015 (costs) and December 2, 2015 (sales).<sup>155</sup> Furthermore, USDOC determined that its analysis of these responses was hindered by the fact that the narrative portion of Hyundai’s responses did not adequately explain many of the revisions.<sup>156</sup> It

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<sup>150</sup> *China – Broiler Products*, para 7.342, citing *US – Steel Plate*, paras. 7.72 and 7.74 (emphasis added); *EC – Salmon (Norway)*, para. 7.364.

<sup>151</sup> *US – Hot-Rolled Steel (AB)*, para. 84; *US – Steel Plate*, para. 7.76; *EC – Salmon (Norway)*, para. 7.369.

<sup>152</sup> Korea First Written Submission, para. 167.

<sup>153</sup> CORE I&D Memo (May 24, 2016) (Exhibit KOR-5) at 10.

<sup>154</sup> *See infra.*, Section II.B.1.

<sup>155</sup> CORE I&D Memo (May 24, 2016) (Exhibit KOR-5) at 12; Certain Corrosion-Resistant Steel Products from Korea: Cancellation of Hyundai Steel Company’s Constructed Export Price (CEP) Verification of Further Manufactured Sales (March 8, 2016) (Exhibit KOR-20).

<sup>156</sup> CORE I&D Memo (May 24, 2016) (Exhibit KOR-5) at 12; Certain Corrosion-Resistant Steel Products from Korea: Cancellation of Hyundai Steel Company’s Constructed Export Price (CEP) Verification of Further Manufactured Sales (March 8, 2016) (Exhibit KOR-20).

therefore determined the responses and databases to be inaccurate and unreliable.<sup>157</sup> As such, these deficiencies rendered Hyundai’s responses unverifiable.<sup>158</sup>

93. In sum, based on the errors and inconsistencies contained in Hyundai’s databases, Hyundai’s information failed to meet the “verifiable” criterion of paragraph 3, and USDOC was therefore justified in disregarding Hyundai’s information and resorting to facts available.

ii. *USDOC Properly Determined that Hyundai Did Not Act To the Best of Its Ability In Responding To USDOC’s Requests for Information.*

94. Korea claims that USDOC disregarded information provided by Hyundai to the best of its ability, in contravention of paragraph 5 of Annex II of the Anti-Dumping Agreement.<sup>159</sup> The record demonstrates the contrary; USDOC documented multiple instances of incomplete, insufficiently explained, deficient, and unusable information received from Hyundai in its various responses to USDOC’s requests for information. Given this, USDOC properly determined that Hyundai did not act to the best of its ability in responding to USDOC’s requests for information.<sup>160</sup>

95. Paragraph 5 requires that an investigating authority may not disregard information that is less than ideal where the interested party submitting the information has acted to the “best of its ability.”<sup>161</sup> Importantly, paragraph 5 “is supplemental to paragraph 3 and not an exception to it; information that satisfies the requirements of paragraph 3, even if not perfect, may not be disregarded.”<sup>162</sup>

96. The United States has shown above that Hyundai’s information did not meet the criteria of paragraph 3 of Annex II, and thus does not fall within the ambit of paragraph 5 of Annex II. In any event, as discussed above, the facts show that Hyundai did not act to the best of its ability in responding to USDOC’s requests for information.<sup>163</sup> Despite multiple opportunities and

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<sup>157</sup> CORE I&D Memo (May 24, 2016) (Exhibit KOR-5) at 12; Certain Corrosion-Resistant Steel Products from Korea: Cancellation of Hyundai Steel Company’s Constructed Export Price (CEP) Verification of Further Manufactured Sales (March 8, 2016) (Exhibit KOR-20).

<sup>158</sup> CORE I&D Memo (May 24, 2016) (Exhibit KOR-5) at 12, 16; Certain Corrosion-Resistant Steel Products from Korea: Cancellation of Hyundai Steel Company’s Constructed Export Price (CEP) Verification of Further Manufactured Sales (March 8, 2016) (Exhibit KOR-20).

<sup>159</sup> Korea First Written Submission, paras. 170-181.

<sup>160</sup> CORE I&D Memo (May 24, 2016) (Exhibit KOR-5), 14-17.

<sup>161</sup> Anti-Dumping Agreement, Annex II, para. 5.

<sup>162</sup> *China - Broiler Products*, para 7.344, citing *US – Steel Plate*, para. 7.65.

<sup>163</sup> CORE I&D Memo (May 24, 2016) (Exhibit KOR-5) at 14-17.

clarifications afforded it, Hyundai failed to provide the necessary information.<sup>164</sup> In finding that Hyundai had not acted to the best of its ability, USDOC noted, “Hyundai has submitted a series of inaccurate value added calculations and discredited claims of difficulty in gathering data and Section E responses that were unusable, unreliable, and unverifiable.”<sup>165</sup>

*c. USDOC Used Special Circumspection In Selecting from the Facts Available, Properly Corroborated the Replacement Information, and Selected Reasonable Replacements for the Missing Necessary Information.*

97. Korea claims that in selecting from among the facts available, USDOC failed to engage in the requisite comparative analysis of available information to arrive at an accurate determination, and that it relied on secondary information without using special circumspection and without corroboration, in contravention of Article 6.8 and paragraph 7 of Annex II of the Anti-Dumping Agreement.<sup>166</sup> These claims are without merit.

98. USDOC used special circumspection in selecting from the facts available, properly corroborated the replacement information, and selected reasonable replacements for the missing necessary information, in accordance with its obligations under Article 6.8 and paragraph 7 of Annex II of the Anti-Dumping Agreement.

99. Because Hyundai failed to provide necessary missing information and significantly impeded the proceeding, USDOC determined that it may resort to the use of facts available within the meaning of Article 6.8 and Annex II of the Anti-Dumping Agreement. USDOC replaced the missing necessary information regarding Hyundai’s further-manufactured U.S. sales with the rate of 86.34 percent, which is the highest rate alleged in the petition.<sup>167</sup> Korea claims that this rate was selected solely because it was alleged in the petition and without any special circumspection or corroboration. However, the record evidence belies Korea’s position, indicating that USDOC considered this information carefully and selected a reasonable replacement that adheres to the obligations of paragraph 7 and Article 6.8.

100. USDOC selected the highest rate alleged in the petition (“petition rate”). This is fully consistent with paragraph 7 of Annex II, which provides that investigating authorities may replace missing necessary information with “information supplied in the application for the initiation of the investigation,” provided it undertakes special circumspection in doing so. The Appellate Body has opined that:

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<sup>164</sup> CORE I&D Memo (May 24, 2016) (Exhibit KOR-5) at 14-17.

<sup>165</sup> CORE I&D Memo (May 24, 2016) (Exhibit KOR-5) at 14-17.

<sup>166</sup> Korea First Written Submission, para. 88.

<sup>167</sup> CORE I&D Memo (May 24, 2016) (Exhibit KOR-5) at 17.

{W}hen culling necessary information from secondary sources, the agency should ascertain for itself the reliability and accuracy of such information by checking it, where practicable, against information contained in other independent sources at its disposal, including material submitted by interested parties. Such an active approach is compelled by the obligation to treat data obtained from secondary sources ‘with special circumspection’.<sup>168</sup>

101. Korea argues that the USDOC did not give special circumspection considering the reliability and accuracy of the secondary source, as it simply resorted to the highest margin from the petition.<sup>169</sup> However, contrary to Korea’s assertion, USDOC did undertake special circumspection in using the rate from the petition.<sup>170</sup> As USDOC noted, no information on the record called into question the relevance of the petition rate.<sup>171</sup> Moreover, Hyundai provided company-specific sales during the period of investigation, which confirm the relevance of the rate from the petition.<sup>172</sup> Specifically, the USDOC noted that Hyundai’s margin program output showed product-specific margins for coil at or above the petition rate.<sup>173</sup> In other words, the rate was relevant to Hyundai.<sup>174</sup>

102. While Korea asserts that, in its view, there was “better information on the record,” it offers no alternative.<sup>175</sup> Additionally, USDOC did not “automatically” resort to the petition rate, as Korea asserts.<sup>176</sup> Rather, USDOC explained its reasoning for selecting the information it selected. Indeed, there is no indication that USDOC’s selection of the highest transaction specific margin alleged in the petition was not a reasonable replacement for the missing necessary information.

103. Further, consistent with paragraph 7 of Annex II, USDOC corroborated its rate to the extent practicable using sources reasonably at its disposal. USDOC used special circumspection to determine whether the rates alleged in the petition were relevant and reliable for purposes of using them as facts available to replace Hyundai’s further manufactured sales. After its close analysis, USDOC found that because the rates were derived from the CORE steel industry and

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<sup>168</sup> *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 7.289.

<sup>169</sup> Korea First Written Submission, paras. 191-192.

<sup>170</sup> Korea First Written Submission, para. 190.

<sup>171</sup> CORE I&D Memo (May 24, 2016) (Exhibit KOR-5) at 18.

<sup>172</sup> CORE I&D Memo (May 24, 2016) (Exhibit KOR-5) at 19.

<sup>173</sup> CORE I&D Memo (May 24, 2016) (Exhibit KOR-5) at 19; *see* Final Determination Margin Calculation for Hyundai Steel Company (Hyundai) (May 31, 2016) (Exhibit USA-11 (BCI)).

<sup>174</sup> CORE I&D Memo (May 24, 2016) (Exhibit KOR-5) at 19.

<sup>175</sup> Korea First Written Submission, paras. 191-192.

<sup>176</sup> Korea First Written Submission, para. 192.

were based on price quotes/offers for sales of CORE produced in and exported from Korea, in addition to have taken into account other differences in the Korean industry, the rates were in fact relevant and reliable, and therefore reasonable replacements for the missing necessary information.<sup>177</sup>

104. Korea further claims that USDOC did not engage in a process of reasoning and evaluation in selecting the facts available.<sup>178</sup> The record demonstrates the opposite conclusion. USDOC did not select a rate out of thin air, or a rate that has no relationship to Hyundai; it selected as a reasonable replacement a margin that was “within the range” of Hyundai’s own reported product-specific margins and relevant and reliable based on its analysis of supporting record evidence.<sup>179</sup>

105. Korea’s complaint that the selected replacement information is not related to the “commercial reality” of the company at issue is a red herring. “Commercial reality” is not a phrase that appears in the covered agreements. The relevant company’s “true margin” is unknowable because of the company’s non-cooperation. In any event, the margin is within the range of Hyundai’s reported product-specific margins.

106. Moreover, USDOC’s selection was not made on the “sole basis” of the adverse inference, as Korea suggests with its citation to the recent *US – Tube and Pipe Products (Turkey)* dispute.<sup>180</sup> USDOC here specifically detailed the relationship of the selected reasonable replacements to the missing necessary information and to the information of the record of this case; the adverse inference was not the sole basis for its selection.

107. USDOC therefore selected the petition rate as a reasonable replacement for the missing necessary information, in accordance with paragraph 7 of Annex II. Korea’s claim to the contrary is without merit, as USDOC detailed its corroboration of the selected rates in its final determination, and Korea points to no other information that suggests the rates are not reasonable replacements.

108. Finally, Korea further argues that USDOC’s decision to use an adverse inference when relying on the facts available was made with a view to ensuring a less favorable result, and that USDOC’s application of facts available was “punitive.”<sup>181</sup> These arguments do not appear to be separate legal claims, but rather seem to be overall characterizations intended to provide

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<sup>177</sup> CORE I&D Memo (May 24, 2016) (Exhibit KOR-5) at 18-19.

<sup>178</sup> Korea First Written Submission, paras. 193, 198, 200-202.

<sup>179</sup> CORE I&D Memo (May 24, 2016) (Exhibit KOR-5) at 17-19.

<sup>180</sup> Korea First Written Submission, paras. 199-200.

<sup>181</sup> Korea First Written Submission, paras. 88, 196-201.



atmospheric support to Korea’s legal arguments. In any event, these arguments are mischaracterizations, unsupported by the record evidence.

109. Given the facts described above, USDOC made an unbiased and objective determination that “Hyundai failed to cooperate by not acting to the best of its ability.”<sup>182</sup> That the outcome of Hyundai’s non-cooperation is less favorable than Korea would have liked does not mean the application of facts available was punitive or otherwise inconsistent with Article 6.8.<sup>183</sup> Indeed, paragraph 7 provides a warning that “if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favorable to the party than if the party did cooperate.”

110. Here, USDOC’s reliance on the petition rate alleged as the reasonable replacement for the missing necessary information, given its relevance and reliability based on Hyundai’s own reported product-specific margins,<sup>184</sup> further rebuts Korea’s erroneous allegation that USDOC did not act consistently with paragraph 7 of Annex II or Article 6.8 of the Anti-Dumping Agreement.

**C. Korea Failed to Establish Any WTO Inconsistency in USDOC’s Application of Facts Available in the LTFV Investigations of Imports of Cold Rolled Steel (CRS) and Hot Rolled Steel (HRS).**

111. Regarding the CRS and HRS investigations, Korea alleges that USDOC’s resort to the use of facts available is inconsistent with Article 6.8 and paragraphs 1, 3, 5, 6, and 7 of Annex II of the Anti-Dumping Agreement because the conditions for resorting to the use of facts available were not met and the application of the facts available contravened the requirements of Annex II.<sup>185</sup>

112. Korea has failed to demonstrate that USDOC failed to comply with the requirements of Article 6.8 and Annex II when resorting to the use of facts available in filling the gaps created by Hyundai during the course of the CRS and HRS investigations. The record shows that Hyundai’s failure to provide necessary information resulted in significant gaps in the records, necessitating USDOC’s resort to the use of facts available to determine a margin for Hyundai, as provided for by Article 6.8 and Annex II of the Anti-Dumping Agreement.

113. Further, the record demonstrates that USDOC properly determined that Hyundai failed to cooperate to the best of its ability in the investigations, and therefore USDOC properly

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<sup>182</sup> CORE I&D Memo (May 24, 2016) (Exhibit KOR-5) at 14-17.

<sup>183</sup> *See US – Carbon Steel (India) (AB)*, para. 4.426.

<sup>184</sup> CORE I&D Memo (May 24, 2016) (Exhibit KOR-5) at 19; *See* Final Determination Margin Calculation for Hyundai Steel Company (Hyundai) (May 31, 2016) (Exhibit USA-11 (BCI)).

<sup>185</sup> Korea First Written Submission, paras. 208-210, 458-463.

disregarded certain of Hyundai’s information and selected reasonable replacements for such missing necessary information to fill the resulting gaps in the record, in compliance with Article 6.8 and Annex II. Additionally, USDOC selected reasonable replacements for the missing information by relying on data Hyundai itself provided. Therefore, USDOC’s reliance on facts available was not punitive and fully complied with Article 6.8 and Annex II of the Anti-Dumping Agreement.

114. Subsection 1 below presents the facts regarding USDOC’s application of facts available with respect to Hyundai, as supported by the evidence on the record in this dispute. Subsection 2 demonstrates Korea’s failure to establish that USDOC’s application of facts available was inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement.

***1. USDOC Made Multiple Requests for Information, and Was Justified in the Application of Facts Available in the Investigation of Imports of Cold Rolled Steel.***

115. As described in subsection a below, during the course of the investigation, Hyundai repeatedly failed to provide information regarding one of Hyundai’s affiliated service providers and related freight charges despite USDOC’s multiple requests. As described in subsection b below, Hyundai also failed to provide information relating to several product specifications sold in both the home and U.S. markets. USDOC thus properly relied on facts available with respect to freight charges associated with the affiliated services provider, and with respect to information related to certain product specifications.

***a. Hyundai Failed to Provide Information Regarding its Affiliate, [[\*\*\*]].***

116. On August 24, 2015, USDOC initiated a LTFV investigation into CRS from Korea.<sup>186</sup> USDOC selected Hyundai as one of the two mandatory respondents.<sup>187</sup> On September 18, 2015, USDOC issued its initial questionnaires.<sup>188</sup> In the initial questionnaire, USDOC requested that Hyundai report all sales and cost information both for itself and for all “affiliates involved with

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<sup>186</sup> *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*, 80 Fed. Reg. 51,198 (Dep’t of Commerce) (August 24, 2015) (Exhibit USA-12).

<sup>187</sup> *See* Department of Commerce Respondent Selection for the Antidumping Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Republic of Korea (September 15, 2015) (Exhibit USA-13 (BCI)).

<sup>188</sup> *See* Department of Commerce Initial AD Questionnaire (September 18, 2015) (Exhibit KOR-33).

the production or sale of products under investigation during the {period of investigation} in the foreign market of the United States.”<sup>189</sup>

117. Hyundai reported that it was affiliated with [[\*\*\*]], a service provider.<sup>190</sup> In response to USDOC’s requests for information, Hyundai stated that [[\*\*\*]] had provided Hyundai with domestic inland freight from factory to warehouse, domestic warehousing, domestic inland freight from factory/warehouse to customer, domestic inland freight for U.S. sales from factory to port, international freight, and other freight services.<sup>191</sup>

118. In its Section A response, Hyundai stated that it would “demonstrate in its forthcoming Sections B and C responses that transactions with affiliated service providers are at arm’s length.”<sup>192</sup> Hyundai provided some supporting documentation for its argument that such transactions were conducted at arm’s length, but did not provide sufficient information explaining its relationship with the affiliated service provider [[\*\*\*]].<sup>193</sup>

119. Because Hyundai’s response was not sufficient, USDOC followed up with further questions seeking to understand the nature of the transactions between Hyundai and [[\*\*\*]]. In its supplemental Sections B-C questionnaire, USDOC requested “copies of all international freight contracts between [[\*\*\*]] and its unaffiliated customers” and, “if all possible, provide a price quote from [[\*\*\*]]’s sub-contractor to another customer showing the arm’s length transaction comparisons between Hyundai and [[\*\*\*]], and [[\*\*\*]] and its sub-contractor.”<sup>194</sup>

120. Hyundai responded that [[\*\*\*]] does not have any contracts with unaffiliated customers for shipments to the United States, and that “while Hyundai understands that [[\*\*\*]] does provide shipping services to unaffiliated customers for shipments to third countries, [[\*\*\*]] has declined Hyundai’s request to provide its contracts with unaffiliated third parties . . . .”<sup>195</sup>

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<sup>189</sup> Department of Commerce Initial AD Questionnaire (September 18, 2015) (Exhibit KOR-33) at G-10.

<sup>190</sup> See Hyundai Steel’s Section A Response (October 16, 2015) (Exhibit KOR-28 (BCI)) at A-12.

<sup>191</sup> See Hyundai Steel’s Section B Response (November 6, 2015) (Exhibit KOR-36 (BCI)) at B-28-30 (“Hyundai used an affiliated freight company, [[\*\*\*]], to transport merchandise to offsite facilities.”); Hyundai Steel’s Section C Response (November 9, 2015) (Exhibit KOR-51 (BCI)) at C-27-30; Hyundai Steel’s Section D Response (Part I) (November, 5, 2015) (Exhibit USA-14 (BCI)) at D-6 and Ex. D-4.

<sup>192</sup> See Hyundai Steel’s Section A Response (October, 16, 2015) (Exhibit KOR-28 (BCI)) at A-13.

<sup>193</sup> See, e.g., Hyundai Steel Section B-C Supplemental Response (December 15, 2015) (Exhibit KOR-34 (BCI)) at 7-8, and Exhibits S-6 and S-7.

<sup>194</sup> Hyundai Steel Section B-C Supplemental Response (December 15, 2015) (Exhibit KOR-34 (BCI)) at 24.

<sup>195</sup> Hyundai Steel Section B-C Supplemental Response (December 15, 2015) (Exhibit KOR-34 (BCI)) at 24.

Hyundai asserted that it was “not in a position to compel [[\*\*\*]] sub-contractor to provide its price quotes to another customer.”<sup>196</sup>

121. On January 19, 2016, USDOC made a second request for the same information, requesting copies of [[\*\*\*]] contracts with unaffiliated parties,<sup>197</sup> which would have allowed for a proper comparison of the arm’s-length nature of the transactions between Hyundai and [[\*\*\*]]. Although Hyundai had previously stated that [[\*\*\*]] did provide shipping services to third countries to unaffiliated customers, in its response to this second request, Hyundai changed its position and provided no explanation. Specifically, while Hyundai had previously reported that [[\*\*\*]] provided shipping services to unaffiliated customers in third countries, but that [[\*\*\*]] had declined Hyundai’s request for contracts, Hyundai changed its position and reported that [[\*\*\*]] “does not offer similar services to unaffiliated parties.”<sup>198</sup>

122. On March 7, 2016, USDOC published its preliminary determination wherein it found that there were sales of subject merchandise at less-than-fair-value from Korea.<sup>199</sup>

123. In March 2016, USDOC conducted its sales verification.<sup>200</sup> At verification, USDOC made a third request that Hyundai provide freight information between its affiliate, [[\*\*\*]], and other unaffiliated parties. Specifically, USDOC asked to verify copies of “freight contracts between [[\*\*\*]] and its unaffiliated freight providers, . . . along with complete freight documents from Hyundai to [[\*\*\*]] to transport subject merchandise.”<sup>201</sup> USDOC also requested copies of contracts between [[\*\*\*]] and all unaffiliated parties for similar services that cover the period of investigation, as well as a breakdown of all direct costs incurred by [[\*\*\*]].<sup>202</sup> Hyundai provided

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<sup>196</sup> Hyundai Steel Section B-C Supplemental Response (December 15, 2015) (Exhibit KOR-34 (BCI)).

<sup>197</sup> Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Supplemental Questionnaire for Sections B-C (January 19, 2016) (Exhibit USA-15 (BCI)) (“Submit copies of all contracts that [[\*\*\*]] has with all unaffiliated parties for similar services that covers the {period of investigation}.”); Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Supplemental Questionnaire for Sections B-C (January 19, 2016) (Exhibit USA\_15 (BCI)) at Question 3(C); *see also* Hyundai’s Second Supplemental Sections B-C Questionnaire Response (February 2, 2016) (Exhibit KOR-37 (BCI)) at 2.

<sup>198</sup> Hyundai’s Second Supplemental Sections B-C Questionnaire Response (February 2, 2016) (Exhibit KOR-37 (BCI)) at 2.

<sup>199</sup> *See Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, 81 Fed. Reg. 11,575 Department of Commerce (March 7, 2016) (Exhibit KOR-44), and accompanying CRS I&D Memo (February 29, 2016) (Exhibit KOR-43).

<sup>200</sup> *See Cold-Rolled Steel Flat Products from the Republic of Korea: Hyundai Steel Company Verification of Sales Agenda* (April 15, 2016) (Exhibit USA-16).

<sup>201</sup> Department of Commerce, CEP Verification Report, Hyundai Steel (May 26, 2016) (Exhibit KOR-47 (BCI)) at 42.

<sup>202</sup> Department of Commerce, CEP Verification Report, Hyundai Steel (May 26, 2016) (Exhibit KOR-47 (BCI)) at 42.

“a chart comparing Hyundai’s freight costs with [\*\*\*]’s total costs,” but this information could not be tied back to actual transaction documents and therefore could not be verified.<sup>203</sup> Hyundai officials indicated “that the information on the chart was not based on actual transaction documents.”<sup>204</sup>

124. Hyundai refused to provide contracts between [\*\*\*] and unaffiliated parties, which would have allowed for a proper comparison of the arm’s-length nature of the transactions between Hyundai and [\*\*\*]. Hyundai stated at verification that it could not obtain this information because there was no “direct ownership” of [\*\*\*] by Hyundai.<sup>205</sup> However, this statement was difficult to square with Hyundai’s previous statement that [\*\*\*] and Hyundai Steel were affiliated companies, as [\*\*\*].<sup>206</sup>

125. Accordingly, USDOC sought further information on Hyundai’s relationships with affiliates. USDOC requested a “list of shareholders” for [\*\*\*], which Hyundai was able to provide at verification.<sup>207</sup> Upon examining the list of shareholders, USDOC identified an individual named [\*\*\*], who was listed as the majority owner of the company.<sup>208</sup> USDOC compared this information with a list of Hyundai’s board members previously submitted, which identified the [\*\*\*] of Hyundai Steel as [\*\*\*].<sup>209</sup> In response to USDOC’s questions, Hyundai confirmed at verification that these individuals were the same person.<sup>210</sup>

126. Commerce then verified and confirmed with Hyundai that a large shareholder in [\*\*\*], identified as [\*\*\*], is in fact the same individual as [\*\*\*], the direct and indirect owner of Hyundai Steel.<sup>211</sup> This directly contradicted Hyundai’s claim that there was no “direct

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<sup>203</sup> Department of Commerce, CEP Verification Report, Hyundai Steel (May 26, 2016) (Exhibit KOR-47 (BCI)) at 42.

<sup>204</sup> Department of Commerce, CEP Verification Report, Hyundai Steel (May 26, 2016) (Exhibit KOR-47 (BCI)) at 42.

<sup>205</sup> Department of Commerce, CEP Verification Report, Hyundai Steel (May 26, 2016) (Exhibit KOR-47 (BCI)) at 42-43.

<sup>206</sup> Hyundai Steel’s Section A Response October 16, 2015 (Exhibit KOR-28 (BCI)) at A-12.

<sup>207</sup> Hyundai Steel’s Section A Response October 16, 2015 (Exhibit KOR-28 (BCI)) at 43.

<sup>208</sup> Hyundai Steel’s Section A Response October 16, 2015 (Exhibit KOR-28 (BCI)); *see also* Hyundai Steel’s Section A Response October 16, 2015 (Exhibit KOR-28 (BCI)) at Exhibit 28.

<sup>209</sup> *See* Hyundai Steel’s Section A Response October 16, 2015 (Exhibit KOR-28 (BCI)) at Exhibit 10.

<sup>210</sup> Department of Commerce, CEP Verification Report, Hyundai Steel (May 26, 2016) (Exhibit KOR-47 (BCI)) at 43.

<sup>211</sup> Department of Commerce, CEP Verification Report, Hyundai Steel (May 26, 2016) (Exhibit KOR-47 (BCI)) at 43-44.

ownership” of [[\*\*\*]] by Hyundai. Company officials also confirmed that [[\*\*\*]] and [[\*\*\*]] are father and son, respectively.<sup>212</sup>

127. Given the fact that [[\*\*\*]], along with his father [[\*\*\*]], possessed the largest ownership shares in [[\*\*\*]] at the same time [[\*\*\*]] was Vice Chairman of Hyundai Steel, and while his father [[\*\*\*]] was both a direct and indirect owner of Hyundai Steel, USDOC again asked why Hyundai Steel could not obtain the requested information from [[\*\*\*]] to help verify the arm’s-length nature of the freight expenses incurred by Hyundai.<sup>213</sup> Again, Hyundai company officials refused to seek that information from [[\*\*\*]], and stated that the only information [[\*\*\*]] could provide was the freight contract it maintained with its sub-contractor.<sup>214</sup> Asked why [[\*\*\*]] was willing to provide some information, *i.e.*, the contracts with its subcontractor, but was unwilling to provide the additional documentation requested, company officials indicated that they did not know.<sup>215</sup>

128. On July 29, 2016, USDOC published its final determination.<sup>216</sup> After verifying record information and evaluating arguments raised by interested parties, USDOC made changes to its preliminary calculated margins. USDOC relied on facts available for certain of Hyundai’s reported information and accordingly revised the margin for Hyundai.<sup>217</sup>

129. USDOC determined that Hyundai had failed to provide necessary information relating to the arm’s length nature of its transactions with its affiliated service provider.<sup>218</sup> Accordingly, USDOC was unable to verify the arm’s length nature of the transactions.<sup>219</sup> As a result, USDOC determined that it was appropriate to rely on facts available for these expenses.<sup>220</sup> Furthermore, because Hyundai had failed to provide the requested information or fully cooperate with USDOC’s requests, USDOC found that it was appropriate to use an adverse inference when

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<sup>212</sup> Department of Commerce, CEP Verification Report, Hyundai Steel (May 26, 2016) (Exhibit KOR-47 (BCI)) at 43-44.

<sup>213</sup> Department of Commerce, CEP Verification Report, Hyundai Steel (May 26, 2016) (Exhibit KOR-47 (BCI))) at 44.

<sup>214</sup> Department of Commerce, CEP Verification Report, Hyundai Steel (May 26, 2016) (Exhibit KOR-47 (BCI)) at 44.

<sup>215</sup> Department of Commerce, CEP Verification Report, Hyundai Steel (May 26, 2016) (Exhibit KOR-47 (BCI)) at 44.

<sup>216</sup> *See Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, 81 Fed. Reg. 49,953 (Dep’t of Commerce) (July 29, 2016) (Exhibit KOR-30), and the accompanying CRS I&D Memo (July 20 2016) (Exhibit KOR-41).

<sup>217</sup> *See* CRS I&D Memo (July 20, 2016) (Exhibit KOR-41).

<sup>218</sup> CRS I&D Memo (July 20, 2016) (Exhibit KOR-41) at 74.

<sup>219</sup> CRS I&D Memo (July 20, 2016) (Exhibit KOR-41) at 74.

<sup>220</sup> CRS I&D Memo (July 20, 2016) (Exhibit KOR-41) at 74.

selecting a reasonable replacement from among the facts available to replace the missing necessary information.<sup>221</sup> As reasonable replacements, USDOC selected Hyundai's lowest reported value for home inland freight and warehousing expenses, and the highest reported values by destination for its international freight and U.S. inland freight.<sup>222</sup> For home market inland freight, USDOC selected the second-highest transaction-specific value as the reasonable replacement.<sup>223</sup>

b. *Hyundai's Reporting of Inaccurate, Inconsistent, and Unverifiable CONNUMs*

130. Separately, USDOC found that Hyundai failed to provide requested necessary information and failed to cooperate to the best of its ability with respect to USDOC's requests for information regarding certain CONNUMs<sup>224</sup> provided in Hyundai's reporting.<sup>225</sup> Specifically, at different segments of Hyundai's verification, USDOC discovered discrepancies in Hyundai's reporting of product specifications and CONNUMs.<sup>226</sup> As outlined in USDOC's verification reports, for the home market sales verification, the company officials were unable to explain why for certain sale observations, the product "specification" in the observed database on-site was inconsistent with the specification reported to USDOC.<sup>227</sup> For the U.S./CEP sales verification, USDOC observed several inconsistencies with the observed and reported fields titled "QUALITYH/U," "QUALITYH," and "QUALITYU."<sup>228</sup>

131. While Hyundai was able to substantiate its product reporting for some issues, USDOC found that for the remaining issues where Hyundai was "unable to substantiate its product reporting, which include instances in which information was misreported and/or based on inconsistent internal information, recalculations are possible without resort to total AFA, though

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<sup>221</sup> CRS I&D Memo (July 20, 2016) (Exhibit KOR-41) at 74.

<sup>222</sup> CRS I&D Memo (July 20, 2016) (Exhibit KOR-41) at 74.

<sup>223</sup> CRS I&D Memo (July 20, 2016) (Exhibit KOR-41) at 74.

<sup>224</sup> A CONNUM is a number assigned to each unique product reported in the sales database based on a set of physical characteristics identified in the questionnaire issued to respondents (*i.e.*, model-matching criteria). This process generates a hierarchy of specified physical characteristics, and products sharing the identical/similar physical characteristics are assigned the same CONNUM for purposes of the price comparison. *See*, LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 9.

<sup>225</sup> CRS I&D Memo (July 20, 2016) (Exhibit KOR-41) at 59. "CONNUM" refers to control numbers, which are used for purposes of Department of Commerce's model-matching methodology.

<sup>226</sup> CRS I&D Memo (July 20, 2016) (Exhibit KOR-41) at 58-63.

<sup>227</sup> Department of Commerce, HM Sales Verification Report (May 26, 2016) (Exhibit KOR-46 (BCI)) at 2.

<sup>228</sup> Department of Commerce, CEP Verification Report, Hyundai Steel (May 26, 2016) (Exhibit KOR-47 (BCI)) at 2, 12-25.

involving some application of partial AFA where data do not exist on the record to fully correct the problems in question and the Department found Hyundai to be uncooperative.”<sup>229</sup>

132. 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.<sup>230</sup> Spec H products were improperly reported as AHSS/UHSS products, as the actual merchandise sold did not have the chemical properties required for the AHSS/UHSS classification.<sup>231</sup> The Spec H products should have been classified as structural quality products.<sup>232</sup> 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.<sup>233</sup> Certain Spec C products were found to have inconsistencies between the reported quality (commercial) and the sold quality (drawing or deep drawing), such that those sales could not be verified.<sup>234</sup>

133. The proper reporting of the CONNUMs assigned to each product is a crucially important part of the dumping margin calculation. Misreporting products sold has the effect of distorting the calculated margin, because certain costs that should be associated with a given CONNUM are instead associated with a different CONNUM, which can significantly affect the price comparison between the home market and U.S. sales and ultimately the dumping margin. Thus, the reported CONNUM information is necessary to the calculation of the dumping margin.

134. USDOC determined that because of all of the errors and inconsistencies identified in Hyundai’s reported CONNUMs, it could not rely on the reported information for those classes of products. USDOC found that because the misreported CONNUMs were not discovered until verification, after Hyundai had multiple opportunities to properly report its CONNUMs for each product specifications, Hyundai had failed to provide the necessary information for reporting sales under that CONNUM, and further had withheld the requested information, significantly impeded the proceeding in doing so, and USDOC was therefore unable to verify the missing information.<sup>235</sup>

135. Further, USDOC determined that because “these {were} problems involving products analyzed during verification, and for which Hyundai {} had no plausible explanation, either at

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<sup>229</sup> CRS I&D Memo (July 20, 2016) (Exhibit KOR-41) at 60.

<sup>230</sup> CRS I&D Memo (July 20, 2016) (Exhibit KOR-41) at 60.

<sup>231</sup> CRS I&D Memo (July 20, 2016) (Exhibit KOR-41) at 60-61.

<sup>232</sup> CRS I&D Memo (July 20, 2016) (Exhibit KOR-41) at 60-61.

<sup>233</sup> CRS I&D Memo (July 20, 2016) (Exhibit KOR-41) at 61.

<sup>234</sup> CRS I&D Memo (July 20, 2016) (Exhibit KOR-41) at 61-62.

<sup>235</sup> CRS I&D Memo (July 20, 2016) (Exhibit KOR-41) at 59-60.



verification or in its case or rebuttal briefs, for misidentifying these sales,” Hyundai had failed to cooperate by not acting to the best of its ability in reporting its own product specifications information, and the use of an adverse inference was warranted in selecting the replacement information.<sup>236</sup>

136. Accordingly, USDOC resorted to the use of facts available concerning the limited volume of U.S. and home market sales involving the erroneous or inconsistent CONNUMs at issue. Specifically, for the small volume of U.S. sales concerning certain Spec C sales, USDOC revised the reported CONNUM for that classification and selected as a reasonable replacement the highest calculated margin for any other U.S. sale by Hyundai, *i.e.* Hyundai’s reported and verified information.<sup>237</sup> For the home market sales concerning Spec D, H, and E products, USDOC revised the reported CONNUMs for those classifications, , and selected as a reasonable replacement Hyundai’s highest reported total cost of manufacturing, *i.e.* Hyundai’s reported and verified information.<sup>238</sup>

**2. *Hyundai Repeatedly Failed to Provide Information Related to Hyundai’s Affiliates, [\*\*\*] and [\*\*\*], and USDOC Was Justified in the Application of Facts Available in the Investigation of Imports of Hot Rolled Steel.***

137. Despite multiple requests from USDOC during the course of the investigation, Hyundai repeatedly failed to provide information regarding two of its affiliated service providers and related freight and insurance charges. Thus, USDOC properly relied on facts available to make its determinations regarding freight and insurance charges associated with the affiliated service providers and regarding those certain sales.

138. On August 31, 2015, USDOC initiated a LTFV investigation on HRS from Korea.<sup>239</sup> USDOC selected Hyundai as one of the two mandatory respondents.<sup>240</sup> On October 5, 2015, USDOC issued its initial questionnaire.<sup>241</sup> In the initial questionnaire, USDOC requested that Hyundai report all sales and cost information both for itself and for all “affiliates involved with the production or sale of products under investigation during the {period of investigation} in the

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<sup>236</sup> CRS I&D Memo (July 20, 2016) (Exhibit KOR-41) at 63.

<sup>237</sup> CRS I&D Memo (July 20, 2016) (Exhibit KOR-41) at 63.

<sup>238</sup> CRS I&D Memo (July 20, 2016) (Exhibit KOR-41) at 63.

<sup>239</sup> *See Certain Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, the Republic of Korea, the Netherlands, the Republic of Turkey, and the United Kingdom: Initiation of Less-Than-Fair-Value Investigations*, 80 Fed. Reg. 54,261 (Dep’t of Commerce) (September 9, 2015) (Exhibit USA-17).

<sup>240</sup> *See Antidumping Duty Investigation of Certain Hot-Rolled Steel Flat Products from Korea: Respondent Selection Memorandum* (October 1, 2015) (Exhibit USA-18).

<sup>241</sup> *See Department of Commerce Initial AD Questionnaire* (October 5, 2015) (Exhibit KOR-58).

foreign market or the United States.”<sup>242</sup> Hyundai reported that it was affiliated with [[\*\*\*]] and [[\*\*\*]], service providers.<sup>243</sup> According to Hyundai, [[\*\*\*]] and [[\*\*\*]] provided freight and insurance services, respectively.<sup>244</sup>

139. In its Section A response, Hyundai stated that it would “demonstrate in its forthcoming Sections B and C responses that transactions with affiliated service providers are at arm’s length.”<sup>245</sup> Despite providing some supporting documentation for its claim that such transactions were conducted at arm’s length, including some reported expenses and sample contracts, Hyundai did not provide sufficient information explaining its relationship with the affiliated service providers.<sup>246</sup>

140. Because Hyundai’s response was not sufficient, USDOC issued additional questions seeking to understand the nature of the transactions between Hyundai and [[\*\*\*]].<sup>247</sup> In its supplemental Section A-C questionnaire, USDOC requested “copies of all international freight contracts with [[\*\*\*]] and all unaffiliated freight providers” and “demonstrate that the freight rates charged by affiliate, [[\*\*\*]] are arm’s-length prices... {because} {t}he net profit information provided for [[\*\*\*]] does not show that [[\*\*\*]] earned a profit from its freight services, or from non-operating income.”<sup>248</sup>

141. Hyundai responded by providing a supposedly “representative sample” of contracts between [[\*\*\*]] and its subcontractors for inland and ocean freight.<sup>249</sup> According to Hyundai, this information showed that the services provided by [[\*\*\*]] were at arm’s-length.<sup>250</sup>

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<sup>242</sup> Department of Commerce Initial AD Questionnaire (October 5, 2015) (Exhibit KOR-58) at G-10.

<sup>243</sup> See Hyundai Steel’s Section A Response (November 2, 2015) (Exhibit KOR-55 (BCI)) at A-11- A-14.

<sup>244</sup> See Hyundai Steel’s Section A Response (November 2, 2015) (Exhibit KOR-55 (BCI)) at A-11- A-14; Hyundai Steel’s Section B-C Questionnaire Response (November 23, 2015) (Exhibit KOR-56 (BCI)) or (Exhibit KOR-60 (BCI)) at B-28 – B-31, and C-26 – C-28.

<sup>245</sup> See Hyundai Steel’s Section A Response (November 2, 2015) (Exhibit KOR-55 (BCI)) at A-11.

<sup>246</sup> See, e.g., Hyundai Steel’s Section B-C Questionnaire Response (November 23, 2015) (Exhibit KOR-56 (BCI)) or (Exhibit KOR-60 (BCI)) at Exhibits B-14 and B-16.

<sup>247</sup> See Section D Questionnaire (December 18, 2015) (Exhibit USA-19 (BCI)) at 4; and Supplemental Section A-C Questionnaire (December 23, 2015) (Exhibit USA-20 (BCI)) at 16-17.

<sup>248</sup> Supplemental Section A-C Questionnaire December 23,2015 (Exhibit USA-20 (BCI)) at 16-17.

<sup>249</sup> See Hyundai’s Supplemental Sections A-C Response (January 19, 2016) (Exhibit KOR-59 (BCI)) at 31-33, 43-48, and Exs. S-38, S-56, S-59, and S-60.

<sup>250</sup> See Hyundai’s Supplemental Sections A-C Response (January 19, 2016) (Exhibit KOR-59 (BCI)) at 31-33, and Exs. S-38, S56, S59-61.

142. On March 22, 2016, USDOC published its preliminary determination wherein it found that there were sales of subject merchandise at less-than-fair-value from Korea.<sup>251</sup> USDOC relied on Hyundai's representations regarding the affiliate expenses for purposes of the preliminary determination.

143. In April 2016, USDOC conducted its sales verification.<sup>252</sup> At verification, USDOC made a third request that Hyundai provide freight and insurance information between its affiliates—[[\*\*\*]] and [[\*\*\*]]—and other unaffiliated parties.<sup>253</sup> Specifically, USDOC asked Hyundai to obtain: (1) comparative freight charge information (inland and ocean freight) between [[\*\*\*]] and other unaffiliated freight providers; and (2) comparative marine insurance rate information between [[\*\*\*]] and other unaffiliated parties.<sup>254</sup> Hyundai declined to provide contracts between its affiliates and unaffiliated parties, which would have allowed for a proper comparison of the arm's-length nature of the transactions between them.<sup>255</sup> According to Hyundai, despite its affiliations with [[\*\*\*]] and [[\*\*\*]], it could not compel these companies to provide the requested materials.<sup>256</sup>

144. Given these statements, at verification, USDOC re-examined Hyundai's questionnaire response regarding its relationships with affiliates.<sup>257</sup> Upon further examination, USDOC confirmed that Hyundai and its affiliated service providers were held and commonly controlled by the same family/family members during the period of investigation.<sup>258</sup> Specifically, the part owner and Vice Chairman of Hyundai were the two largest shareholders in [[\*\*\*]], and Hyundai and [[\*\*\*]] were related *via* the [[\*\*\*]] during the relevant period.<sup>259</sup> Although USDOC raised

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<sup>251</sup> See *Certain Hot-Rolled Steel Flat Products From the Republic of Korea: Affirmative Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 81 Fed. Reg. 15,228 (Dep't of Commerce) (March 22, 2016) (Exhibit KOR-62), and the accompanying HRS Preliminary Decision Memorandum (March 14 2016) (Exhibit KOR-63).

<sup>252</sup> See Hyundai's Sales Verification Report (July 5, 2016) (Exhibit KOR-57 (BCI)) at 1.

<sup>253</sup> See Hyundai's Sales Verification Report (July 5, 2016) (Exhibit KOR-57 (BCI)) at 14-15.

<sup>254</sup> See Hyundai's Sales Verification Report (July 5, 2016) (Exhibit KOR-57 (BCI)) at 14-15.

<sup>255</sup> See Hyundai's Sales Verification Report (July 5, 2016) (Exhibit KOR-57 (BCI)) at 14-15.

<sup>256</sup> See Hyundai's Sales Verification Report (July 5, 2016) (Exhibit KOR-57 (BCI)) at 14-15.

<sup>257</sup> See Hyundai's Sales Verification Report (July 5, 2016) (Exhibit KOR-57 (BCI)) at 2-3.

<sup>258</sup> See Hyundai's Sales Verification Report (July 5, 2016) (Exhibit KOR-57 (BCI)) at 2-3, 14-15; Sales Verification Exhibits (April 29, 2016) (Exhibit KOR-61 (BCI)) at Exhibit 4.

<sup>259</sup> See Hyundai's Sales Verification Report (July 5, 2016) (Exhibit KOR-57 (BCI)) at 2-3, 14-15; Sales Verification Exhibits (April 29, 2016) (Exhibit KOR-61 (BCI)) at Exhibit 4.

these overlapping roles and ownership positions at verification, company officials reiterated that it was not within Hyundai's ability to obtain the requested information.<sup>260</sup>

145. On August 12, 2016, USDOC published its final determination.<sup>261</sup> After verifying record information and evaluating arguments raised by interested parties, USDOC made changes to its preliminary calculated margins. USDOC relied on facts available for certain of Hyundai's reported information and accordingly revised the margin for Hyundai.<sup>262</sup>

146. USDOC determined that Hyundai failed to provide necessary information relating to the arm's length nature of its transactions with its affiliated service providers—[[\*\*\*]] and [[\*\*\*]].<sup>263</sup> USDOC explained that, despite having been asked more than once, Hyundai failed to provide such information and thus, USDOC was unable to verify the arm's length nature of the transactions provided by the company's affiliates.<sup>264</sup> Accordingly, USDOC determined that it was appropriate to rely on facts available for these expenses.<sup>265</sup>

147. Furthermore, because Hyundai failed to cooperate with USDOC's repeated requests for this information, USDOC found that it was appropriate to use an adverse inference when selecting a reasonable replacement from among the facts available to replace the missing necessary information.<sup>266</sup> As reasonable replacements, USDOC selected Hyundai's lowest reported values for home inland freight and warehousing expenses, and the highest reported values by destination for its international freight and U.S. inland freight.<sup>267</sup> For marine insurance, USDOC selected Hyundai's highest reported value as the reasonable replacement.<sup>268</sup>

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<sup>260</sup> See Hyundai's Sales Verification Report (July 5, 2016) (Exhibit KOR-57 (BCI)) at 14-15.

<sup>261</sup> See *Certain Hot-Rolled Steel Flat Products From the Republic of Korea: Final Determination of Sales at Less Than Fair Value*, 81 Fed. Reg. 53,419 (Dep't of Commerce) (August 12, 2016) (Exhibit KOR-53), and the accompanying HRS I&D Memo (August 4, 2016) (Exhibit KOR-67).

<sup>262</sup> See HRS I&D Memo (August 4, 2016) (Exhibit KOR-67) at 18-19.

<sup>263</sup> See HRS I&D Memo (August 4, 2016) (Exhibit KOR-67) at 18-19.

<sup>264</sup> See HRS I&D Memo (August 4, 2016) (Exhibit KOR-67) at 19.

<sup>265</sup> See HRS I&D Memo (August 4, 2016) (Exhibit KOR-67) at 19.

<sup>266</sup> See HRS I&D Memo (August 4, 2016) (Exhibit KOR-67) at 19.

<sup>267</sup> See HRS I&D Memo (August 4, 2016) (Exhibit KOR-67) at 19-20.

<sup>268</sup> See HRS I&D Memo (August 4, 2016) (Exhibit KOR-67) at 19.

**3. *USDOC’s Resort to Facts Available in the HRS and CRS Investigations is Consistent With Article 6.8 and Paragraphs 1 and 6 of Annex II.***

148. Korea claims that in the CRS and HRS investigations, the conditions for resorting to facts available were not met,<sup>269</sup> but this claim is not substantiated by the record evidence. As demonstrated below, Korea fails to establish that USDOC acted inconsistently with Article 6.8 or paragraphs 1 or 6 of Annex II of the Anti-Dumping Agreement when resorting to the facts available.

*a. Hyundai’s Failure to Provide Information on Affiliated Service Providers in the CRS and HRS Investigations*

149. Korea alleges there was no legal basis for USDOC to resort to facts available with respect to the service expenses associated with Hyundai’s cross-owned affiliates. Korea argues that the requested information was not “necessary” and there was no information missing.<sup>270</sup> In addition, Korea argues that USDOC applied facts available without informing the relevant party as soon as possible after the initiation of the investigation and in detail of the information “required.” Korea also argues that USDOC failed to give Hyundai a reasonable period of time to provide the information requested.<sup>271</sup>

150. The record does not support Korea’s arguments. Information is necessary when it is “required to complete a determination.”<sup>272</sup> Here, USDOC did not have enough information on the record to establish that the transactions performed between Hyundai and its affiliated service providers were conducted on an arm’s-length basis.<sup>273</sup> Korea’s attempt to characterize this information as not necessary is not persuasive.

151. Korea’s argument that it provided USDOC with the information to calculate any necessary arm’s length adjustments, and that the information was verified by USDOC without issue, sidesteps the issue.<sup>274</sup> The question is not whether Hyundai correctly reported its expenses for the transactions with the affiliated party, but rather whether those transactions were at arm’s length.

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<sup>269</sup> Korea First Written Submission, paras. 207-12, 252-56, 486-498.

<sup>270</sup> Korea First Written Submission, paras. 268, 487-490.

<sup>271</sup> Korea First Written Submission, paras. 271, 491-498.

<sup>272</sup> *US – Carbon Steel (India) (AB)*, para. 4.416.

<sup>273</sup> CRS I&D Memo (July 20, 2016) (Exhibit KOR-41) at 74.

<sup>274</sup> Korea First Written Submission, paras. 262, 488.

152. Contrary to Korea’s claims that USDOC’s request was only made at verification, USDOC indicated early on in the investigation that information related to the transactions between Hyundai and its affiliates would be required.<sup>275</sup>

153. Following Hyundai’s initial response in the CRS investigation, USDOC determined that it needed further information to evaluate the transactions between Hyundai and [[\*\*\*]], and issued two more questionnaires requesting more detailed information, such as contracts between Hyundai and [[\*\*\*]] demonstrating that the affiliated service provider made a profit on its transactions with Hyundai, and explanations as to whether certain of the following types of transactions were conducted at an arm’s length basis (inland freight in Korea, home market warehousing, inland freight to port for U.S. sales, and ocean freight).<sup>276</sup> Specifically, Hyundai was asked to explain

why the transactions between Hyundai Steel {and its affiliated service provider} for inland freight and warehousing are at arm’s length. Please demonstrate how these transactions should be considered at arm’s length when {they take place} between two affiliated companies” and, importantly, to “provide copies of all freight contracts with {the affiliated service provider} and all unaffiliated freight providers that cover the full POI.<sup>277</sup>

154. Similarly, in the HRS investigation, following Hyundai’s initial response, USDOC determined that it needed further information to evaluate nature of the transaction between Hyundai and its affiliated service providers—[[\*\*\*]] and [[\*\*\*]]<sup>278</sup>—and requested similar information.<sup>279</sup>

155. The number of times that Hyundai was asked to provide information related to the transactions between Hyundai and its affiliates, including in Hyundai’s initial questionnaire response, belies Hyundai’s claims that it was not allowed a reasonable period of time to provide the information and not informed as soon as possible after the initiation of the investigation that it needed to provide such information.<sup>280</sup>

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<sup>275</sup> Department of Commerce Initial AD Questionnaire (September 18, 2015) (Exhibit KOR-33); Department of Commerce Initial AD Questionnaire (October 5, 2015) (Exhibit KOR-58) at G-10.

<sup>276</sup> Department of Commerce Supplemental B-C QR (January 19, 2016) (Exhibit USA-15) at question 3.

<sup>277</sup> Department of Commerce Supplemental A-C QR (December 23, 2015) (Exhibit USA-20 (BCI)) at question 11.

<sup>278</sup> See HRS I&D Memo (August 4, 2016) (Exhibit KOR-67) at 18-19.

<sup>279</sup> Department of Commerce Supplemental Section A-C Questionnaire (December 23, 2015) (Exhibit USA-20 (BCI)) at 16-17.

<sup>280</sup> Korea First Written Submission, paras. 263, 494.

156. Korea makes much of the fact that the two entities are legally separate, and therefore draws an inference for USDOC and for the Panel that it “had no control over the information” requested by USDOC. However, a legal separation between two companies is not the issue. The issue is whether the two legally distinct companies are affiliated. And on this issue, USDOC’s determination is logically sound:

Hyundai Steel defined the companies that are members of the Hyundai Motor Group and/or held by the Chung family as being affiliated parties via control by a ‘group,’ which has the ability to directly or indirectly control its group members, and are expected to cooperate with USDOC’s antidumping investigation.<sup>281</sup>

157. The affiliated service provider is one such “group” member, and thus Hyundai should have been able to respond fully to USDOC’s requests for information with the affiliate’s contracts and transaction details. Hyundai’s proffered excuses, that its company officers “did not know” why the affiliated service provider was not providing the contracts,<sup>282</sup> despite the close relationship between Hyundai’s management and the two largest shareholders of the affiliated service provider, simply does not explain—much less excuse—why it could not obtain the information USDOC needed to establish the nature of the transactions between the two companies. USDOC therefore properly determined that necessary information regarding the nature of the transactions between the two entities was missing from the record and determined to resort to facts available to fill the resulting gaps in the record. Nothing in Article 6.8 or Annex II precludes this.

158. Korea also assigns great value to what it terms USDOC’s “expansive,” “sudden,” “surprise” request for Hyundai’s contracts with its affiliated service provider at its verification, as if such a request was unreasonable and unexpected, and attempts to characterize USDOC’s document request at verification as, essentially, unfair.<sup>283</sup> Korea argues that because USDOC used Hyundai’s affiliated service expenses without adjustment for its preliminary determination, no other information was relevant to that determination.<sup>284</sup> Korea ignores that a preliminary determination is just that—preliminary—meaning it is subject to change prior to the final determination. Furthermore, Korea ignores or discounts the relevance of verification, a process specifically provided for in the WTO Agreement to *verify* the submitted information against the responding company’s actual books and records, instead of accepting information without question or scrutiny.

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<sup>281</sup> CRS I&D Memo (July 20, 2016) (Exhibit KOR-41) at 74.

<sup>282</sup> Department of Commerce, CEP Verification Report, Hyundai Steel (May 26, 2016) (Exhibit KOR-47 (BCI)) at 44.

<sup>283</sup> Korea First Written Submission, paras. 230-231, 267.

<sup>284</sup> Korea First Written Submission, paras. 229, 262-263, 489, 492-495.

159. USDOC’s “intensive” and “top to bottom comprehensive”<sup>285</sup> verification procedures are designed to verify the information used in making a final determination.<sup>286</sup> Requesting information at verification that is not on the outline itself is part of USDOC’s verification approach, and parties were notified that if they were unable to support or explain an answer to the reported information, USDOC may consider such an answer “unverified” and resort to the use of facts available.<sup>287</sup> This process is designed to bolster the accuracy of USDOC’s calculations.

160. Korea’s characterization of USDOC’s request as “entirely results-driven”<sup>288</sup> is contradicted by the record. USDOC makes clear in its verification outline that it may ask questions relating to any part of Hyundai’s responses, which includes those relating to the affiliated service provider.<sup>289</sup>

161. Moreover, as Korea itself notes, interested parties had notified USDOC prior to verification that seeking such documents would further clarify the relationship and the nature of the transactions between the entities, given Hyundai’s inability to provide the documentation USDOC had requested earlier.<sup>290</sup> Hyundai is required to be responsive to USDOC’s requests at verification, which can cover the full breadth of Hyundai’s prior responses. Hyundai’s inability to respond satisfactorily at verification does not demonstrate that Hyundai was asked to provide something brand new and unexpected. Rather, it provides support for USDOC’s determination that it could not verify Hyundai’s previous responses.

162. In sum, the conditions for resorting to the facts available with respect to Hyundai’s affiliated service provider were met and are demonstrated by the facts on the record in the CRS

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<sup>285</sup> Korea First Written Submission, paras. 240, 488-490.

<sup>286</sup> Department of Commerce CRS Sales Verification Outline (April 15, 2016) (Exhibit USA-16) at 1; Department of Commerce HRS Sales Verification Outline (April 11, 2016) (Exhibit KOR-69 (BCI)).

<sup>287</sup> Department of Commerce CRS Sales Verification Outline (April 15, 2016) (Exhibit USA-16) at 2; Department of Commerce HRS Sales Verification Outline (April 11, 2016) (Exhibit KOR-69 (BCI)) at 2 (“It is the responsibility of the respondent to be fully prepared for this verification. If your client is not prepared to support or explain a response item at the appropriate time, the verifiers will move on to another topic. If, due to time constraints, it is not possible to return to that item, we may consider the item unverified, which may result in our basing the results of this investigation on the facts available, possibly including information that is adverse to the interests of your client.”).

<sup>288</sup> Korea First Written Submission, para. 267.

<sup>289</sup> Department of Commerce CRS Sales Verification Outline (April 15, 2016) (Exhibit USA-16) at 1 (“The purpose of providing this agenda in advance of the actual verification is to allow you to brief the appropriate company personnel on the items to be covered and the type of documentation required to verify each item. The enclosed agenda is not necessarily all inclusive and we reserve the right to request any additional information or materials necessary for a complete verification.”).

<sup>290</sup> Pre-Verification Comments (March 3, 2016) (Exhibit KOR-40 (BCI)) at 14-16.



and HRS investigations. USDOC determined and communicated to Hyundai that necessary information regarding the nature of the transactions between Hyundai and its affiliated service provider was missing from the record. Hyundai failed to provide necessary information within a reasonable period, USDOC specified in detail the necessary information as soon as possible following initiation, and USDOC provided a reasonable period of time for Hyundai to respond to its requests for the necessary information. Therefore, Korea fails to demonstrate that USDOC's resort to the facts available in the CRS and HRS investigations was inconsistent with Article 6.8 or paragraphs 1 or 6 of Annex II of the Anti-Dumping Agreement.

*b. Hyundai Presented Inaccurate CONNUM Data in the CRS Investigation.*

163. Korea claims that the necessary conditions were not met for USDOC to resort to the use of facts available to replace missing necessary information regarding Hyundai's inaccurately reported CONNUMs,<sup>291</sup> but this claim is not substantiated by the record evidence. Korea claims that none of the missing information was "necessary" because it related to a "miniscule" number of transactions.<sup>292</sup> To the contrary, USDOC complied with Article 6.8 and paragraphs 1 and 6 of Annex II of the Anti-Dumping Agreement when resorting to the facts available regarding the missing CONNUM information. We demonstrate below Korea's failure to show otherwise.

164. Korea's claim that the information requested by USDOC related to the misreported CONNUMs was not "necessary" to the margin calculation for the investigation is not supported by the record.<sup>293</sup>

165. Information is necessary when it is required to complete a determination.<sup>294</sup> USDOC requested Hyundai report the relevant CONNUMs for each of its reported sales at the outset of the investigation. As USDOC explained in the questionnaire issued to Hyundai, properly reported CONNUMs are crucial for accurate dumping margin calculations, as they indicate the timing and market of sales of identical products (*i.e.* with unique product characteristics and costs of production).<sup>295</sup>

166. Korea's claim that the misreported information was not necessary amounts to a claim that because the number of affected sales was "miniscule," the information could not be necessary.

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<sup>291</sup> Korea First Written Submission, paras. 207-12, 252-56, 273-83.

<sup>292</sup> Korea First Written Submission, paras. 274-76.

<sup>293</sup> Korea First Written Submission, paras. 273-83.

<sup>294</sup> See *US – Carbon Steel (India) (AB)*, para. 4.416.

<sup>295</sup> Department of Commerce Initial AD Questionnaire (September 18, 2015) (Exhibit KOR-33), page B-7 "Assign a control number to each unique product reported in the section B sales data file. Identical products should be assigned the same control number in each record in every file in which the product is referenced (*e.g.*, products with identical physical characteristics reported in the foreign market sales file and the U.S. market sales file should have the same control number)."

However, the magnitude of the erroneously reported information is not the standard against which information is judged for its necessity; instead, it is whether the information is “required to complete a determination.” 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.<sup>296</sup> 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.

167. Korea claims that USDOC should have accepted Hyundai’s explanation at verification as to why internal product codes did not match the reported CONNUMs.<sup>297</sup> It claims that Hyundai’s explanation, that the product-coding of CONNUMs in Hyundai’s business records differed from the CONNUMs reported to USDOC because of the “complex nature of combining internal product codes,” was reasonable and should have been accepted.<sup>298</sup> As an initial matter, Korea’s assertion that, in its view, USDOC should have accepted an explanation of failure to meet a request is insufficient to establish a breach of a WTO obligation. The question is whether the covered agreements preclude USDOC from making the determinations it made, not whether Korea considers it would have made a different one.

168. In any event, the record shows that Hyundai was unable to substantiate certain instances of its misreporting. In the instances when Hyundai failed to substantiate its misreporting, including the five Spec products, the USDOC provided sound reasoning for why it was unable to accept Hyundai’s explanation.<sup>299</sup> Indeed, USDOC took great pains to explain exactly why each of Hyundai’s proffered explanations was not sufficient, in accordance with paragraph 6 of Annex II.<sup>300</sup>

169. In sum, Korea fails to demonstrate why USDOC’s determination that Hyundai failed to provide necessary information and subsequent rejection of that unusable information due to Hyundai’s failures to report accurately its own sales information, does not meet the conditions outlined in Article 6.8 and paragraphs 1 and 6 of Annex II of the Anti-Dumping Agreement.

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<sup>296</sup> CRS I&D Memo (July 20, 2016) (Exhibit KOR-41) at 58-63.

<sup>297</sup> Korea First Written Submission, para. 279.

<sup>298</sup> Korea First Written Submission, para. 279.

<sup>299</sup> CRS I&D Memo (July 20, 2016) (Exhibit KOR-41) at 60-61.

<sup>300</sup> CRS I&D Memo (July 20, 2016) (Exhibit KOR-41) at 58-63.

**4. *USDOC Properly Applied Facts Available and Acted Consistently With Article 6.8 and Paragraphs 3 and 5 of Annex II.***

170. Korea asserts that in the CRS and HRS investigations USDOC acted inconsistently with Article 6.8 and paragraphs 3 and 5 of Annex II of the Anti-Dumping Agreement in applying facts available with respect to Hyundai’s affiliated service providers and, in the CRS investigation, also with respect to certain misreported CONNUMs.<sup>301</sup> For the reasons below, Korea’s claims in this respect fail.

*a. Hyundai’s Affiliated Service Provider*

*i. USDOC Properly Determined It Could Not Verify Hyundai’s Reported Information.*

171. Korea argues that USDOC acted inconsistently with paragraph 3 of Annex II by disregarding verifiable and verified information that was appropriately submitted by Hyundai.<sup>302</sup> It claims that USDOC relied on the information in its preliminary determination, and that Hyundai “provided all requested sales and cost information in its possession in an accurate and timely manner, including information about its affiliated service providers and the arm’s length nature of the transactions” with these affiliates.<sup>303</sup> As explained above, contrary to Korea’s assertion, Hyundai failed to provide *all* of the requested information regarding such transactions. Specifically, Hyundai failed to provide requested documents to demonstrate that the transactions with affiliated service providers took place at arm’s length.<sup>304</sup>

172. While USDOC relied on Hyundai’s reported information for its preliminary determination, Hyundai subsequently failed to provide the relevant contracts<sup>305</sup> to demonstrate that the transactions with affiliated service providers took place at arm’s length, despite Hyundai’s relationship with its affiliated service providers. Accordingly, for the final determination, USDOC was not able to rely on the information provided by Hyundai. Moreover, contrary to what Hyundai alleges, USDOC attempted to verify Hyundai’s reported information regarding the transactions with affiliated suppliers, but Hyundai did not provide USDOC with the documents that would have allowed USDOC to do so. In other words, by not submitting the requested contracts, Hyundai denied USDOC the opportunity to verify whether the transactions

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<sup>301</sup> Korea First Written Submission, paras. 284-95.

<sup>302</sup> Korea First Written Submission, paras. 293-295, 499-505.

<sup>303</sup> Korea First Written Submission, paras. 293, 487, 491.

<sup>304</sup> CRS I&D Memo (July 20, 2016) (Exhibit KOR-41) at 73-74; HRS I&D Memo (August 4, 2016) (Exhibit KOR-67) at 18-19.

<sup>305</sup> Department of Commerce, CEP Verification Report, Hyundai Steel (May 26, 2016) (Exhibit KOR-47 (BCI)) at 42-44; Hyundai’s Sales Verification Report (July 5, 2016) (Exhibit KOR-57 (BCI)) at 14-15; *see also* HRS I&D Memo (August 4, 2016) (Exhibit KOR-67) at 18-19.

with the affiliated service providers were at arm's length. Information is verifiable when the accuracy and reliability of the information can be assessed by an objective process of examination.<sup>306</sup> An investigating authority cannot examine the accuracy and reliability of information when the necessary information used to examine the accuracy and reliability of the information submitted is withheld.

173. With respect to the CRS investigation, Korea argues that other record information could have been used to verify the arm's length nature of the transaction in question, namely the information it submitted in response to USDOC's November 24, 2015, Supplemental Sections B-C Questionnaire and its January 19, 2016, Supplemental Sections B-C Questionnaire.<sup>307</sup> However, these responses were not comprehensive, provided only sample or example contracts in certain instances, and were not responsive to the request for the actual contracts between the affiliated service provider and its unaffiliated customers. Accordingly, the information provided in those responses cannot serve as verified information that demonstrate the arm's length nature of the transactions at issue.<sup>308</sup>

174. Based on the errors and inconsistencies contained in Hyundai's databases USDOC made an unbiased and objective determination to disregard the information Hyundai submitted and resort to facts available. Korea has failed to show that the Anti-Dumping Agreement requires anything different.

*ii. USDOC Properly Determined that Hyundai Did Not Act to the Best of Its Ability in Responding to USDOC's Requests for Information.*

175. Korea claims that USDOC improperly found that Hyundai did not act to the best of its ability, in contravention of paragraph 5 of Annex II of the Anti-Dumping Agreement.<sup>309</sup> The record demonstrates the contrary; USDOC documented multiple instances of incomplete, insufficiently explained, deficient, and unusable information received from Hyundai in its various responses to USDOC's requests for information. Moreover, USDOC properly determined that Hyundai did not act to the best of its ability in responding to USDOC's requests for information.<sup>310</sup>

176. The United States has explained above that Hyundai's information did not even meet the criteria of paragraph 3 of Annex II, and thus falls outside the ambit of paragraph 5 of Annex II.

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<sup>306</sup> *US – Steel Plate*, para. 7.71; *EC – Salmon (Norway)*, para. 7.357.

<sup>307</sup> Korea First Written Submission, paras. 262, 293.

<sup>308</sup> CRS I&D Memo (July 20, 2016) (Exhibit KOR-41) at 74.

<sup>309</sup> Korea First Written Submission, paras. 286-87, 289, 499-505.

<sup>310</sup> CRS I&D Memo (July 20, 2016) (Exhibit KOR-41) at 73-74; HRS I&D Memo (August 4, 2016) (Exhibit KOR-67) at 18-19.

In any event, Hyundai did not act to the best of its ability in responding to USDOC’s requests for information.<sup>311</sup> Hyundai’s failure to provide the necessary information, coupled with its inability to provide this information despite the multiple opportunities and clarifications afforded it, demonstrated to USDOC that Hyundai did not cooperate to the best of its ability.<sup>312</sup>

*b. Hyundai’s Missing CONNUM Data*

177. Given the inconsistencies with respect to Hyundai’s reporting of certain CONNUMs, USDOC properly determined that the relevant CONNUM information could not be verified, and therefore disregarded the information when determining Hyundai’s final antidumping margin.<sup>313</sup> Nothing in paragraph 3 or paragraph 5 of Annex II of the Anti-Dumping Agreement required a different result.

178. Korea claims that Hyundai acted to the best of its ability in responding the USDOC’s requests for information regarding the CONNUMs and provided USDOC with all the information requested.<sup>314</sup> Additionally, Korea claims that USDOC improperly disregarded verified and verifiable information on the record.<sup>315</sup> Korea’s arguments are meritless.

179. Despite multiple opportunities to provide accurate information, Hyundai failed to provide necessary information.<sup>316</sup> As a result of these failures, the necessary information, the accurate CONNUMs for each of those product specifications, was not on the record. Thus, USDOC needed to fill in the gaps with replacement information. As USDOC notes, application of facts available was warranted “because Hyundai withheld the requested information, significantly impeded the proceeding in doing so, and the Department was therefore unable to verify the missing information.”<sup>317</sup>

180. Korea claims that it provided all the necessary information, because it had “explained from the outset of the investigation its reporting methodology and explained that there could be certain instances where the requested CONNUM data and the internal company product codes for CEP sales might be different.” However, no such explanation appears on the cited pages. Nonetheless, USDOC took into account that there may be some errors, and allowed for such

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<sup>311</sup> CRS I&D Memo (July 20, 2016) (Exhibit KOR-41) at 63, 73-74; HRS I&D Memo (August 4, 2016) (Exhibit KOR-67) at 18-19.

<sup>312</sup> CRS I&D Memo (July 20, 2016) (Exhibit KOR-41) at 63, 73-74; HRS I&D Memo (August 4, 2016) (Exhibit KOR-67) at 18-19.

<sup>313</sup> CRS I&D Memo (July 20, 2016) (Exhibit KOR-41) at 47-63.

<sup>314</sup> Korea First Written Submission, paras. 297-300.

<sup>315</sup> Korea First Written Submission, paras. 301-06.

<sup>316</sup> CRS I&D Memo (July 20, 2016) (Exhibit KOR-41) at 47-63.

<sup>317</sup> CRS I&D Memo (July 20, 2016) (Exhibit KOR-41) at 60.

errors when Hyundai was able to substantiate the reason for the error. As noted above, USDOC noted several problems with Hyundai’s product reporting, but only applied facts available to “issues for which the respondent was unable to substantiate its product reporting.”<sup>318</sup> Thus, contrary to Hyundai’s claim, USDOC did not fail to use all substantiated facts.<sup>319</sup> Korea has failed to show that USDOC did not take into account all verifiable and substantiated facts. Moreover, as discussed above, USDOC provided a detailed explanation of the reporting problems for each of the product specifications and why they were deficient.<sup>320</sup>

181. As noted above, where a party has not acted to the best of its ability, the investigating authority is not bound by the provisions of paragraphs 3 and 5.<sup>321</sup> Here, USDOC did not have to rely on unverified information simply because Korea believes Hyundai has acted to the best of its ability. USDOC demonstrated the multiple ways that Hyundai failed to accurately report its CONNUMs for the relevant product classifications, explained why it found Hyundai to not be acting to the best of its ability, and selected reasonable replacements for the missing necessary information.

**5. *USDOC Engaged in a Process of Reasoning and Evaluation When Selecting from Among the Facts Available and Properly Selected a Replacement for the Missing Necessary Information.***

182. Korea claims that USDOC acted inconsistently with Article 6.8 and paragraph 7 of Annex II when selecting the replacements for the missing necessary information on the record.<sup>322</sup> We address each claim in turn below.

*a. Hyundai’s Affiliated Service Providers*

183. Korea alleges that USDOC failed to engage in the requisite process of reasoning and evaluation when selecting the replacement information.<sup>323</sup> To the contrary, the record shows that USDOC engaged in a careful assessment of the missing necessary information, and reasonably decided to rely on Hyundai’s own reported information in selecting replacement information.

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<sup>318</sup> CRS I&D Memo (July 20, 2016) (Exhibit KOR-41) at 59.

<sup>319</sup> Korea First Written Submission, para. 301.

<sup>320</sup> See *infra*, Section II.C.1.b.

<sup>321</sup> Anti-Dumping Agreement, Annex II, paras. 3 and 5.

<sup>322</sup> Korea First Written Submission, paras. 308, 309-320, 506-517.

<sup>323</sup> Korea First Written Submission, paras. 309-10, 507-512.

184. Korea’s claim rests on its argument that because USDOC selected either the lowest or highest values reported by Hyundai, that information is not the “best” available information to replace the missing information.<sup>324</sup> Korea has provided no explanation for *why* the USDOC’s process for selecting these values is inconsistent with any specific provision of the Anti-Dumping Agreement. Rather, Korea’s objection seems to boil down to its dissatisfaction that USDOC selected these particular values, which is insufficient for establishing a claim of WTO inconsistency.

185. USDOC properly determined that because “Hyundai {} failed to provide the requested information or fully cooperate with {USDOC}’s request for this information,”<sup>325</sup> Hyundai failed to cooperate by not acting to the best of its ability in responding to USDOC’s multiple requests for information. Hyundai failed to provide the requested necessary information, but also failed to provide a sufficient explanation for why it could not provide the information. Hyundai changed its explanation several times over the course of the investigation, creating confusion and undermining USDOC’s confidence in its explanations.

186. Furthermore, once USDOC confirmed the relationship between Hyundai and the service providers, Hyundai’s excuse for not providing the information was that it could not obtain the information. Such a response is hardly indicative of a respondent acting to the best of its ability in responding to a request for information from the affiliated companies.

187. Moreover, Korea misstates the record evidence. USDOC did not “reject all of {Hyundai’s} expense data and apply {} the highest/lowest reported expense values across the entire database.”<sup>326</sup> Rather, after determining that it could not confirm the arm’s length nature of the transactions provided by the affiliates, USDOC disregarded only certain information, namely only the expenses relating to Hyundai’s affiliated service providers. USDOC replaced those missing values with other expense values reported by Hyundai, a reasonable selection in light of Hyundai’s failure to report the necessary information.

188. In the CRS investigation, USDOC replaced home market inland freight and warehousing with Hyundai Steel’s lowest reported value for its home inland freight and warehousing fields. USDOC replaced international freight and U.S. inland freight with the highest reported values by destination for Hyundai Steel’s international freight and U.S. inland freight. And USDOC

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<sup>324</sup> Korea First Written Submission, paras. 310, 311, 313, 510-512.

<sup>325</sup> CRS I&D Memo (July 20, 2016) (Exhibit KOR-41) at 74; *see also* HRS I&D Memo (August 4, 2016) (Exhibit KOR-67) at 19.

<sup>326</sup> Korea First Written Submission, para. 313; *See also* Korea First Written Submission, para. 516

replaced home market inland freight for U.S. sales with the second-highest transaction-specific value.<sup>327</sup>

189. In the HRS investigation, USDOC replaced home market inland freight and warehousing with Hyundai’s lowest reported value for its home inland freight and warehousing fields. In addition, USDOC replaced marine insurance, international freight, and domestic inland freight for U.S. with the highest reported values.<sup>328</sup>

190. Korea’s attempt to characterize these replacements as “arbitrary” and “punitive” is meritless. USDOC selected information from Hyundai’s own expense reporting, as such information was related to the type of missing necessary information. That the outcome is less favorable than Korea would have liked does not mean the application of facts available was punitive or otherwise inconsistent with Article 6.8 and Annex II.<sup>329</sup> Indeed, Annex II warns of the consequences that may result from non-cooperation.<sup>330</sup>

191. Finally, Korea claims that USDOC did not use special circumspection in selecting the replacement data.<sup>331</sup> This argument consists of a single citation to a panel report in another dispute, *US – Pipe and Tube Products (Turkey) (Panel)*, para 7.215, as support for its statement, and does not provided any factual citation or explanation of how USDOC did not use special circumspection in selecting the replacement information in this investigation.<sup>332</sup> Given Korea’s failure to explain its argument with even the slightest detail or support, Korea’s claim in this respect fails.

192. Korea has therefore failed to demonstrate that USDOC’s application of facts available is inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement.

*b. Hyundai’s Missing CONNUM Data*

193. Korea claims that USDOC acted inconsistently with Article 6.8 and paragraph 7 of Annex II when selecting from among the facts available to replace the inaccurately reported, and

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<sup>179</sup> CRS I&D Memo (July 20, 2016) (Exhibit KOR-41) at 74, citing Hyundai Steel’s Sales Final Calculation Memo (July 20, 2016) (Exhibit KOR-49 (BCI)).

<sup>328</sup> HRS I&D Memo (August 4, 2016) (Exhibit KOR-67) at 19-20.

<sup>329</sup> See *US – Carbon Steel (India) (AB)*, para. 4.426.

<sup>330</sup> See Anti-Dumping Agreement, Annex II, para. 7. See also *US – Carbon Steel (India) (AB)*, para. 4.426 (explaining that “Annex II to the Anti-Dumping Agreement thus provides contextual support for our understanding that the procedural circumstances in which information is missing are relevant to an investigating authority’s use of ‘facts available’ under Article 12.7 of the SCM Agreement”).

<sup>331</sup> Korea First Written Submission, paras. 318-19.

<sup>332</sup> Korea First Written Submission, paras. 318-19, 509.



therefore missing, necessary CONNUM information for certain product specifications.<sup>333</sup> Korea specifically argues that “USDOC failed to engage in the necessary process of reasoning and evaluation to ensure the information selected as facts available was the *best* information available to arrive at an *accurate* determination.”<sup>334</sup>

194. Korea has failed to establish any breach of the Anti-Dumping Agreement. For the sales where Hyundai was “unable to substantiate its product reporting,” USDOC partially used adverse inferences in resorting to facts available to account for the problems, and selected the highest rate alleged in the petition. Nothing in paragraph 7 of Annex II requires a different result.

195. Korea’s claim again rests on its argument that because USDOC selected the highest values reported by Hyundai for its costs of manufacturing for home-market sales or the highest calculated margin for U.S. sales, that information is not the “best” available information to replace the missing information.<sup>335</sup> Korea has provided no explanation for *why* the USDOC’s process for selecting these values is inconsistent with any provision of the Anti-Dumping Agreement. Rather, Korea’s objection seems to boil down to its dissatisfaction that USDOC selected these particular values.

196. USDOC did not fail to make an unbiased and objective determination when it selected the replacement information. Indeed, it replaced the missing information with values reported by Hyundai itself for the relevant CONNUM product specifications. USDOC reasoned that because the CONNUMs for which Hyundai misreported certain sales depended on certain unverified information (such as the yield strength field for Spec E product sales, and the correct product quality for Spec D product sales), it would revise the affected CONNUMs across the database, rather than rely on unverified information for each CONNUM.<sup>336</sup> As USDOC explained, for the U.S. sales associated with the Spec C issue (which are limited to a small volume of U.S. sales of products classified under that specification and under the two other specifications with comparable linking problems), it replaced the missing information with the highest calculated margin for any other of Hyundai’s reported U.S. sales.<sup>337</sup> For Spec D, Spec H, and Spec E, all of which involve only home market sales, USDOC revised the reported product characteristics, and therefore also the CONNUMs, as described in detail in the I&D Memorandum, and assigned to

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<sup>333</sup> Korea First Written Submission, paras. 321-330.

<sup>334</sup> Korea First Written Submission, para. 322 (emphasis original).

<sup>335</sup> Korea First Written Submission, paras. 310, 311, 313

<sup>336</sup> CRS I&D Memo (July 20, 2016) (Exhibit KOR-41) at 58-63; *see also* Department of Commerce Memo Addressing Claims of Ministerial Errors (August 31, 2016) (Exhibit KOR-52 (BCI)), wherein Department of Commerce explains that Hyundai’s allegations of ministerial errors in relying on facts available for each CONNUM was not an error.

<sup>337</sup> HRS Preliminary Decision Memorandum (March 14, 2016) (Exhibit KOR-63).

the appropriate CONNUMs the highest reported total cost of manufacturing for the CONNUMs in question.<sup>338</sup>

197. Korea similarly argues that USDOC’s selected facts resulted in a determination that was “punitive in nature.”<sup>339</sup> This does not appear to be a separate legal argument, but rather Korea’s general characterization of the outcome of the investigation. In any event, there is no basis for the argument. That the outcome is less favorable than Korea would have like does not mean the application of facts available was punitive or otherwise inconsistent with Article 6.8 and Annex II.<sup>340</sup>

198. Korea has therefore failed to demonstrate that USDOC acted inconsistently with Article 6.8 and paragraph 7 of Annex II of the Anti-Dumping Agreement.

**D. Korea Has Failed to Establish that LPT USDOC’s Application of Facts Available Regarding Certain Administrative Reviews on Large Power Transformers (LPTs) Was Inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement.**

199. Korea claims that USDOC acted inconsistently with Article 6.8 and Annex II of the Anti-Dumping Agreement in resorting to the use of facts available in the course of several determinations made concerning the antidumping duty order on large power transformers from Korea with respect to Hyundai Heavy Industries (“HHI” or “Hyundai”) and Hyosung Corporation (“Hyosung”).

200. As we explain below, for each of the challenged reviews, USDOC satisfied the conditions required to resort to facts available, appropriately applied facts available, and selected reasonable replacement information in accordance with Article 6.8 and Annex II of the Anti-Dumping Agreement. For each of the reviews, the United States provides the relevant facts and then addresses Korea’s arguments with respect to each review.

**1. USDOC’s Application of Facts Available Regarding Remand Redetermination Concerning Second Administrative Review on LPTs Was Fully Consistent With Article 6.8 and Annex II of the Anti-Dumping Agreement.**

201. In subsection a, we provide the relevant facts regarding USDOC’s application of facts available against HHI. As discussed in subsection b, USDOC’s application of facts available was consistent with Article 6.8 and Annex II of the Anti-Dumping Agreement, as USDOC

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<sup>338</sup> HRS Preliminary Decision Memorandum (March 14, 2016) (Exhibit KOR-63)

<sup>339</sup> Korea First Written Submission, paras. 325-329.

<sup>340</sup> See *US – Carbon Steel (India) (AB)*, para. 4.426.

properly resorted to facts available, properly applied facts available, and properly selected reasonable replacements for HHI’s missing information.

*a. HHI Failed to Provide Necessary Information.*

202. In the second administrative review, petitioner, ABB Inc. (“ABB”), requested the review of imports produced by HHI, Hyosung, Iljin, Iljin Electric Co., Ltd., and LSIS. USDOC selected Hyosung and HHI as mandatory respondents for individual review.<sup>341</sup> On March 16, 2016, USDOC issued its final results.<sup>342</sup> In those results, USDOC found that HHI improperly reported gross unit prices for U.S. sales by including service revenue in excess of the expenses incurred. USDOC explained:

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, {HHI} did not report any of these expenses or revenues and based its reported gross unit price for U.S. sales on the invoice price, less any expenses for “spare parts.”<sup>343</sup>

203. As HHI had not listed freight expenses and other costs related to the shipment or production of LPTs “as a separate line item on the sales invoices or separately invoiced to the customers,” USDOC found “no basis to indicate {HHI} sought or obtained re-imbursements for the expenses from its customers.”<sup>344</sup> As such, USDOC found that “{HHI} was not obligated to report separate expenses and revenues for reimbursed services” and that its reported gross unit price for each sale was an appropriate basis to calculate CEP for its final dumping margin.<sup>345</sup>

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<sup>341</sup> Letter from ABB: Large Power Transformers from the Republic of Korea—Petitioner’s Request for Administrative Review, (August 29, 2014) (Exhibit USA-21); Respondent Selection Memorandum (November 18, 2014) (Exhibit USA-22 (BCI)).

<sup>342</sup> See *Large Power Transformers from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 81 Fed. Reg. 14,087 (Dep’t of Commerce) (March 16, 2016) (Exhibit KOR-111), and the accompanying LPT I&D Memo (March 8, 2016) (Exhibit KOR-110).

<sup>343</sup> LPT I&D Memo (March 8, 2016) (Exhibit KOR-110) at 39.

<sup>344</sup> LPT I&D Memo (March 8, 2016) (Exhibit KOR-110) at 39-40.

<sup>345</sup> LPT I&D Memo (March 8, 2016) (Exhibit KOR-110) at 40.

204. Subsequently, the petitioner (ABB) challenged certain aspects of USDOC’s final results to the U.S. Court of International Trade (“the Court”).<sup>346</sup> Specifically, ABB alleged that USDOC failed to cap the revenues HHI included in its gross unit prices for subject merchandise for sales-related services that were separately purchased by the customer by the amount of the related expenses incurred by HHI, resulting in an overstatement of HHI’s constructed export prices and an understatement of HHI’s dumping margin.<sup>347</sup> After considering ABB’s arguments before the Court, USDOC requested that the Court grant USDOC a voluntary remand for USDOC to evaluate its treatment of service revenue and ensure that the treatment of service revenue was consistent with respect to both respondents.<sup>348</sup> The Court granted USDOC its request for a voluntary remand.

205. After re-examining the record evidence, USDOC found that capping Hyundai’s service-related revenues by the corresponding expense was warranted.<sup>349</sup> However, USDOC found that “because necessary information is missing from the record due to Hyundai’s failure to report service-related revenues, as Commerce requested, we find that HHI impeded this review by failing to provide information necessary” to cap HHI’s services revenue.<sup>350</sup>

206. As explained in the Remand Redetermination, in USDOC’s initial antidumping duty questionnaire to HHI, USDOC instructed HHI to “report the sale price, discounts, rebates and all other revenues and expenses in the currencies in which they were earned or incurred.”<sup>351</sup> USDOC also instructed HHI that “{t}he gross unit prices 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.”<sup>352</sup> HHI responded by reporting fields ADDPOPRU and ADDPOEXPU, and explained that “ADDPOPRU is {sic} sales amount under a separate purchase order for services that were not included in the purchase order for the transformer (*e.g.*, supervision), but that are related to the transformer. ADDPOEXPU is the

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<sup>346</sup> See *ABB, Inc. v. United States*, Slip Op. 17-138, Ct. No. 16-00054 (Ct. Int’l Trade) (October 10, 2017) (Exhibit KOR-206 (BCI)).

<sup>347</sup> *ABB, Inc. v. United States*, Slip Op. 17-138, Ct. No. 16-00054 (Ct. Int’l Trade) (October 10, 2017) (Exhibit KOR-206 (BCI)).

<sup>348</sup> *ABB, Inc. v. United States*, Slip Op. 17-138, Ct. No. 16-00054 (Ct. Int’l Trade) (October 10, 2017) (Exhibit KOR-206 (BCI)).

<sup>349</sup> Draft Results of Redetermination Pursuant to Court Remand (January 9, 2018) (Exhibit KOR-207) at 11.

<sup>350</sup> Draft Results of Redetermination Pursuant to Court Remand (January 9, 2018) (Exhibit KOR-207) at 11.

<sup>351</sup> Department of Commerce Initial AD Questionnaire (December 1, 2014) (Exhibit USA-23) at C-20.

<sup>352</sup> Department of Commerce Initial AD Questionnaire (December 1, 2014) (Exhibit USA-23) at C-18.

expense associated with the additional services.”<sup>353</sup> HHI also reported specific services and related expenses in connection with various U.S. sales.<sup>354</sup> However, and importantly, HHI did *not* report separate revenues for these expenses.<sup>355</sup>

207. In a second request for information relating to the reported service-related revenues during the underlying second administrative review, USDOC requested clarification regarding the figures reported in the fields ADDPOPRU and ADDPOEXPU.<sup>356</sup> In response, HHI stated:

In certain instances, {HHI} sells pursuant to terms of sale under which {HHI} is required to provide services related to the LPT. Where the terms of sale require {HHI} to perform such services, the gross unit price includes the value of the services required. For example, the terms of sale may require {HHI} to deliver the LPT to the customer where the [[\*\*\*]]. Consistent with Commerce’s determination on the original investigation, {HHI} has included the [[\*\*\*]]. In accordance with Commerce’s decision in the original investigation, where the customer has issued a separate, additional purchase order for services related to, but not included in the purchase order for the sale, {HHI} has reported the value of the additional purchase order and related expenses separately (*i.e.*, in the fields ADDPOPRU and ADDPOEXPU).<sup>357</sup>

208. As noted above, on remand, and after a re-examination of the evidence, USDOC determined to cap HHI’s service-related revenues by the corresponding expenses.<sup>358</sup> Specifically, USDOC re-examined the sales documentation HHI had submitted during the administrative review,<sup>359</sup> and determined that for one of HHI’s U.S. sales, HHI failed to report

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<sup>353</sup> Letter from Hyundai: Antidumping Administrative Review of Large Power Transformers from Korea—Response to Sections B and C Questionnaires (January 26, 2015) (Exhibit USA-24 (BCI)) at C-28.

<sup>354</sup> Letter from Hyundai: Antidumping Administrative Review of Large Power Transformers from Korea—Response to Sections B and C Questionnaires (January 26, 2015) (Exhibit USA-24 (BCI)) at C-40-C-41.

<sup>355</sup> Letter from Hyundai: Antidumping Administrative Review of Large Power Transformers from Korea—Response to Sections B and C Questionnaires (January 26, 2015) (Exhibit USA-24 (BCI)) (no separate service-related revenues reported).

<sup>356</sup> Letter to Hyundai: Supplemental Questionnaire for Sections B and C (May 22, 2015) (Exhibit USA-25 (BCI)) at 7 (Question 2).

<sup>357</sup> Letter from Hyundai: Antidumping Administrative Review of Large Power Transformers from Korea—Response to Supplemental Sections B and C Questionnaires (June 3, 2015) (Exhibit USA-26 (BCI)) at 14-15.

<sup>358</sup> Department of Commerce Draft Results of Redetermination Pursuant to Remand (January 9, 2018) (Exhibit USA-27 (BCI)) at 11.

<sup>359</sup> Department of Commerce Draft Results of Redetermination Pursuant to Remand (January 9, 2018) (Exhibit USA-27 (BCI)) at 12.

all relevant service-related revenues.<sup>360</sup> Therefore, based on record evidence, USDOC found in its remand redetermination that HHI collected revenues from customers to cover various service-related expenses, and that the revenues collected exceeded the expenses incurred.<sup>361</sup>

209. In response to HHI’s statement alleging a change in methodology, USDOC noted that it requested a voluntary remand “specifically to examine this issues and its previous practice in this proceeding as Commerce’s understanding of the information continues to evolve.”<sup>362</sup> USDOC explained in the Remand Redetermination that, “if a respondent collects, as a portion of the final price to the 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 must be capped.”<sup>363</sup>

210. As explained above, USDOC initially did not look beyond what HHI reported, noting that since HHI had not listed freight expenses as a separate line item on an invoice, there was no basis to believe that HHI sought or obtained re-imbursements for expenses from its customers.<sup>364</sup> Yet, after a re-examination of the evidence, USDOC found that the fact that certain expenses “are not on the invoice to the unaffiliated customer, or part of the purchase order, does not negate the fact that these are revenue, collected by Hyundai from the unaffiliated customer and dedicated to cover service expenses, and which exceed those service expenses.”<sup>365</sup>

211. In other words in the underlying administrative review, services revenue should have been capped.<sup>366</sup> However, despite USDOC’s requests that HHI “report the sale price, discounts, rebates and all other revenues and expenses... Hyundai refused to provide the necessary

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<sup>360</sup> Department of Commerce Draft Results of Redetermination Pursuant to Remand (January 9, 2018) (Exhibit USA-27 (BCI)) at 11, citing Verification Report, SVA-12 at 83, 14 at 12, 17, 25, and SVA-13, 15; Letter from Hyundai: Antidumping Administrative Review of Large Power Transformers from Korea – Response to First Sales Supplemental Questionnaire Section A (May 13, 2015) (Exhibit USA-28 (BCI)) at Attachment SS-17.

<sup>361</sup> See Department of Commerce Final Results of Redetermination Pursuant to Court Remand (February 8, 2018) (Exhibit USA-29 (BCI)) at 16-24.

<sup>362</sup> Department of Commerce Final Results of Redetermination Pursuant to Court Remand (February 8, 2018) (Exhibit USA-29 (BCI)) at 20.

<sup>363</sup> Department of Commerce Final Results of Redetermination Pursuant to Court Remand (February 8, 2018) (Exhibit USA-29 (BCI)) at 22.

<sup>364</sup> LPT I&D Memo (March 8, 2016) (Exhibit KOR-110) at 39-40.

<sup>365</sup> Department of Commerce Final Results of Redetermination Pursuant to Court Remand (February 8, 2018) (Exhibit USA-29 (BCI)) at 23-24.

<sup>366</sup> Department of Commerce Final Results of Redetermination Pursuant to Court Remand (February 8, 2018) (Exhibit USA-29 (BCI)) at 22.

information.” Indeed, in response to USDOC’s requests,<sup>367</sup> HHI reported that it did not have separate service-related revenues or expenses to report.<sup>368</sup> Because necessary information was missing from the record as a result of HHI’s failure to report service-related revenues and expenses, USDOC found that HHI impeded the review by failing to provide information necessary for USDOC to cap the services revenue.<sup>369</sup> Therefore, USDOC found that a gap existed on the record and selected from among the facts available to cap HHI’s service-related revenues by the associated expenses.<sup>370</sup> As facts available, USDOC reduced the gross unit price of certain U.S. sales by the highest calculated difference between the reported service-related revenues and associated expenses, expressed as a percentage, based on the information contained in the verification exhibits, SVA-14 through SVA-16, and the supplemental section A questionnaire response at Exhibit SS-17.<sup>371</sup>

212. Additionally, USDOC found on remand that HHI failed to act to the best of its ability to report necessary information in the form and manner requested by USDOC.<sup>372</sup> As explained above, USDOC’s initial antidumping duty questionnaire instructed HHI to report the sale price, discounts, rebates and all other revenues and expenses in the currencies in which they were earned or incurred.<sup>373</sup> HHI failed to do so, despite record evidence indicating that HHI possessed the information necessary to report specific service-related revenues and associated expenses.

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<sup>367</sup> Department of Commerce Initial AD Questionnaire (December 1, 2014) (Exhibit USA-23) at C-18, C-20; Letter to Hyundai: Supplemental Questionnaire for Sections B and C (May 22, 2015) (Exhibit USA-25 (BCI)) at 7 (Question 2).

<sup>368</sup> Letter from Hyundai: Antidumping Administrative Review of Large Power Transformers from Korea—Response to Sections B and C Questionnaires (January 26, 2015) (Exhibit USA-24 (BCI)) at C-28; Letter from Hyundai: Antidumping Administrative Review of Large Power Transformers from Korea—Response to Supplemental Sections B and C Questionnaires (June 3, 2015) (Exhibit USA-26 (BCI)) at 14-15.

<sup>369</sup> Letter from Hyundai: Antidumping Administrative Review of Large Power Transformers from Korea—Response to Sections B and C Questionnaires (January 26, 2015) (Exhibit USA-24 (BCI)) at C-28; Letter from Hyundai: Antidumping Administrative Review of Large Power Transformers from Korea—Response to Supplemental Sections B and C Questionnaires (June 3, 2015) (Exhibit USA-26 (BCI)) at 14-15.

<sup>370</sup> Letter from Hyundai: Antidumping Administrative Review of Large Power Transformers from Korea—Response to Sections B and C Questionnaires (January 26, 2015) (Exhibit USA-24 (BCI)) at C-28; Letter from Hyundai: Antidumping Administrative Review of Large Power Transformers from Korea—Response to Supplemental Sections B and C Questionnaires (June 3, 2015) (Exhibit USA-26 (BCI)) at 14-15.

<sup>371</sup> Department of Commerce Draft Results of Redetermination Pursuant to Remand (January 9, 2018) (Exhibit USA-27 (BCI)) at 13-14.

<sup>372</sup> See Department of Commerce Final Results of Redetermination Pursuant to Court Remand (February 8, 2018) (Exhibit USA-29 (BCI)).

<sup>373</sup> Department of Commerce Initial AD Questionnaire (December 1, 2014) (Exhibit USA-23) at C-18 and C-20.

Therefore, for certain U.S. sales, as facts available, USDOC reduced the gross unit prices as discussed above.<sup>374</sup>

*b. USDOC's Application of Facts Available Was Consistent with Article 6.8 and Annex II of the Anti-Dumping Agreement.*

213. Korea argues that in using facts available, USDOC did not meet the conditions for resorting to facts available,<sup>375</sup> failed to use verifiable information on the record, based its determination on non-factual assumption and speculation,<sup>376</sup> and failed to engage in the necessary process of reasoning and evaluation in demonstrating how its selected replacement information was reasonable.<sup>377</sup>

214. Korea's arguments are unsupported by the evidence and fail to demonstrate an inconsistency with Article 6.8 and Annex II of the Anti-Dumping Agreement.

*i. USDOC Met the Conditions For Resorting to the Use of Facts Available.*

215. As we demonstrate below, HHI's inaccurate reporting and omissions resulted in necessary information missing from the record before USDOC for the remand determination, and HHI's failure to report such necessary information significantly impeded USDOC's understanding of the record and its ability to complete the review. In sum, USDOC's resort to facts available was consistent with Article 6.8 and Annex II.

216. Korea's claim that necessary information was not missing is unsupported by the record.<sup>378</sup> Korea argues that HHI correctly reported its revenues for service-related expenses pursuant to the definition used by USDOC in the investigation and in the first and second administrative reviews.<sup>379</sup> However, this argument ignores the fact that USDOC, upon re-

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<sup>374</sup> Analysis of Data Submitted by Hyosung Corporation (Hyosung) in the Draft Results of Remand of the Antidumping Duty Administrative Review of Large Power Transformers from the Republic of Korea; 2013-201 (January 8, 2018) (Exhibit KOR-113 (BCI)) at 14.

<sup>375</sup> Korea First Written Submission, paras. 769-74.

<sup>376</sup> Korea First Written Submission, paras. 833-34, 835-37.

<sup>377</sup> Korea First Written Submission, paras. 851-534.

<sup>378</sup> Korea First Written Submission, paras. 769-72.

<sup>379</sup> Korea First Written Submission, para. 769.



examination of the record, found that HHI had misreported sales by not separately reporting service-related revenues and expenses, as requested.<sup>380</sup>

217. Specifically, prior to the remand in the second administrative review, as HHI had not reported revenues from reimbursements and nothing on the record suggested that it should have done so, USDOC had concluded that its revenue capping methodology was not relevant.<sup>381</sup> However, on remand USDOC determined that HHI had failed, in fact, to report service related revenue, thus depriving USDOC of its ability to cap the revenue at issue.<sup>382</sup>

218. Additionally, Korea argues that USDOC did not “inform HHI” that such information was necessary.<sup>383</sup> Annex II of the Anti-Dumping Agreement provides that “if evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefor, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation.”<sup>384</sup> The opportunity to remedy deficient submissions afforded to parties supplying information arises when such a party actually supplies information. Here, HHI reported to USDOC on multiple occasions that it had no service-related revenues to report. Thus, USDOC’s obligation to inform HHI of the nature of any deficiency never arose.

219. Moreover, by failing to provide information necessary for Commerce to cap the services revenue, HHI impeded this review.

220. In sum, as necessary information was missing from the record regarding HHI’s service-related revenues and because HHI significantly impeded the proceeding by failing to report the necessary information relating to its service-related revenues, USDOC appropriately resorted to using the facts otherwise available pursuant to Article 6.8 and Annex II.

*ii. USDOC Properly Applied Facts Available to HHI.*

221. Korea claims that USDOC disregarded verifiable, appropriately submitted information in violation of paragraph 3 of Annex II.<sup>385</sup> Korea further argues that because there was no basis to

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<sup>380</sup> Department of Commerce Draft Results of Redetermination Pursuant to Remand (January 9, 2018) (Exhibit USA-27 (BCI)) at 11-14.

<sup>381</sup> Department of Commerce Draft Results of Redetermination Pursuant to Remand (January 9, 2018) (Exhibit USA-27 (BCI)) at 11.

<sup>382</sup> Department of Commerce Draft Results of Redetermination Pursuant to Remand (January 9, 2018) (Exhibit USA-27 (BCI)) at 11.

<sup>383</sup> Korea First Written Submission, para. 771.

<sup>384</sup> Anti-Dumping Agreement, Annex II, para. 6.

<sup>385</sup> Korea First Written Submission, para. 837.

find that HHI did not act to the best of its ability, there was no basis to reject the information, pursuant to paragraph 5 of Annex II.<sup>386</sup>

222. Korea’s arguments ignore the record evidence. USDOC did not have verifiable or appropriately submitted information on its record regarding HHI’s service-related revenues, as HHI failed to provide the relevant information. As noted above, despite multiple requests, HHI failed to report its service-related revenues and expenses.<sup>387</sup> Rather, HHI reported that it did not have separate service-related revenues or expenses to report.<sup>388</sup> By not reporting its separate service-related revenues, HHI failed to provide the information necessary for USDOC to apply its standard capping methodology.<sup>389</sup> Thus, there was no verified or appropriately submitted information on the record for USDOC to disregard.

223. Paragraph 5 requires that an investigating authority may not disregard information that is less than ideal where the interested party submitting the information has acted to the “best of its ability”.<sup>390</sup> Importantly, paragraph 5 is “supplemental to paragraph 3 and not an exception to it; information that satisfies the requirements of paragraph 3, even if not perfect, may not be disregarded.”<sup>391</sup>

224. The United States has shown above that HHI’s information did not meet the criteria of paragraph 3 of Annex II, and thus are not afforded the protections of paragraph 5 of Annex II.

225. In any event, HHI did not act to the best of its ability in responding to USDOC’s requests for information.<sup>392</sup> Record evidence indicates that HHI possessed the information necessary to

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<sup>386</sup> Korea First Written Submission, para. 837.

<sup>387</sup> Department of Commerce Initial AD Questionnaire (December 1, 2014) (Exhibit USA-23) at C-18, C-20; Letter to Hyundai: Supplemental Questionnaire for Sections B and C (May 22, 2015) (Exhibit USA-5 (BCI)) at 7 (Question 2) (3279531-01).

<sup>388</sup> Letter from Hyundai: Antidumping Administrative Review of Large Power Transformers from Korea—Response to Sections B and C Questionnaires (January 26, 2015) (Exhibit USA-24 (BCI)) at C-28; Letter from Hyundai: Antidumping Administrative Review of Large Power Transformers from Korea—Response to Supplemental Sections B and C Questionnaires (June 3, 2015) (Exhibit USA-26 (BCI)) at 14-15.

<sup>389</sup> Letter from Hyundai: Antidumping Administrative Review of Large Power Transformers from Korea—Response to Sections B and C Questionnaires (January 26, 2015) (Exhibit USA-24 (BCI)) at C-28; Letter from Hyundai: Antidumping Administrative Review of Large Power Transformers from Korea—Response to Supplemental Sections B and C Questionnaires (June 3, 2015) (Exhibit USA-26 (BCI)) at 14-15.

<sup>390</sup> Anti-Dumping Agreement, Annex II, para. 5.

<sup>391</sup> *China Broiler Products (US)*, para 7.344, citing *US – Steel Plate*, para. 7.65.

<sup>392</sup> Department of Commerce Draft Results of Redetermination Pursuant to Remand (January 9, 2018) (Exhibit USA-27 (BCI)) at 14.

report specific service-related revenues for specific service-related expenses, but failed to do so, despite USDOC’s request for the information.<sup>393</sup>

*iii. USDOC Properly Selected the Reasonable Replacement for HHI’s Missing Information.*

226. Korea claims that USDOC failed to engage in the necessary process of reasoning and evaluation in demonstrating how its selected replacement information was reasonable.<sup>394</sup> Specifically, Korea argues that USDOC did not explain how its selection of the highest calculated difference between HHI’s service-related revenues and reported associated expenses was a reasonable replacement.<sup>395</sup> Similarly, Korea argues that by “completely rejecting HHI’s data on the record,” USDOC penalized HHI with “particularly adverse adjustments.”<sup>396</sup>

227. Korea’s arguments are meritless. USDOC’s selection of the highest calculated percentage difference between the reported service-related expenses and the service-related revenues, based on HHI’s own purchase orders, was a reasonable replacement of the missing information that would have otherwise permitted USDOC to apply its revenue capping methodology. The selected information was a reasonable replacement for the missing necessary information given its relevance and reliability based on HHI’s own reported expenses and the discovered revenues; the fact that it was higher than what HHI was anticipating is irrelevant and not demonstrative of a punitive act by USDOC.

228. USDOC engaged in a process of reasoning and evaluation in which it determined that “a review of the purchase orders for [[\*\*\*]] sales made to the United States indicates that the purchase orders for at least [[\*\*\*]] of these sales contain the information necessary to report separately revenues in excess of expenses,” meaning that HHI could have reported the revenues separately, but elected not to and reported to USDOC that it did not have any to report.<sup>397</sup> USDOC examined those revenues and expenses, and based on the percentage difference between the reported service related expenses and service revenues reported for the [[\*\*\*]] sales where information was available to report separately revenues in excess of expenses, USDOC reduced the gross unit price for each of those sales.<sup>398</sup> With the exception of the [[\*\*\*]] sale where the

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<sup>393</sup> Department of Commerce Draft Results of Redetermination Pursuant to Remand (January 9, 2018) (Exhibit USA-27 (BCI)) at 14.

<sup>394</sup> Korea First Written Submission, paras. 851-534.

<sup>395</sup> Korea First Written Submission, para. 852

<sup>396</sup> Korea First Written Submission, para. 853-54.

<sup>397</sup> Department of Commerce Draft Results of Redetermination Pursuant to Remand (January 9, 2018) (Exhibit USA-27 (BCI)) at 13.

<sup>398</sup> Department of Commerce Draft Results of Redetermination Pursuant to Remand (January 9, 2018) (Exhibit USA-27 (BCI)) at 13-14.

record did not show revenues in excess of expenses, for the remaining sales, Commerce reduced the gross unit prices by the highest percent rate difference identified in the [\*\*\*] sales where information was available.<sup>399</sup>

229. Finally, Korea’s argument that USDOC’s selected replacement information was somehow “punitive” is without merit. As the Appellate Body has recognized, “non-cooperation creates a situation in which a less favourable result becomes possible due to the selection of a replacement of an unknown fact.”<sup>400</sup> That the outcome is less favorable than Korea would have liked does not mean the application of facts available inconsistent with Article 6.8.<sup>401</sup>

230. In sum, USDOC replaced the missing information with record information based on HHI’s own purchase orders. This information was a reasonable replacement for the missing necessary information, given its relevance and reliability, and is consistent with Article 6.8 of the Anti-Dumping Agreement.

***2. USDOC’s Application of Facts Available Regarding the Third Administrative Review on LPTs Was Fully Consistent With Article 6.8 and Annex II of the Anti-Dumping Agreement.***

231. USDOC initiated the third administrative review on the LPTs order on October 6, 2015<sup>402</sup> and later selected HHI and Hyosung as mandatory respondents.<sup>403</sup> On March 13, 2017, USDOC issued its final results, determining that HHI failed to cooperate by not acting to the best of its ability in providing the Department with necessary information in a timely manner as requested by the Department.<sup>404</sup> Specifically, USDOC explained that HHI: (1) overstated U.S. price by failing to report separately service-related revenues, which prevented USDOC from deducting excess revenue amounts from HHI’s reported U.S. price in accordance with domestic law;<sup>405</sup> (2)

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<sup>399</sup> Department of Commerce Draft Results of Redetermination Pursuant to Remand (January 9, 2018) (Exhibit USA-27 (BCI)) at 13-14.

<sup>400</sup> See *US – Carbon Steel (India) (AB)*, para. 4.426 (explaining that “Annex II to the Anti-Dumping Agreement thus provides contextual support for our understanding that the procedural circumstances in which information is missing are relevant to an investigating authority’s use of ‘facts available’ under Article 12.7 of the SCM Agreement”).

<sup>401</sup> See *US – Carbon Steel (India) (AB)*, para. 4.426.

<sup>402</sup> See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 80 Fed. Reg. 60,356 (Dep’t of Commerce) (October 6, 2015) (Exhibit USA-30).

<sup>403</sup> Antidumping Duty Administrative review of Large Power Transformers from the Republic of Korea: Respondent Selection Memorandum (December 2, 2015) (Exhibit USA-31 (BCI)).

<sup>404</sup> *Large Power Transformers From the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 82 Fed. Reg. 13,432 (Dep’t of Commerce) (March 13, 2017) (Exhibit KOR-120), and the accompanying LPT I&D Memo (March 6, 2017) (Exhibit KOR-121).

<sup>405</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 17-22.

understated its home market price by excluding a part that is required to assemble a complete large power transformer from its reported gross unit price in the home market;<sup>406</sup> (3) failed to separately report the price and cost for accessories and;<sup>407</sup> (4) had been systematically selective in providing various documents to the Department, thereby impeding the course of the review.<sup>408</sup>

a. *HHI's Failure to Provide Necessary Information*

i. *HHI's Failure to Report Separately Service-Related Revenue*

232. On December 3, 2015, USDOC issued its initial antidumping duty questionnaire to HHI.<sup>409</sup> As in the prior reviews, USDOC instructed HHI to report separately service-related revenues and the related expenses.<sup>410</sup> Specifically, USDOC instructed HHI to report “revenue in separate fields (*e.g.*, ocean freight revenue, inland freight revenue, oil revenue, installation, etc.) and identify the related expense(s) for each revenue.”<sup>411</sup>

233. On January 27, 2016, HHI responded that the terms of sale include delivery and related freight expenses and revenue to the customer.<sup>412</sup> Rather than following USDOC’s instruction to report service-related revenues and related expenses in separate fields, HHI simply stated that it had correctly reported its gross unit prices without separately reporting such revenues, because such revenues are included in the terms of sale.<sup>413</sup>

234. Following comments from the parties, on July 27, 2016, USDOC issued a supplemental questionnaire to HHI, requesting that HHI “clarify whether HHI received revenue related to international freight, inland freight, oil, installation, or any other expenses on home market” and U.S. sales, and “{i}f so, please report this revenue in a field separate from the related

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<sup>406</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 23-26.

<sup>407</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 26-27.

<sup>408</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 27-28.

<sup>409</sup> Department of Commerce Initial AD Questionnaire (December 3, 2015) (Exhibit KOR-209).

<sup>410</sup> Department of Commerce Initial AD Questionnaire (December 3, 2015) (Exhibit KOR-209) at C-1 of Section C.

<sup>411</sup> Department of Commerce Initial AD Questionnaire (December 3, 2015) (Exhibit KOR-209).

<sup>412</sup> Hyundai Response to Sections B and C Questionnaires (January 27, 2016) (Exhibit KOR-122 (BCI)) at B-3. (“{USDOC} separates freight expenses and revenue where transportation is arranged by the seller on behalf of the customer because delivery is not the seller’s responsibility under the terms of sale, and the seller is separately reimbursed for making those arrangements. In contrast, the terms of sale applicable to Hyundai’s sales of LPTs (with exception of *ex works* sales in the home market) include delivery to the customer’s site.”).

<sup>413</sup> Hyundai Response to Sections B and C Questionnaires (January 27, 2016) (Exhibit KOR-122 (BCI)) at B-3-5.

expense.”<sup>414</sup> USDOC also requested that HHI “provide complete sales documentation (including all sales related documentation generated in the sales process)” for certain sales.<sup>415</sup>

235. HHI responded in two parts. In this first part of its response, HHI stated that according to USDOC’s “treatment of HHI’s sales documentation in prior segments of this proceeding, HHI did not receive separate revenue related to international freight, inland freight, oil, installation, or any other expenses on home-market sales or U.S. sales.”<sup>416</sup> In reviewing the second part of HHI’s response, USDOC discovered that certain documents identified separate service line items with a corresponding price.<sup>417</sup> These documents showed that the prices for these services were higher than the associated expenses reported by HHI in HHI’s sales database.<sup>418</sup> Thus, HHI’s own reporting demonstrated a scenario in which USDOC would have capped certain revenue, because the prices were higher than the associated expenses, suggesting that HHI’s reported gross unit prices were overstated.<sup>419</sup>

236. On August 26, 2016, USDOC issued its preliminary results.<sup>420</sup> For the preliminary results of the review, USDOC preliminarily determined that HHI had made sales of subject merchandise at less than normal value during the period of review.<sup>421</sup>

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<sup>414</sup> Supplemental Questionnaire for Hyundai Heavy Industries Co., Ltd., and Hyundai Corporation USA’s Questionnaire Responses (July 27, 2016) (Exhibit KOR-124 (BCI)) at 6-7.

<sup>415</sup> Supplemental Questionnaire for Hyundai Heavy Industries Co., Ltd., and Hyundai Corporation USA’s Questionnaire Responses (July 27, 2016) (Exhibit KOR-124 (BCI)) at 5.

<sup>416</sup> Hyundai Response to the Second Supplemental Sections A-D Questionnaire (August 10, 2016) (Exhibit KOR-125 (BCI)) at 11.

<sup>417</sup> *Large Power Transformers From the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 82 Fed. Reg. 13,432 (Dep’t of Commerce) (March 13, 2017) (Exhibit KOR-120 (BCI)), and the accompanying LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 20; Hyundai Additional Response to the Second Supplemental Sections A-D Questionnaire (August 18, 2016) (Exhibit KOR-126 (BCI)) at Attachment 2S-17.

<sup>418</sup> Hyundai Additional Response to the Second Supplemental Sections A-D Questionnaire (August 18, 2016) (Exhibit KOR-126 (BCI)) at Attachment 2S-26; LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 20.

<sup>419</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 20.

<sup>420</sup> *See Large Power Transformers From the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review; 2014-2015*, 81 Fed. Reg. 60,672 (Dep’t of Commerce) (September 2, 2016) (Exhibit KOR-116), and accompanying LPT I&D Preliminary Results Memo (August 26, 2016) (Exhibit KOR-127 (BCI)).

<sup>421</sup> *Large Power Transformers From the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review; 2014-2015*, 81 Fed. Reg. 60,672 (Dep’t of Commerce) (September 2, 2016) (Exhibit KOR-116) at 60,672.

237. After issuing its preliminary results, USDOC issued a third supplemental questionnaire to HHI requesting additional information regarding service-related revenues.<sup>422</sup> Nearly a year after USDOC first requested that HHI report separately service-related revenues and associated expenses, HHI provided USDOC with a worksheet in which it claimed that service-related revenues and the corresponding expenses for U.S. sales were reported separately.<sup>423</sup>

238. As the worksheet showing separate reporting of service-related revenues and the corresponding expenses contained missing data, USDOC found the data not reliable for calculating an accurate margin.<sup>424</sup> Specifically, USDOC determined that the worksheet was missing the associated expenses for the reported revenues on multiple U.S. sales.<sup>425</sup> USDOC determined that the incompleteness of HHI's worksheet cast serious doubts on its reliability and, moreover the data were submitted "very late in the process, thereby negating our ability to satisfy ourselves that the data provided are accurate and reliable, and to develop deficiency questionnaires, as needed."<sup>426</sup> Given this lack of information, USDOC's numerous requests for HHI to provide the necessary information, and the multiple opportunities HHI had to provide it, USDOC determined HHI "impeded this review by failing to act the best of its ability by failing to provide the Department with the requested information in timely manner."<sup>427</sup>

*ii. HHI's Exclusion of Certain Parts of Subject Merchandise in the Home Market*

239. In Appendix III of the initial antidumping duty questionnaire, USDOC provided a description of the products under review, which stated that "incomplete LPTs are subassemblies consisting of the active part and any other parts attached to, imported with, or invoiced with the active parts of LPTs."<sup>428</sup> USDOC also requested that HHI "separately report the price and cost

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<sup>422</sup> Antidumping Duty Administrative review of Large Power Transformers from the Republic of Korea: Supplemental Questionnaire for Hyundai Heavy Industries Co., Ltd. and Hyundai Corporation USA's Questionnaire Responses (October 7, 2016) (Exhibit USA-32 (BCI)) at 6.

<sup>423</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 21; Hyundai Additional Third Supplemental Sections A-D Questionnaire Response (November 10, 2016) (Exhibit KOR-119 (BCI)) at Attachment 3S-35.

<sup>424</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 21.

<sup>425</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 21.

<sup>426</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 22.

<sup>427</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 22.

<sup>428</sup> Department of Commerce Initial AD Questionnaire (December 3, 2015) (Exhibit KOR-209) at Appendix III.

for ‘spare parts’ and ‘accessories’ to ensure that product matches are based on accurate physical characteristics of the LPTs.”<sup>429</sup>

240. In response to USDOC’s supplemental questionnaire of July 27, 2016, HHI submitted documentation which incorrectly identified [[\*\*\*]] as non-subject merchandise, an indication that Hyundai had reported home market gross unit prices exclusive of [[\*\*\*]].<sup>430</sup>

241. USDOC’s October 7, 2017 supplemental questionnaire requested that HHI confirm that product-specific costs “do not include costs for spare parts and accessories (*i.e.*, non-subject merchandise).”<sup>431</sup> USDOC also instructed HHI to revise the cost of production database if such spare parts and accessories were included.<sup>432</sup> For a select number of sales, USDOC requested that HHI submit worksheets demonstrating the costs of spare parts and accessories as well as accounting documentation supporting these costs.<sup>433</sup> Despite reporting that “...the Department instructed respondents to report gross unit price to only reflect the price of the LPT and not any spare parts, unless such parts were needed to assemble an incomplete LPT,” HHI’s response continued to report [[\*\*\*]] as non-subject merchandise and to exclude them from its home market gross unit price.<sup>434</sup> Moreover, HHI continued to reference documentation which incorrectly identified the part as non-subject merchandise.<sup>435</sup>

242. In the process of reviewing HHI’s response to USDOC’s October 7, 2017 supplemental questionnaire, Hyundai’s third opportunity to correct its misreporting, USDOC identified HHI’s misreporting of spare parts.<sup>436</sup>

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<sup>429</sup> Department of Commerce Initial AD Questionnaire (December 3, 2015) (Exhibit KOR-209) at D-1 of Section D.

<sup>430</sup> Hyundai Additional Response to the Second Supplemental Sections A-D Questionnaire (August 18, 2016) (Exhibit KOR-126 (BCI)) at Attachment 2S-17.

<sup>431</sup> Antidumping Duty Administrative review of Large Power Transformers from the Republic of Korea: Supplemental Questionnaire for Hyundai Heavy Industries Co., Ltd. and Hyundai Corporation USA’s Questionnaire Responses (October 7, 2016) (Exhibit USA-32 (BCI)) at 8.

<sup>432</sup> Antidumping Duty Administrative review of Large Power Transformers from the Republic of Korea: Supplemental Questionnaire for Hyundai Heavy Industries Co., Ltd. and Hyundai Corporation USA’s Questionnaire Responses (October 7, 2016) (Exhibit USA-32 (BCI)) at 8.

<sup>433</sup> Antidumping Duty Administrative review of Large Power Transformers from the Republic of Korea: Supplemental Questionnaire for Hyundai Heavy Industries Co., Ltd. and Hyundai Corporation USA’s Questionnaire Responses (October 7, 2016) (Exhibit USA-32 (BCI)) at 8.

<sup>434</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 23-24.

<sup>435</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 24.

<sup>436</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 24.



243. ABB, Inc., the domestic petitioner, raised the issue of HHI's failure to include these parts in its reporting of its home market gross unit price in comments.<sup>437</sup> In its response to ABB's comments, HHI did not address the exclusion of certain parts from its home market gross unit price.<sup>438</sup> Rather, in its administrative case brief, HHI argued that "the record is ambiguous and does not allow a definitive conclusion regarding whether the items in question are properly included in the gross unit price."<sup>439</sup> In the alternative, HHI proffered a "revised price calculation worksheet" that allegedly included the excluded parts with increased gross unit prices.<sup>440</sup>

244. USDOC rejected this belated effort and found that HHI had failed to act to the best of its ability by failing to report the gross unit price, including the part at issue, at an earlier stage of the proceeding rather than attempting to do so in its case brief, well after the multiple deadlines USDOC gave HHI for filing such information.<sup>441</sup> USDOC noted that, given the late stage of the review, it has no time to verify the validity of HHI's revisions and cannot confirm whether other accessories, which Hyundai listed as "non-subject merchandise" in the same document that listed [[\*\*\*]] are in fact, non-foreign like product. Moreover, while HHI had included [[\*\*\*]] in the U.S. price and not the home market price, rendering U.S. price and normal value incomparable, this misreporting was grounds to find HHI's reported home market prices, in their entirety, are unreliable.<sup>442</sup>

*iii. HHI's Failure to Separately Report the Price and Cost for Accessories*

245. Further supporting USDOC's decision to resort to using facts available was HHI's refusal to report the price and cost for accessories separately, which in turn made HHI's sales reporting unreliable.<sup>443</sup> Since the original investigation, USDOC has considered whether there are components of a large power transformer that may amount to physical differences in the product such that USDOC would make an adjustment based on the variance in costs of those

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<sup>437</sup> Petitioner's Comments on Hyundai's Fifth Supplemental Questionnaire Response (December 2, 2016) (Exhibit KOR-129 (BCI)) at 12-26.

<sup>438</sup> See Hyundai Rebuttal Comments (November 20, 2015) (Exhibit KOR-132).

<sup>439</sup> Hyundai's Administrative Case Brief (January 5, 2017) (Exhibit USA-33 (BCI)) at 21.

<sup>440</sup> Hyundai's Administrative Case Brief (January 5, 2017) (Exhibit USA-33 (BCI)) at 21.

<sup>441</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 26 ("Hyundai should have reported this information in its initial response to the Department's AD Questionnaire. Alternatively, Hyundai should have alerted the Department of its misreporting at some earlier point in the course of the review. Hyundai did neither.").

<sup>442</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 26.

<sup>443</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 26.

components.<sup>444</sup> In this review, USDOC determined that there may be differences in costs between similar product CONNUMs reported by HHI based on whether HHI considers certain components of a large power transformer “accessories,” which would have affected USDOC’s price comparison.<sup>445</sup>

246. In its initial questionnaire, USDOC requested that HHI report the price and cost for such components separately.<sup>446</sup> USDOC requested this information to determine whether “the differences in costs between similar product {CONNUMs} reported by {HHI} were due to the differences in the physical characteristics of the products within the CONNUMs or were the result of factors other than physical characteristics.”<sup>447</sup> HHI refused to provide this information, arguing that there is no fixed definition as to what constitutes “accessories;” and that USDOC has not requested such information in prior reviews.<sup>448</sup> USDOC found this response unreasonable, particularly in light of the fact that HHI’s sales documentation used the term “accessories.”<sup>449</sup>

247. USDOC published the final results of the review on March 13, 2017.<sup>450</sup> As explained above, USDOC found that HHI “impeded this administrative review by failing to act to the best of its ability in providing {USDOC} with necessary information in a timely manner as requested by {USDOC}.”<sup>451</sup> USDOC explained that HHI overstated U.S. price by failing to report separately service-related revenues, which prevented USDOC from deducting excess revenue amounts from HHI’s reported U.S. price in accordance with domestic law.<sup>452</sup> Similarly, USDOC found that HHI understated its home market price by excluding a part that is required to assemble a complete large power transformer from its reported gross unit price in the home

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<sup>444</sup> See LPT I&D Memo (July 2, 2012) (Exhibit KOR-145) at 29 (“{USDOC} asked Hyundai to verify that for all sales, the gross unit price only reflects the actual large power transformer, and not any spare parts, unless such parts are need{ed} to assemble an incomplete large power transformer.”).

<sup>445</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 26.

<sup>446</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 26; Department of Commerce Initial AD Questionnaire (December 3, 2015) (Exhibit KOR-209) at D-1.

<sup>447</sup> Department of Commerce Initial AD Questionnaire (December 3, 2015) (Exhibit KOR-209) at D-1.

<sup>448</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 26; Hyundai Section D Questionnaire Response (February 5, 2016) (Exhibit KOR-134 (BCI)) at D-2-D-3.

<sup>449</sup> Hyundai Heavy Industries Additional Third Supplemental Sections A-D Questionnaire Response (November 10, 2016) (Exhibit KOR-119 (BCI)) at Attachment 3S-35.

<sup>450</sup> *Large Power Transformers From the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2014-2015*, 82 Fed. Reg. 13,432 (Dep’t of Commerce) (March 13, 2017) (Exhibit KOR-120 (BCI)), and the accompanying LPT I&D Memo (March 6, 2017) (Exhibit KOR-121).

<sup>451</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 17.

<sup>452</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 17-22.

market.<sup>453</sup> Furthermore, despite numerous opportunities to do so, HHI failed to separately report the price and cost for accessories.<sup>454</sup> Lastly, USDOC articulated other discrepancies in HHI's reporting, which supported USDOC's decision to apply facts available.<sup>455</sup> Because USDOC found that HHI failed to act to the best of its ability, USDOC resorted to facts available and assigned a dumping margin alleged in the petition.<sup>456</sup>

*b. USDOC's Application of Facts Available Was Consistent with Article 6.8 and Annex II of the Anti-Dumping Agreement*

*i. USDOC Satisfied the Conditions for Resorting to Facts Available Under Article 6.8 of the Antidumping Agreement.*

248. As detailed above, USDOC provided HHI multiple opportunities to provide the requested information regarding the service-related revenues, parts, accessories, and other items, but HHI's inaccurate, incomplete, and late reporting resulted in USDOC's inability to rely on any of HHI's information. Further, HHI significantly impeded the proceeding by failing to provide complete and accurate information throughout the proceeding, potentially overstating U.S. prices and understating home market prices, engaging in "selective reporting," and demonstrating a pattern of reporting behavior that called into question all of its responses.

249. Korea alleges that USDOC's resort to the use of facts available regarding the results of the third administrative review was inconsistent with Article 6.8 and paragraphs 3 and 5 of Annex II because USDOC improperly rejected all of HHI's reported information.<sup>457</sup> Specifically, Korea claims that HHI provided timely verifiable data "as defined and accepted from the original investigation," as well as verifiable data on service-related revenues in accordance with the POR2 review results.<sup>458</sup> Regarding its misreporting of a part of subject merchandise as non-subject, Korea argues that "such a small amount of data...cannot be 'requisite, essential, needful' for {} USDOC's dumping determination."<sup>459</sup> With respect to the missing data for accessories, Korea argues that because USDOC did not require information about accessories in the investigation, first, or second administrative reviews, such information

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<sup>453</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 23-26.

<sup>454</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 26-27.

<sup>455</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 27-28.

<sup>456</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 28-29.

<sup>457</sup> Korea First Written Submission, paras. 838-40.

<sup>458</sup> Korea First Written Submission, para. 776.

<sup>459</sup> Korea First Written Submission, paras. 780, 781.

was not necessary here, and further, that USDOC did not properly request the information at any point during the proceeding.<sup>460</sup> These claims are contradicted by the record evidence.

250. As USDOC explained in its I&D Memorandum, on multiple occasions, beginning with its initial questionnaire, it instructed HHI to: “report revenue in separate fields (e.g., ocean freight revenue, inland freight revenue, oil revenue, installation, etc.) and identify the related expense(s) for each revenue;” “report gross unit price to only reflect the price of the LPT and not any spare parts, unless such parts were needed to assemble an incomplete LPT;” and “separately report the price and cost for spare parts and accessories to ensure that product matches are based on accurate physical characteristics of the LPTs.”<sup>461</sup> USDOC found that: improper inclusion of service-related revenues could “affect the Department’s ability to calculate an accurate antidumping margin,”<sup>462</sup> “including the part not reported in home market prices in U.S. price, but not in home market price, is a serious issue because it renders U.S. price and normal value incomparable,”<sup>463</sup> costs of accessories is required to determine whether differences in costs between similar product matching control numbers were due to physical differences of the product or other factors,<sup>464</sup> and complete sales documentation is vital to verify a respondent’s reporting.<sup>465</sup> In sum, USDOC thoroughly explained why such information was necessary to its dumping margin calculations.

251. Korea’s arguments that the data are not necessary because it had provided the services data with respect to how service revenue was “defined and accepted” previously, also ignores the record.<sup>466</sup> As USDOC noted, while it had “permitted Hyundai to include service-related revenues in the gross unit price on the basis of Hyundai’s claim in prior segments, the record evidence in this review indicates that there are separate line items for revenues from service-related revenues, as shown in purchase orders and/or invoices.”<sup>467</sup> Similarly, whether USDOC asked about accessories during previous segments is irrelevant.<sup>468</sup> This information was

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<sup>460</sup> Korea First Written Submission, para. 784.

<sup>461</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 18, 23, and 26; *see also* Department of Commerce Initial AD Questionnaire (December 3, 2015) (Exhibit KOR-209) B-1 and C-1, Appendix III, D-1. *See also* Antidumping Duty Administrative review of Large Power Transformers from the Republic of Korea: Supplemental Questionnaire for Hyundai Heavy Industries Co., Ltd. and Hyundai Corporation USA’s Questionnaire Responses (October 7, 2016) (Exhibit USA-32 (BCI)) at 5-6.

<sup>462</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 18.

<sup>463</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 25.

<sup>464</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 26.

<sup>465</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 28.

<sup>466</sup> Korea First Written Submission, para. 776.

<sup>467</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 22.

<sup>468</sup> Korea First Written Submission, para. 784.

necessary for “the purpose of determining whether the differences in costs between similar product matching controls numbers were due to differences in physical characteristic of the products or the result of other factors.”<sup>469</sup> Finally, Korea claims that the missing data on parts was a small piece of data and thus not necessary.<sup>470</sup> However, how “isolated” the sales are, is not known. As the USDOC noted, the document showed a pattern of HHI including parts in the data for U.S. sales, but excluding parts in the home market sales for sales where additional documentation was requested and for sales where additional documentation was not requested, calling into question the reliability of Hyundai’s reported home market prices.<sup>471</sup>

252. Korea argues that HHI provided timely verifiable data “as defined and accepted from the original investigation” through the instant investigation, as well as verifiable data on service-related revenues in accordance with the POR2 review results. This claim is unsupported by the record. USDOC explained in great detail the difficulties it had in obtaining each of the missing or incomplete documents.<sup>472</sup> In certain instances, USDOC had to request the documentation three times from HHI, and even then, the submitted information was not complete.<sup>473</sup> USDOC ultimately determined:

Specifically, {HHI} has significantly impeded this review by failing to act to the best of its ability by not providing complete and accurate information, and has, therefore, undermined the reliability of the response based upon {HHI}: (1) systematically overstating U.S. prices; and (2) systematically understating home market prices. Further, {HHI} failed to provide the Department with requested cost information, which prevented the Department from determining whether costs could be distorted by incomplete reporting. In addition to the “selective reporting” issues identified above, these three issues demonstrate that {HHI} has engaged in a pattern of behavior that leaves the Department with a response that, taken as whole, is unreliable.<sup>474</sup>

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<sup>469</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 26.

<sup>470</sup> Korea First Written Submission, para. 780.

<sup>471</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 25.

<sup>472</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 17-22.

<sup>473</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 22 (“Had {HHI} followed {USDOC}’s request to report separately service-related revenues and the related expenses early on (i.e., in {HHI}’s January 27, 2016, Sections B and C Questionnaire Response or even in {HHI}’s August 10, 2016, Supplemental Questionnaire Response), we would have had the time to request additional necessary information (i.e., the missing data) and verify other issues that Petitioner raised in its case brief...{i}n sum, the worksheet Hyundai eventually provided, and which contained missing data, is not reliable for calculating an accurate margin”).

<sup>474</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 28-29.

253. In sum, necessary information was missing from the record and USDOC, in requesting such information multiple times from HHI, ensured that HHI was aware of its reporting requirements; HHI failed to provide the requested information to such a degree that USDOC could not rely on HHI's other reported information. USDOC therefore acted consistently with Article 6.8 and Annex II when it resorted to facts available.

254. Moreover, for each type of missing information, USDOC determined that HHI had failed to provide necessary information and in accordance with Article 6.8 of the Anti-Dumping Agreement, and thus found that HHI had significantly impeded the proceeding.<sup>475</sup>

255. As discussed above, HHI had multiple opportunities to submit the data, but chose not or provided incomplete data. Moreover, as the record shows, HHI chose to ignore or defy USDOC's definitions and instructions, resulting in inaccurate and flawed reporting of sales-related service expenses, parts of subject merchandise, and accessories.<sup>476</sup> USDOC noted:

For the reasons identified above, we determine that Hyundai impeded this review by failing to act {to} the best of its ability. Hyundai failed to provide information specifically requested by the Department. Hyundai is obligated to submit the requested information whether it agreed with the request or not. Rather than seeking clarification, Hyundai withheld necessary information that was specifically requested by the Department.<sup>477</sup>

256. USDOC further found that HHI's systematic selective reporting in providing various documents significantly impeded the course of the review.<sup>478</sup> When viewed in isolation, USDOC reasoned, each failure may not have warranted the application of facts available, the totality of these failures demonstrate that HHI has been selective in its reporting, thereby demonstrating that HHI has engaged in a pattern of behavior that leaves USDOC with a response that, taken as whole, is incomplete and unreliable.<sup>479</sup> Thus, USDOC found that this pattern of behavior significantly impeded the review.<sup>480</sup>

257. Korea further argues that to be deemed to have significantly impeded the proceeding, HHI's failures must "be material, notable and not simply inadvertent or of no direct and material effect on the investigation."<sup>481</sup> While Korea provides no basis for this condition for imposing

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<sup>475</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 4.

<sup>476</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 22, 23, 26.

<sup>477</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 27.

<sup>478</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 27.

<sup>479</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 27.

<sup>480</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 27.

<sup>481</sup> Korea First Written Submission, para. 783.

facts available, the facts here show that such a standard was certainly satisfied. Korea also claims that HHI did not significantly impede the proceeding, as it either provided alternative information that could have been used in place of the missing information,<sup>482</sup> or that USDOC should have been more specific in its requests for certain information.<sup>483</sup> However, the arguments ignore USDOC’s finding that HHI’s responses to information requests demonstrated a pattern of behaviour that left HHI’s responses, and any alternative information, as unreliable.<sup>484</sup> Moreover, USDOC made multiple requests for information that USDOC notes is “the kind of information that Hyundai should have known, and had reason to know from the start of the review the Department was requesting.”<sup>485</sup>

258. In sum, considering the totality of HHI’s failure to report separately service-related revenues and expenses, failure to adequately explain its exclusion of a certain subject part from its home market gross unit prices, failure to report separately the prices and costs of “accessories,” and collective failure to provide complete sales documentation, USDOC appropriately satisfied the conditions necessary to resort to facts available. Korea has not otherwise provided any evidence to the contrary, and, therefore, fails to demonstrate an inconsistency with Article 6.8 and Annex II of the Anti-Dumping Agreement.

*ii. USDOC Properly Applied Facts Available in Accordance with Article 6.8 and Paragraphs 3 and 5 of Annex II.*

259. Next Korea claims that USDOC’s resort to the use of facts available was inconsistent with Article 6.8 and paragraphs 3 and 5 of Annex II because USDOC improperly rejected all of HHI’s reported information.<sup>486</sup> Korea specifically claims that USDOC “rejected all of the verifiable, substantiated facts that HHI submitted” on the record,<sup>487</sup> asserting that HHI had provided all relevant information in its November 10, 2016 response for the service-related revenues and expenses, and in its other initial and supplemental responses for the single “part,” the “accessories,” and the complete sales documentation.<sup>488</sup>

260. Again, Korea’s claim is unsupported by the record. As explained above, USDOC determined that HHI did not act to the best of its ability because of its failure to provide, in a timely manner, the information necessary for USDOC to calculate a weighted-average dumping

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<sup>482</sup> Korea First Written Submission, paras. 783, 796-97

<sup>483</sup> Korea First Written Submission, para. 778-79, 789, 796.

<sup>484</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 4.

<sup>485</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 4.

<sup>486</sup> Korea First Written Submission, paras. 838-40.

<sup>487</sup> Korea First Written Submission, para. 838.

<sup>488</sup> Korea First Written Submission, para. 838.

margin.<sup>489</sup> Moreover, USDOC determined that “Rather than providing the requested documentation, 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.”<sup>490</sup> As USDOC determined that HHI failed to act to the best of its ability, its rejection of HHI’s reported information was not inconsistent with its obligations under Annex II or Article 6.8.

261. Paragraph 5 requires that an investigating authority may not disregard information that is less than ideal where the interested party submitting the information has acted to the “best of its ability”.<sup>491</sup>

262. The United States has shown above that because HHI’s information did not meet the criteria of paragraph 3 of Annex II, HHI is not afforded the protections of paragraph 5 of Annex II. In any event, as detailed above, HHI did not act to the best of its ability in responding to USDOC’s requests for information.<sup>492</sup> This is supported by HHI’s failure to provide the necessary information, despite the multiple opportunities and clarifications afforded it.<sup>493</sup> Indeed, in finding that HHI had not acted to the best of its ability, USDOC noted, “{i}n addition to the “selective reporting” issues identified above, these three issues demonstrate that {HHI} has engaged in a pattern of behavior that leaves {USDOC} with a response that, taken as whole, is unreliable.”<sup>494</sup>

*iii. USDOC Properly Selected a Replacement for the Missing Necessary Information.*

263. Korea next claims that USDOC did not select the “best” information to use to replace all of HHI’s information because it did not provide adequate reasoning and explanation for its selection of the petition rate as the replacement rate; did not sufficiently corroborate that rate; and finally, claims that such action was punitive.<sup>495</sup>

264. The record demonstrates the contrary. USDOC engaged in a process of reasoning and evaluation when it properly selected the alleged petition rate as a reasonable replacement for the

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<sup>489</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 28.

<sup>490</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 28.

<sup>491</sup> Anti-Dumping Agreement, Annex II, para. 5.

<sup>492</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 28.

<sup>493</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 4-5, 8-29.

<sup>494</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 29.

<sup>495</sup> Korea First Written Submission, paras. 855-56, 858-60.



missing necessary information. Further, USDOC used special circumspection in selecting the petition rate as a reasonable replacement for HHI’s unreliable information.

265. Record evidence belies Korea’s claim that USDOC selected the highest petition rate in applying facts available solely because it was alleged in the petition and without any special circumspection or corroboration. Rather, USDOC considered this information carefully and selected a reasonable replacement that adheres to the obligations of paragraph 7 of Annex II and Article 6.8 of the Anti-Dumping Agreement.

266. USDOC selection of the highest rate alleged in the petition is in accordance with paragraph 7 of Annex II, which provides that investigating authorities may replace missing necessary information with “information supplied in the application for the initiation of the investigation,” provided it undertakes special circumspection in doing so.

267. While Korea asserts that USDOC did not select the “best” information to use to replace all of HHI’s information, it offers no alternative.<sup>496</sup> Furthermore, Korea has not demonstrated—as is its burden—that USDOC’s selection of the highest margin alleged in the petition was an improper replacement for the missing necessary information from among the facts available.

268. Moreover, contrary to Korea’s assertion,<sup>497</sup> USDOC corroborated its rate to the extent practicable using sources reasonably at its disposal, as required by paragraph 7 of Annex II in using the rate from the petition.<sup>498</sup> Specifically, the USDOC explained that during its pre-initiation analysis of the probative value of the rate, it examined information from various independent sources to determine the relevance and reliability of the rate, and that no information on the record called into question the relevance of the petition rate.<sup>499</sup> USDOC further explained that the rate was relevant because the rate alleged in the petition was based on sales declarations concerning U.S. sales of large power transformers lost to Korean competitors and four prices for large power transformers manufactured in Korea and offered for sale in the United States by two Korean producers/exporters, and that it included adjustments for typical expenses and revenues.<sup>500</sup>

269. USDOC further explained that it considered the record evidence of the review when determining the probative value of the selected rate. It “compared the {p}etition dumping margin of 60.81 percent to transaction-specific data for Hyosung in this review {and} found the highest transaction-specific rate related to sales by Hyosung exceeded the dumping margin

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<sup>496</sup> Korea First Written Submission, paras. 856, 859-60.

<sup>497</sup> Korea First Written Submission, paras. 856, 858-59.

<sup>498</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 6-7.

<sup>499</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 7.

<sup>500</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 7.

alleged in the {p}etition.”<sup>501</sup> Thus, the selected rate was a reasonable replacement for HHI’s unreliable reporting.

270. Moreover, the record demonstrates USDOC engaged in the requisite process of reasoning and evaluation in selecting the alleged petition rate. USDOC did not select a rate out of thin air, or a rate that has no relationship to HHI; it selected as a reasonable replacement a margin that was lower than the highest-transaction specific margin calculated for a cooperating respondent, and relevant and reliable based on its analysis of supporting record evidence.<sup>502</sup>

271. USDOC therefore selected the petition margin as a reasonable replacement for the missing necessary information, in accordance with paragraph 7 of Annex II. Korea’s claim to the contrary is without merit.

272. Finally, contrary to Korea’s characterization, USDOC did not apply facts available with a view to ensuring a less favourable, punitive rate.<sup>503</sup> Given the facts described above, USDOC properly determined that HHI failed to cooperate by not acting to the best of its ability.<sup>504</sup> As the Appellate Body has recognized, “non-cooperation creates a situation in which a less favourable result becomes possible due to the selection of a replacement of an unknown fact.”<sup>505</sup> That the outcome is less favorable than Korea would have like does not mean USDOC’s application of facts available was somehow inconsistent with Article 6.8.<sup>506</sup>

273. In sum, USDOC’s selection of the petition rate as the reasonable replacement for the missing necessary information in the third administrative review, given its relevance and reliability as explained in the I&D Memorandum,<sup>507</sup> was not inconsistent with paragraph 7 of Annex II or Article 6.8 of the Anti-Dumping Agreement.

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<sup>501</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 6.

<sup>502</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 5-8.

<sup>503</sup> Korea First Written Submission, para. 860.

<sup>504</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 29; *see also* LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 17-29.

<sup>505</sup> *See US – Carbon Steel (India) (AB)*, para. 4.426 (explaining that “Annex II to the Anti-Dumping Agreement thus provides contextual support for our understanding that the procedural circumstances in which information is missing are relevant to an investigating authority’s use of ‘facts available’ under Article 12.7 of the SCM Agreement”).

<sup>506</sup> *See US – Carbon Steel (India) (AB)*, para. 4.426.

<sup>507</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 5-8.

**3. USDOC’s Application of Facts Available Regarding the Fourth Administrative Review on LPTs Was Fully Consistent With Article 6.8 and Annex II of the Anti-Dumping Agreement.**

274. USDOC initiated the fourth administrative review of LPTs from Korea in October 2016 and, as in previous administrative reviews, USDOC selected HHI and Hyosung as mandatory respondents.<sup>508</sup> Shortly thereafter, USDOC issued its initial antidumping duty questionnaire to both parties on January 5, 2017.<sup>509</sup>

275. In subsection a, we review the facts surrounding HHI’s and Hyosung’s failure to report necessary information with respect to “accessories,” HHI’s improper reporting of home market gross unit prices and failure to disclose an affiliated sales agent, and Hyosung’s failure to report separately service-related revenues and expenses, failure to explain an invoice used for different sales in separate periods of review, and failure to report certain price adjustments. In subsection b, we demonstrate how Korea has failed to show that USDOC’s application of facts available with respect to these failures was inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement.

*a. HHI and Hyosung Failed to Report Necessary Information.*

*i. HHI Failed to Report the Prices and Costs of “Accessories.”*

276. In Section D of its initial questionnaire, USDOC specifically instructed HHI and Hyosung to “[p]lease separately report the price and cost for ‘spare parts’ and ‘accessories’ to ensure that product matches are based on accurate physical characteristics of the LPTs.”<sup>510</sup> In its February 27, 2017 questionnaire response, HHI responded to this request by stating that it had separately reported the price and cost for spare parts, but that “there is no definition of what constitutes accessories . . . . Transformer parts that {sic} physically attached to an LPT are within the definition of the scope of subject merchandise . . . ,” which HHI claimed fell within the scope language that states “any other parts attached to, imported with or invoiced with the active parts of large power transformers.”<sup>511</sup> On this basis, HHI took the position that “[i]n accordance with the definition of the scope of subject merchandise, {HHI} has included the costs

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<sup>508</sup> See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 81 Fed. Reg. 71061 (Dep’t of Commerce) (October 14, 2016) (Exhibit KOR-138) at 71063; *Antidumping Duty Administrative Review of Large Power Transformers (LPTs) from the Republic of Korea (Korea): Respondent Selection Memorandum* (January 3, 2017) (Exhibit USA-34 (BCI)).

<sup>509</sup> Department of Commerce Initial AD Questionnaire (January 5, 2017) (Exhibit USA-35).

<sup>510</sup> Department of Commerce Initial AD Questionnaire (January 5, 2017) (Exhibit USA-35) at D-1.

<sup>511</sup> Hyundai Heavy Industries Co., Ltd. Sections B-D Response (February 27, 2017) (Exhibit KOR-144 (BCI)) at D-2-D-3.

of all parts that are attached to, imported with or invoiced with the active parts of large power transformers.”<sup>512</sup>

277. In the very same response however, HHI presented a different positions on whether its sales of transformers involved associated sales of accessories. In particular when HHI described the types of changes that occur after the initial agreement that affect the terms of the sale, HHI specifically referred to accessories as a type of change that can occur after the initial purchase order.<sup>513</sup>

278. On March 29, 2017, HHI filed a letter that, among other things, requested clarification of a definition of “accessories” for the purpose of the questionnaire response and the method to calculate prices and costs for such components.<sup>514</sup> In this request for clarification, HHI summarized the various ways in which the term “accessories” had been used, or defined, by parties throughout the proceeding.<sup>515</sup> While acknowledging how other parties have attempted to define and report accessories, HHI did not offer a definition of the term – even though HHI had previously taken positions in its February response on sales of accessories. In other words, HHI asked USDOC to define “accessory,” despite HHI’s use of the term in its sales documentation.<sup>516</sup> And, although HHI had claimed it had already reported all components it considered to be subject merchandise in accordance with the scope of the review, HHI submitted this request for clarification on how to report accessories months after USDOC initially had requested such information.<sup>517</sup>

279. On April 12, 2017, USDOC issued a supplemental questionnaire and requested that HHI explain whether its sales documentation separately listed or itemized the price or revenues for accessories, and as it had done in the prior reviews, requested that HHI separately report the

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<sup>512</sup> Hyundai Heavy Industries Co., Ltd. Sections B-D Response (February 27, 2017) (Exhibit KOR-144 (BCI)) at D-3.

<sup>513</sup> See Hyundai Heavy Industries Co., Ltd. Section A Response (February 2, 2017) (Exhibit KOR-150 (BCI)) at A-29.

<sup>514</sup> Large Power Transformers from South Korea: Request of Clarification (March 29, 2017) (Exhibit KOR-146 (BCI)) at 5.

<sup>515</sup> Large Power Transformers from South Korea: Request of Clarification (March 29, 2017) (Exhibit KOR-146 (BCI)) at 5.

<sup>516</sup> Large Power Transformers from South Korea: Request of Clarification (March 29, 2017) (Exhibit KOR-146 (BCI)) at, *e.g.*, 3.

<sup>517</sup> Department of Commerce Initial AD Questionnaire (January 5, 2017) (Exhibit USA-35) The initial questionnaire was issued to parties on January 5, 2017, over three months prior to Hyundai Heavy Industries’ request for clarification.

revenues and associated expenses for accessories whose revenues are separately reported in its sales documentation.<sup>518</sup>

280. On May 3, 2017, HHI filed its response to USDOC’s first sales supplemental questionnaire.<sup>519</sup> In this response, HHI stated that it “provide {d} in Attachment SA-46 worksheets for home-market and U.S. sales indicating whether any of the sales documentation separately lists or otherwise itemizes values for the main transformer body, accessories and sales-related revenues.”<sup>520</sup> Attachment SA-46 provided separate line items for various parts and expenses, but did not identify which parts of the LPT HHI defined and treated as accessories.<sup>521</sup> For example, for the home market sale SEQH [\*\*\*], HHI provided a line-item description of certain components in the LPT, such as “[\*\*\*].”<sup>522</sup>

281. On May 19, 2017, following up on HHI’s clarification request, USDOC issued a letter to HHI requesting that HHI “provide a definition of how {it uses} and/or understand{s} the scope of the term accessories when negotiating with {its} customers, . . . explain {its} basis for such usage and/or understanding in detail,” and “describe in detail what constitutes ‘main bodies,’ ‘spare parts,’ and ‘accessories’ . . . .”<sup>523</sup>

282. HHI responded to USDOC’s letter on June 16, 2017. HHI stated, again:

{HHI} has no particular understanding of the scope of the term “accessories” when negotiating with customers. Internally, {HHI} does not have a definition of “accessories.” Moreover, there is no particular use of the term “accessories” by {HHI}’s customers. Indeed, even within the same sale, {HHI} and the customer can and do use the term “accessories” inconsistently.<sup>524</sup>

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<sup>518</sup> Hyundai Heavy Industries Co., Ltd. First Sales Supplemental Questionnaire (April 12, 2017) (Exhibit USA-36 (BCI)) at 14-15.

<sup>519</sup> Hyundai’s Supplemental A Questionnaire Response (May 3, 2017) (Exhibit USA-37 (BCI)).

<sup>520</sup> Hyundai’s Supplemental A Questionnaire Response (May 3, 2017) (Exhibit USA-37 (BCI)) at 41.

<sup>521</sup> Hyundai’s Supplemental A Questionnaire Response (May 3, 2017) (Exhibit USA-37 (BCI)) at Attachment SA-46.

<sup>522</sup> Hyundai’s Supplemental A Questionnaire Response (May 3, 2017) (Exhibit USA-37 (BCI)) at Attachment SA-46.

<sup>523</sup> Letter to Hyundai: Antidumping Duty Administrative Review of Large Power Transformers from the Republic of Korea: Second Sales Supplemental Questionnaire (May 19, 2017) (Exhibit KOR-147 (BCI)) at 9-10.

<sup>524</sup> Letter from Hyundai: Large Power Transformers from South Korea: Second Supplemental Sales Response (Q29 and Q30) and Supplemental D Questionnaire Response (Q14) (June 16, 2017) (Exhibit KOR-148 (BCI)) at 2<sup>nd</sup> SS-1-2<sup>nd</sup> SS-2.

HHI continued to explain that internally HHI uses the term “accessories” inconsistently. That is, whether it is the “sales staff,” the “production team,” or the “shipping department,” HHI claimed that each division within HHI had a different understanding of the term “accessories.”<sup>525</sup> Likewise, in sales negotiations, HHI claimed that “[HHI] itself does not follow any definition for accessories,” but instead “mirrors the terminology used by a customer in its request for quotation (“RFQ”).”<sup>526</sup>

283. On this basis, HHI “renew {ed} its request for clarification of the meaning of the term accessories” and, in reporting, had “followed the definition of accessories from the prior review.”<sup>527</sup> That is, HHI alleged that USDOC had previously defined “accessories” as “non-subject merchandise” and under that definition if there are components that are not “attached to, imported with, or invoiced with the active parts” of the LPT, the component is an accessory. Thus, because, as HHI claimed, there were no components that were *not* attached to, imported with, or invoiced with the active parts of the LPT, HHI did not report any of the requested information concerning accessories.

284. In the May 19, 2017 letter, USDOC also requested that HHI provide a chart identifying each component for two select sales, including main bodies, spare parts, and accessories for the LPTs sold for certain sales and explain how prices are determined for each component, including accessories.<sup>528</sup> On June 19, 2017, HHI responded to this portion of USDOC’s questionnaire, but again did not identify any parts as accessories in the chart provided.<sup>529</sup>

285. On July 10, 2017, HHI requested a meeting with USDOC to discuss, among other issues, the “accessory” issue.<sup>530</sup> The next day, USDOC issued a supplemental questionnaire that requested HHI report accessories in a separate field in the cost database to the extent that it has

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<sup>525</sup> Letter from Hyundai: Large Power Transformers from South Korea: Second Supplemental Sales Response (Q29 and Q30) and Supplemental D Questionnaire Response (Q14) (June 16, 2017) (Exhibit KOR-148 (BCI)) at 2<sup>nd</sup> SS-2.

<sup>526</sup> Letter from Hyundai: Large Power Transformers from South Korea: Second Supplemental Sales Response (Q29 and Q30) and Supplemental D Questionnaire Response (Q14) (June 16, 2017) (Exhibit KOR-148 (BCI)) at 2<sup>nd</sup> SS-3.

<sup>527</sup> Letter from Hyundai: Large Power Transformers from South Korea: Second Supplemental Sales Response (Q29 and Q30) and Supplemental D Questionnaire Response (Q14) (June 16, 2017) (Exhibit KOR-148 (BCI)) at 2<sup>nd</sup> SS-7.

<sup>528</sup> Hyundai Heavy Industries Co., Ltd. Second Sales Supplemental Questionnaire (May 19, 2017) (Exhibit KOR-147 (BCI)) at 10.

<sup>529</sup> Hyundai Heavy Industries Co., Ltd. Second Sales Supplemental Response (June 19, 2017) (Exhibit KOR-213 (BCI)) at Attachment 2<sup>nd</sup> SS-21.

<sup>530</sup> Letter from Hyundai: Large Power Transformers from Korea: Request for Meeting (July 10, 2017) (Exhibit USA-38).

reported accessories in its revised sales database.<sup>531</sup> On July 14, 2017, HHI met with USDOC officials.<sup>532</sup> Shortly thereafter, HHI responded to USDOC’s July 11, 2017 supplemental questionnaire.<sup>533</sup> Instead of identifying accessories, HHI stated that “{b}ecause {USDOC} is still considering the definition of an accessory, it is unclear whether some of these items will ultimately be considered to be parts.”<sup>534</sup> HHI, therefore, reported no costs for accessories.<sup>535</sup>

286. Despite USDOC’s repeated requests, Hyundai failed to provide USDOC with requested information. As USDOC noted in its final determination, while HHI claims not to have a particular understanding of accessories, it nonetheless argues that it properly reported accessories.<sup>536</sup> Additionally, HHI’s sales documents used the term “accessories.”<sup>537</sup> As USDOC noted, HHI’s sales documentation reflects Hyundai’s awareness and understanding of the types of components that constitute accessories.<sup>538</sup> Additionally, HHI failed to engage with USDOC. If HHI had responded to USDOC’s requests enquiring how HHI uses/understands the term “accessories,” USDOC could have then engaged in further analyses to determine whether the current reporting of such components is appropriate for the purpose of calculating a margin.<sup>539</sup> However, HHI chose not that, resulting in USDOC finding that HHI withheld necessary information and otherwise impeded the review.<sup>540</sup>

*ii. HHI Understated its Home Market Gross Unit Prices.*

287. After issuing its initial questionnaire to HHI and finding HHI’s response insufficient, USDOC issued a supplemental questionnaire. To determine whether HHI reported accurate gross unit prices, service-related revenues, and expenses, USDOC requested that HHI provide

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<sup>531</sup> Letter to Hyundai: Antidumping Duty Administrative Review of Large Power Transformers from the Republic of Korea Supplemental Questionnaire (July 11, 2017) (Exhibit USA-39 (BCI)) at 4.

<sup>532</sup> Memorandum to File, 2015/2016 Administrative Review of the Antidumping Duty Order on Large Power Transformers from the Republic of Korea: Meeting with Counsel for Hyundai Heavy Industries Co., Ltd. (July 21, 2017) (Exhibit USA-40).

<sup>533</sup> Letter from Hyundai: Large Power Transformers from South Korea: Second Cost Supplemental Response (July 24, 2017) (Exhibit USA-41 (BCI)).

<sup>534</sup> Letter from Hyundai: Large Power Transformers from South Korea: Second Cost Supplemental Response (July 24, 2017) (Exhibit USA-41 (BCI)) at 9-10, Attachment 2SD-9.

<sup>535</sup> Letter from Hyundai: Large Power Transformers from South Korea: Second Cost Supplemental Response (July 24, 2017) (Exhibit USA-41 (BCI)) at 9-10, Attachment 2SD-9.

<sup>536</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 10.

<sup>537</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 11.

<sup>538</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 11.

<sup>539</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 13.

<sup>540</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 14.

complete sales and expense documentation for certain home market and U.S. sales.<sup>541</sup> HHI responded to USDOC's request on June 26, 2017. HHI purported to include complete sales and expense documentation for these certain home market and U.S. sales.<sup>542</sup>

288. However, while reviewing documentation for one of the home market sales, USDOC found that HHI had improperly reported its home market gross unit prices.<sup>543</sup> Specifically, USDOC discovered that even though HHI's later-revised contracts identified different contract values, HHI continued to use the values from its initial contract to report its gross unit prices for certain sales.<sup>544</sup>

289. During the course of analyzing HHI's submitted information, USDOC discovered a discrepancy regarding HHI's classification of a particular component of an LPT as "non-subject merchandise," though the component is "always attached or assembled" to the LPT.<sup>545</sup> USDOC also noted inexplicable changes in contract values between the initial contract and later revised contracts.<sup>546</sup> Specifically, USDOC had found that HHI submitted sales and expense documentation from an older contract that had been revised several times—demonstrating a difference in contract values between the original purchase and later revised purchase contracts.<sup>547</sup> For example, the sales and expense documentation for SEQH [[\*\*\*]] submitted by HHI in the supplemental questionnaire related back to HHI's [[\*\*\*]] purchase contract [[\*\*\*]].<sup>548</sup> This purchase contract contained the "prices for LPTs and other related components,

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<sup>541</sup> See Letter to Hyundai: Antidumping Duty Administrative Review of Large Power Transformers from the Republic of Korea: Second Sales Supplemental Questionnaire (May 19, 2017) (Exhibit KOR-147 (BCI)) at 13. See Question 42, "For SEQHs [[\*\*\*]] and SEQUs [[\*\*\*]], please provide complete sales and expense documentation."

<sup>542</sup> Letter from Hyundai: Large Power Transformers from South Korea: 2<sup>nd</sup> Supplemental Sales Response to Questions 42, 47-50, 52, 54, 55, and 77 (June 26, 2017) (Exhibit KOR-215 (BCI)) at 1-2, Attachment 2<sup>nd</sup> SS-94.

<sup>543</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 15; *see also* LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 15-18.

<sup>544</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 15; Letter from Hyundai: Large Power Transformers from South Korea: Second Supplemental Sales Response to Questions 42, 47-50, 52, 54, 55, and 77 (June 26, 2017) (Exhibit KOR-215 (BCI)) at Exhibit 94.

<sup>545</sup> See Hyundai's Second Sales Supplemental Questionnaire Response (June 19, 2017) (Exhibit KOR-213 (BCI)) at Attachment 2<sup>nd</sup> SS-21.

<sup>546</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 17.

<sup>547</sup> Hyundai's Second Sales Supplemental Questionnaire (June 27, 2017) (Part II) Attachment 2<sup>nd</sup> SS-94 (Exhibit USA-42 (BCI)).

<sup>548</sup> Hyundai's Second Sales Supplemental Questionnaire (June 27, 2017) (Part II) Attachment 2<sup>nd</sup> SS-94 (Exhibit USA-42 (BCI)).



which constituted HHI’s reported gross unit prices for SEQH [[\*\*\*]] . . . <sup>549</sup>.” The price listed in this purchase contract was [[\*\*\*]] Korean Won.<sup>550</sup> However, USDOC discovered two revised purchase order contracts that modified the above contract, [[\*\*\*]], which included different purchase prices. These two revised contracts, included prices of [[\*\*\*]] Korean Won and [[\*\*\*]] Korean Won, respectively.<sup>551</sup> Despite having revised the price of the initial contract, HHI “still used the values of the line items from the initial purchase contract (*i.e.* {HHI’s} [[\*\*\*]] purchase contract) for its reported gross unit prices for these sales.”<sup>552</sup> In its case brief, HHI argued that the discrepancy was due a “change to the total contract price related solely to non-subject merchandise,” which was “*not attached to the LPT.*”<sup>553</sup>

290. In its final results, USDOC explained that as the discrepancies, which indicated an understatement of HHI’s home market gross unit price, were discovered after USDOC’s preliminary results, in light of the statutory deadlines to complete the review, “it was not practicable for {USDOC} to request additional information for this sale along with complete documentation for significantly more home market sales to engage in a thorough analysis to determine whether {HHI} understated {its} home market gross unit prices.”<sup>554</sup> Accordingly, “it became impracticable to send yet another supplemental questionnaire to {HHI} to resolve an issue for which {HHI} was already under an obligation to correctly report.”<sup>555</sup>

*iii. HHI Failed to Disclose an Affiliated Sales Agent.*

291. In its initial questionnaire, USDOC also requested that HHI “{p}rovide a list of all the production facilities, sales office locations, research and development facilities and administrative offices for Hyundai’s offices and affiliates . . . .”<sup>556</sup> Additionally, USDOC requested that HHI “{i}dentify all suppliers, (sub)contractors, lenders, exporters, distributors,

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<sup>549</sup> See Department of Commerce Preliminary Analysis Memorandum (HHI) (August 31, 2017) (Exhibit USA-43 (BCI)) at 2.

<sup>550</sup> See Department of Commerce Preliminary Analysis Memorandum (HHI) (August 31, 2017) (Exhibit USA-43 (BCI)) at 2.

<sup>551</sup> See Hyundai’s Second Sales Supplemental Questionnaire Response (June 19, 2017) (Exhibit KOR-213 (BCI)) at Exhibit 94.

<sup>552</sup> Department of Commerce Preliminary Analysis Memorandum (HHI) (August 31, 2017) (Exhibit USA-43 (BCI)) at 3.

<sup>553</sup> See Hyundai’s Administrative Case Brief (January 5, 2017) (Exhibit USA-33 (BCI)) at 38-40.

<sup>554</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 17.

<sup>555</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 17.

<sup>556</sup> Department of Commerce Initial AD Questionnaire (January 5, 2017) (Exhibit USA-35) at A-4.

resellers, and other persons involved in the development, production, sale and/or distribution of the merchandise under review which {USDOC} may also consider affiliated with {HHI}.”<sup>557</sup>

292. On February 2, 2017, HHI responded to section A of USDOC’s initial questionnaire and stated that “{d}uring the {period of review}, {HHI’s} Atlanta office was involved in the sales and distribution of LPTs in the United States” and submitted Attachment A-4.<sup>558</sup> Attachment A-4 listed other sales offices worldwide, including one in the United States.<sup>559</sup> HHI also stated that “{t}he only companies that are involved with the subject merchandise are those discussed in answer to Question 2(b).”<sup>560</sup> HHI further stated that other than affiliations identified in Attachment A-8, HHI “is not affiliated with its suppliers, (sub)contractors, lenders, exporters, distributors, resellers, or other persons involved in the development, production, sale, and/or distribution of the merchandise under review.”<sup>561</sup>

293. After reviewing HHI’s February 2, 2017 response, USDOC discovered that HHI failed to provide complete responses regarding affiliated transactions noted in HHI’s financial statements.<sup>562</sup> In a supplemental questionnaire issued on April 12, 2017, USDOC, again, requested that HHI report “all business transactions that may directly or indirectly affect the development, production, sale and/or distribution of the merchandise under review {HHI} has or had with any affiliates.”<sup>563</sup> On May 3, 2017, HHI responded that “{a}lthough such affiliated-party transactions are noted in {its} financial statements, they are not business or operational relationships affecting the development, production, sale and/or distribution of the merchandise under review.”<sup>564</sup>

294. On May 19, 2017, USDOC again requested that HHI provide a complete list of branch offices for the United States, and a chart that includes a complete list of all of HHI’s subsidiaries and/or affiliates.<sup>565</sup> USDOC also requested that HHI confirm whether it provided a complete list of HHI’s affiliates involved in the “development, production, sale, distribution, and input

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<sup>557</sup> Department of Commerce Initial AD Questionnaire (January 5, 2017) (Exhibit USA-35) at A-6.

<sup>558</sup> HHI Section A Response (February 2, 2017) (Exhibit KOR-150 (BCI)) at A-8 and Attachment A-4.

<sup>559</sup> HHI Section A Response (February 2, 2017) (Exhibit KOR-150 (BCI)) at A-9.

<sup>560</sup> HHI Section A Response (February 2, 2017) (Exhibit KOR-150 (BCI)) at A-9.

<sup>561</sup> HHI Section A Response (February 2, 2017) (Exhibit KOR-150 (BCI)) at A-15 and Attachment A-8.

<sup>562</sup> Hyundai Heavy Industries Co., Ltd. First Sales Supplemental Questionnaire (April 12, 2017) (Exhibit USA-36 (BCI)) at 4.

<sup>563</sup> Hyundai Heavy Industries Co., Ltd. First Sales Supplemental Questionnaire (April 12, 2017) (Exhibit USA-36 (BCI)) at 4.

<sup>564</sup> Hyundai’s Supplemental A Questionnaire Response (May 3, 2017) (Exhibit USA-37 (BCI)) at 6-7 and Attachment SA-6 (internal quotations omitted).

<sup>565</sup> Letter to Hyundai: Antidumping Duty Administrative Review of Large Power Transformers from the Republic of Korea: Second Sales Supplemental Questionnaire (May 19, 2017) (Exhibit KOR-147 (BCI)) at 4.

supplying, financing, contracting, exporting, and/or services related to merchandise under review.”<sup>566</sup> HHI responded on June 19, 2017, and stated that its New Jersey and Texas branch offices were not involved in the sale of merchandise under review.<sup>567</sup> HHI also explained that it had inadvertently omitted a subsidiary of Hyundai USA (*i.e.*, its U.S. affiliate) and submitted a revised list of its affiliates involved in the development, production, sale, distribution, and input supplying, financing, contracting, exporting, and/or services related to merchandise under review.<sup>568</sup> HHI stated that “{w}ith this revision {HHI} has provided a complete list of {its} affiliates involved in development, production, sale, distribution, and input supplying, financing, contracting, exporting, and/or services related to {merchandise under consideration}.”<sup>569</sup>

295. Shortly thereafter, USDOC discovered record evidence that indicated that HHI is affiliated with a sales agent in the United States.<sup>570</sup> Specifically, USDOC found that in Attachment SA-15, an employee of [[\*\*\*]], [[\*\*\*]], used an email that belonged to HHI, *i.e.*, [[\*\*\*]].<sup>571</sup> Furthermore, the email address showed that the employee used a title and division the belonged to HHI, *i.e.*, [[\*\*\*]].<sup>572</sup>

296. Despite USDOC’s multiple requests for complete and accurate information regarding its precise relationship with this sales agent, HHI failed to provide this information, thus precluding USDOC from examining whether the indirect selling expenses were reported accurately.<sup>573</sup>

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<sup>566</sup> Letter to Hyundai: Antidumping Duty Administrative Review of Large Power Transformers from the Republic of Korea: Second Sales Supplemental Questionnaire (May 19, 2017) (Exhibit KOR-147 (BCI)) at 5.

<sup>567</sup> Letter from Hyundai: Large Power Transformers from South Korea: Second Sales Supplemental Response (June 19, 2017) (Exhibit KOR-213 (BCI)) at 2.

<sup>568</sup> Letter from Hyundai: Large Power Transformers from South Korea: Second Sales Supplemental Response (June 19, 2017) (Exhibit KOR-213 (BCI)) at 4-5 and Attachment 2<sup>nd</sup> SS-6.

<sup>569</sup> Letter from Hyundai: Large Power Transformers from South Korea: Second Sales Supplemental Response (June 19, 2017) (Exhibit KOR-213 (BCI)) at 5 and Attachment 2<sup>nd</sup> SS-6.

<sup>570</sup> Hyundai’s Supplemental A Questionnaire Response (May 3, 2017) (Exhibit USA-37 (BCI)) at Attachment SA-15.

<sup>571</sup> Hyundai’s Supplemental A Questionnaire Response (May 3, 2017) (Exhibit USA-37 (BCI)) at Attachment SA-15.

<sup>572</sup> Hyundai’s Supplemental A Questionnaire Response (May 3, 2017) (Exhibit USA-37 (BCI)) at Attachment SA-15.

<sup>573</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 19.

*iv. Hyosung Failed Separately to Report Service-Related Revenues and Expenses.*

297. USDOC issued the same initial questionnaire to Hyosung on January 5, 2017.<sup>574</sup> Section C of the questionnaire requested that Hyosung “{r}eport revenue in separate fields (*e.g.*, ocean freight revenue, inland freight revenue, oil revenue, installation, *etc.*) and identify the related expense(s) for each revenue.”<sup>575</sup> Hyosung responded to USDOC’s initial questionnaire on February 27, 2017, and stated:

In the fields REV\_OCNFRT, REC\_USINLFT, REV\_OIL, REV\_INSTALL, and REV\_STORAGE, Hyosung reports revenues associated with ocean freight, U.S. inland freight (inclusive of any storage charges incurred in the United States), oil, installation, and storage charges associated with storage services in Korea that are recorded separately on HICO America’s invoice to the customer.<sup>576</sup>

Hyosung reported an additional field, which it stated contained the gross unit price “{o}nly for the main {LPT} body excluding revenues related to spare parts, accessories, and services such as transportation, oiling, installation, and storage.”<sup>577</sup>

298. Separately, as part of its description of the sales process, in the discussion of the distribution process, Hyosung reported that its U.S. affiliate, HICO America Sales and Technology, Inc. (HICO America), supplies an “Order Acknowledgment Form” (OAF) to Hyosung upon the receipt of a purchase order or sales contract from a customer.<sup>578</sup> On April 12, 2017, USDOC issued its first supplemental questionnaire to Hyosung, within which USDOC requested that Hyosung “{p}rovide the order acknowledgment form (OAF) issued by HICO America for each” of the U.S. sales reported by Hyosung during the period of review.<sup>579</sup> Hyosung responded to USDOC’s request by providing copies of the first page of the OAFs for

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<sup>574</sup> See Department of Commerce Initial AD Questionnaire (January 5, 2017) (Exhibit USA-46).

<sup>575</sup> Department of Commerce Initial AD Questionnaire (January 5, 2017) (Exhibit USA-46) at C-1.

<sup>576</sup> Hyosung Sections B-D Response (February 27, 2017) (Exhibit KOR-153 (BCI)) at C-24.

<sup>577</sup> Hyosung Sections B-D Response (February 27, 2017) (Exhibit KOR-153 (BCI)) at C-1.

<sup>578</sup> Hyosung Section A Response (February 2, 2017) (Exhibit KOR-152 (BCI)) at A-18.

<sup>579</sup> Hyosung First Sales Supplemental Questionnaire (April 12, 2017) (Exhibit USA-44 (BCI)) at 6, question 16.

only a portion of the U.S. sales.<sup>580</sup> Of those OAFs that Hyosung reported, the OAFs were incomplete and the vast majority of the OAFs were illegible.<sup>581</sup>

299. On May 26, 2017, USDOC issued a second sales supplemental questionnaire to Hyosung, requesting, in part, complete sales documentation for certain of Hyosung’s U.S. sales.<sup>582</sup> As part of the requested sales documentation, Hyosung responded with a few legible first pages of the OAFs for certain sales.<sup>583</sup> However, the OAFs were still incomplete because they were missing pages.<sup>584</sup>

300. USDOC also requested in the same supplemental questionnaire that Hyosung report “a net unit price which is inclusive of all parts and accessories, but net of service-related revenues” for U.S. sales and that,

{f}or each of the reported net price variables, please describe how you calculated service-related revenues. If such revenue items are on the invoice to the customer, please provide an example. If not, please explain your calculation methodology and provide an example of the calculation. Please identify each service provided with its associated service revenue.<sup>585</sup>

Hyosung responded that it provided the requested information regarding gross unit price and the various components of the price as well as service-related revenues, and reference Exhibit SBC-32(1) for specific details regarding each of USDOC’s questions.<sup>586</sup> Exhibit SBC-32(1) contained

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<sup>580</sup> Hyosung Supplemental Questionnaire Response (May 8, 2017) (Exhibit KOR-154 (BCI)) at S-21 and Exhibit S-18.

<sup>581</sup> Hyosung Supplemental Questionnaire Response (May 8, 2017) (Exhibit KOR-154 (BCI)) at S-21 and Exhibit S-18. Hyosung provided copies that were dark in the fields containing many of the values for the various fields listed on the OAF. While it is possible to see that there is a field, many of the values or descriptions in the fields are not visible and thus are incomplete responses.

<sup>582</sup> Hyosung Third Supplemental Questionnaire (May 26, 2017) (Exhibit KOR-155) at 13, question 66 (referencing 5, question 14).

<sup>583</sup> Hyosung Third Supplemental Questionnaire Response (June 21, 2017) (Exhibit KOR-156 (BCI)) at 41 and Exhibit SBC-66.

<sup>584</sup> Hyosung Third Supplemental Questionnaire Response (June 21, 2017) (Exhibit KOR-156 (BCI)) at 41 and Exhibit SBC-66.

<sup>585</sup> Hyosung Third Supplemental Questionnaire (May 26, 2017) (Exhibit KOR-155) at 8-9, question 32.

<sup>586</sup> Hyosung Third Supplemental Questionnaire Response (June 21, 2017) (Exhibit KOR-156 (BCI)) at 23-24 and Exhibit SBC-32(1).

a sales listing of all of Hyosung’s U.S. sales, but did not list service-related revenues for most U.S. sales.<sup>587</sup>

301. USDOC also requested in question 35 that Hyosung report all ocean freight revenues, stating specifically that “{i}f such revenues are separately identified on any sales documents, please indicate that documents where these are located and provide copies of those documents. If your reported value is based upon an allocation, please explain that methodology.”<sup>588</sup>

Hyosung responded, in part, that “{f}or sales that did not separately specify an ocean freight revenue line item on the invoice, Hyosung has not reported separate ocean freight revenues, as no such revenues were charged to the customer as separate items.”<sup>589</sup> However, the few legible partial OAFs indicated that HICO America dedicated a portion of the sales price charged to its U.S. customers to cover service-related expenses.<sup>590</sup>

302. As explained above and in its issues and decision memorandum, USDOC explained that the OAFs illustrated that Hyosung, in fact, had allocated revenues to cover certain service-related expenses and that those revenues exceeding the associated expense. Specifically, the USDOC explained:

Our analysis indicated that the price charged to Hyosung’s U.S. customer did not change from the time of the issuance of the OAF to the time of the invoice, as the reported gross unit price in the SAS dataset was the same as what appeared on the OAF. The OAF contained a number of expenses for services, and the estimated costs for those services. Those estimated costs, however, were also the portion of the price charged to the customer that was set aside to cover those expenses. Indeed, the OAF also contained a price for the customer less the amounts budgeted for the services, indicating what portion of the revenues collected from the customer (the price charged to the customer) were dedicated to the provision of services. In the SAS dataset, the actual reported expenses were less than the amount of revenue set aside to cover those expenses, showing that the price charged to the customer (which is the same as the revenue collected from the customer) contains a subset of revenues set aside to cover expenses and that those revenues exceeded the actual expenses. Absent record evidence that Hyosung refunded its U.S. customer the difference between the amounts collected to cover the expenses and the actual expenses or other documentation that Hyosung

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<sup>587</sup> Hyosung Third Supplemental Questionnaire Response (June 21, 2017) (Exhibit KOR-156 (BCI)) at Exhibit SBC-32(1).

<sup>588</sup> Hyosung Third Supplemental Questionnaire (May 26, 2017) (Exhibit KOR-155) question 35.

<sup>589</sup> Hyosung Third Supplemental Questionnaire Response (June 21, 2017) (Exhibit KOR-156 (BCI)) at 27.

<sup>590</sup> See, e.g., Hyosung Supplemental Questionnaire Response (May 8, 2017) (Exhibit KOR-154 (BCI)) at Exhibit S-18.

allocated these revenues differently, it is reasonable to conclude based on this record evidence that Hyosung collected service-related revenues in excess of the expenses and that such revenue should be reported and capped.<sup>591</sup>

Accordingly, USDOC determined that the OAFs were incomplete, partially illegible, and the record lacked sufficient information to calculate estimated revenues and expenses related to services.<sup>592</sup>

v. *Hyosung Failed to Explain an Invoice Used for Different Sales in Separate Periods of Review.*

303. In its initial section C questionnaire response regarding the invoice reported, Hyosung stated that “{t}he invoice number for each U.S. sale has been reported in the INVOICED field in the U.S. sales database. Certain sales are divided into multiple invoices, and those invoices are issued separately to its unaffiliated customer. In this case, Hyosung reported the last invoice number in the INVOICED field.”<sup>593</sup> In response to a question from USDOC in the first supplemental questionnaire, Hyosung provided a reconciliation of sales made to the United States during the period of review.<sup>594</sup>

304. In certain instances, as part of the reconciliation submitted with Hyosung’s supplemental section A response, Hyosung reported the same invoice number for more than one sale.<sup>595</sup> Specifically, for SEQUs [[\*\*\*]], Hyosung reported invoice number [[\*\*\*]] as the invoice covering [[\*\*\*]] of these SEQUs.<sup>596</sup> This same invoice, [[\*\*\*]], covered SEQU [[\*\*\*]] from the previous period of review.<sup>597</sup> Hyosung did not explain why one invoice could cover multiple

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<sup>591</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 28-29.

<sup>592</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 28-29.

<sup>593</sup> Hyosung Sections B-D Response (February 27, 2017) (Exhibit KOR-153 (BCI)) at C-16.

<sup>594</sup> Hyosung Section A Response (February 2, 2017) (Exhibit KOR-152 (BCI)) at Exhibit S-1.

<sup>595</sup> Hyosung Section A Response (February 2, 2017) (Exhibit KOR-152 (BCI)) at Exhibit S-1.

<sup>596</sup> Hyosung Section A Response (February 2, 2017) (Exhibit KOR-152 (BCI)) at Exhibit S-1. Exhibit S-1 showed SEQUs [[\*\*\*]] with [[\*\*\*]] numbers [[\*\*\*]]. These SEQUs were the same as those for which the correct OAFs were not reported.

<sup>597</sup> Petitioner’s Comments on Hyosung’s Supplemental Section A Response (June 1, 2017) (Exhibit USA-45 (BCI)) at 9-11. Petitioner also raised a number of concerns regarding Hyosung’s commercial interactions with customer [[\*\*\*]], including invoices which [[\*\*\*]], and that there have been [[\*\*\*]] in consecutive periods of review, as well as possible [[\*\*\*]].

sales in the current review period, as well as a sale in the previous review period. Hyosung also did not submit OAFs for the above noted sales, which it was required to provide.<sup>598</sup>

*vi. Hyosung Failed to Report Certain Price Adjustments.*

305. In section C of the initial Anti-Dumping questionnaire, in fields 16 through 21, USDOC instructed 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.<sup>599</sup>

In a supplemental questionnaire, USDOC requested complete documentation for certain of Hyosung's U.S. sales.<sup>600</sup>

306. Although Hyosung provided documentation in its response, including invoices for certain U.S. sales, Hyosung did not report certain price adjustments and discounts.<sup>601</sup> For example, for SEQU [[\*\*\*]], Exhibit SBC-66 contained an invoice to customer [[\*\*\*]] which indicated a [[\*\*\*]].<sup>602</sup> Similarly, for SEQU [[\*\*\*]], the invoice covering this sale and SEQUs [[\*\*\*]] indicated that Hyosung granted a [[\*\*\*]] of [[\*\*\*]] to customer [[\*\*\*]].<sup>603</sup> Neither of these discounts were reported to USDOC in accordance with USDOC's request.

307. Additionally, Hyosung did not report interest revenue from any customer in its section C response.<sup>604</sup> However, record evidence indicated that Hyosung charged, and received, interest on

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<sup>598</sup> See Hyosung Section A Response (February 2, 2017) (Exhibit KOR-152 (BCI)) at S-21 and Exhibit S-18.

<sup>599</sup> Department of Commerce Initial AD Questionnaire (January 5, 2017) (Exhibit USA-46) at C-18.

<sup>600</sup> Hyosung Third Supplemental Questionnaire (May 26, 2017) (Exhibit KOR-155) at 13-14, question 66.

<sup>601</sup> See Hyosung Third Supplemental Questionnaire Response (June 21, 2017) (Exhibit KOR-156 (BCI)).

<sup>602</sup> Hyosung Third Supplemental Questionnaire Response (June 21, 2017) (Exhibit KOR-156 (BCI)) at Exhibit SBC-66.

<sup>603</sup> Hyosung Third Supplemental Questionnaire Response (June 21, 2017) (Exhibit KOR-156 (BCI)) at SBC-9.

<sup>604</sup> See, generally, Hyosung Sections B-D Response (February 27, 2017) (Exhibit KOR-153 (BCI)). In the Initial AD Questionnaire, regarding payment terms 9or PAYTERMU), USDOC instructed that “{i}f payment terms you offer are tied to early payment discounts or to interest penalties for late payment, please explain.” See Department of Commerce Initial AD Questionnaire (January 5, 2017) (Exhibit USA-46) at C-18.



late payments from customer [[\*\*\*]]<sup>605</sup> for certain sales during the period of review. Exhibit SBC-9 contained invoices for SEQU [[\*\*\*]], and some invoices indicated interest charges received by Hyosung.<sup>606</sup> Some of the invoices with such charges are invoices [[\*\*\*]].<sup>607</sup>

308. Hyosung stated that certain price adjustments listed in the sales documentation are reflections of negotiations with the customer at the time of the purchase order and, therefore, do not fit the description of “price adjustments,” as defined by USDOC.<sup>608</sup>

309. USDOC published in the *Federal Register* its preliminary results on September 7, 2017.<sup>609</sup> As a result of the issues detailed above, USDOC preliminarily determined that both HHI and Hyosung failed to act to the best of their ability to comply with a request for information by USDOC.<sup>610</sup> Therefore, USDOC resorted to facts available and preliminarily assigned HHI and Hyosung an antidumping duty margin of 60.81 percent.<sup>611</sup> Additionally, in accordance with sections 777A(c)(2) and 735(c)(5) of the Tariff Act of 1930 (the Act), USDOC preliminarily assigned the non-selected companies<sup>612</sup> an antidumping duty margin of 60.81 percent.<sup>613</sup>

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<sup>605</sup> See Hyosung Third Supplemental Questionnaire Response (June 21, 2017) (Exhibit KOR-156 (BCI)) at Exhibit S-18. The OAF in Exhibit S-18 indicated that the customer is [[\*\*\*]].

<sup>606</sup> Hyosung Third Supplemental Questionnaire Response (June 21, 2017) (Exhibit KOR-156 (BCI)) at Exhibit SBC-9.

<sup>607</sup> Hyosung Third Supplemental Questionnaire Response (June 21, 2017) (Exhibit KOR-156 (BCI)) at Exhibit SBC-9.

<sup>608</sup> Hyosung’s Prelim Rebuttal Comments (August 11, 2017) (Exhibit USA-47 (BCI)) at 24-25. Hyosung also listed a price adjustment, without explanation, see Hyosung’s Prelim Rebuttal Comments (August 11, 2017) (Exhibit USA-47 (BCI)) at Appendix 9.

<sup>609</sup> *Large Power Transformers From the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review; 2015-2016*, 82 Fed. Reg. 42,289 (Dep’t of Commerce) (September 7, 2017) (Exhibit KOR-139), and the accompanying LPT I&D Memo (PDM) (August 31, 2017) (Exhibit KOR-140).

<sup>610</sup> LPT I&D Memo (PDM) (August 31, 2017) (Exhibit KOR-140) at 5.

<sup>611</sup> LPT I&D Memo (PDM) (August 31, 2017) (Exhibit KOR-140) at 6.

<sup>612</sup> The non-selected companies are Iljin, Ijlin Electric Co. Ltd., and LSIS. See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 81 Fed. Reg. 71,061 (Dep’t of Commerce) (October 14, 2016) (Exhibit KOR-138).

<sup>613</sup> LPT I&D Memo (PDM) (August 31, 2017) (Exhibit KOR-140) at 19. See also 19 U.S.C. § 1677f-1(c) and 19 U.S.C. § 1673d(c)(5).

310. Following parties' submissions of their respective administrative case and rebuttal briefs, USDOC published its final results of the administrative review on March 16, 2018.<sup>614</sup> For the final results, USDOC continued to find that HHI and Hyosung failed to act to the best of their abilities and, as a result, continued to resort to facts available, assigning the companies an antidumping duty margin of 60.81 percent.<sup>615</sup> In the final results, USDOC explained that HHI withheld requested information and otherwise impeded the review by (1) failing to provide USDOC with the prices and costs for "accessories;" (2) inconsistent reporting of an identical component in different sales as foreign like product and non-foreign like product; and (3) failing to report an affiliated sales agent.<sup>616</sup> Additionally, regarding Hyosung, USDOC explained that Hyosung withheld requested information and otherwise impeded the review by failing to (1) provide USDOC with complete and accurate information regarding the revenues earned in connection with the provision of services; (2) explain why one invoice was submitted for payment for a U.S. sale when the same invoice was used to demonstrate payment for a separate sale in a separate administrative review; and (3) report discounts and other adjustments which appear on the invoices for U.S. customers.<sup>617</sup>

*b. Korea Has Failed to Show That USDOC's Application of Facts Available Was Inconsistent with Article 6.8 and Paragraphs 1, 3, 5, 6, and 7 of Annex II of the Anti-Dumping Agreement.*

311. As the record shows, USDOC acted consistent with Article 6.8 and Annex II of the Anti-Dumping Agreement in applying facts available to HHI and Hyosung. Korea's arguments to the contrary are unsupported by the record.

*i. USDOC Satisfied the Conditions for Resorting to Facts Available Under Article 6.8 of the Antidumping Agreement.*

312. As explained above, USDOC resorted to facts available with respect to HHI because HHI had withheld requested information and otherwise impeded the review to provide USDOC with the prices and costs "accessories", provided inconsistent reporting of an identical component in different sales as foreign like and non-foreign like product, calling into question the reliability of its reporting of home market sales, and failed to report an affiliated sales agent. USDOC noted that collectively, these issues demonstrate how HHI impeded the review.<sup>618</sup>

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<sup>614</sup> See *Large Power Transformers From the Republic of Korea: Final Results of Antidumping Duty Administrative Review: 2015-2016*, 83 Fed. Reg. 11,679 (Dep't of Commerce) (March 16, 2018) (Exhibit KOR-109), and the accompanying LPT I&D Memo (March 9, 2018) (Exhibit KOR-211).

<sup>615</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 3-4, 5-19, 25-32, 20-22.

<sup>616</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 5-19.

<sup>617</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 25-32.

<sup>618</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 4.

Moreover, by failing to provide this information, “collectively, these issues demonstrate how Hyundai has impeded this review.”<sup>619</sup>

313. Korea’s arguments to the contrary are unsupported by the evidence and fail to demonstrate an inconsistency with Article 6.8 and Annex II of the Anti-Dumping Agreement.

314. Regarding the missing data on accessories, Korea claims that there was “no legitimate basis for concluding that ‘necessary’ information relating to sales ‘accessories’ was not provided or refused access to by HHI.”<sup>620</sup> Further, Korea asserts that USDOC had no reasonable basis to claim that HHI significantly impeded the proceeding because it “did its utmost” to provide the information in a timely manner and it provided “all the data on accessories based on HHI’s interpretation of the term.”<sup>621</sup>

315. The record shows otherwise. As laid out above, USDOC repeatedly requested relevant information on accessories over the course of several months. Yet, HHI chose not to report the prices and costs for “accessories.”<sup>622</sup> And HHI’s positions were inconsistent. While stating that it properly reported the requested information, at the same time HHI argued that it did not know how the term accessories was defined – even though the term was contained in HHI’s own sales documentation.<sup>623</sup> USDOC noted in its I&D Memorandum that despite HHI protestations that it did not understand what the term “accessories” meant, the other mandatory respondent, Hyosung, was “able to identify what an accessory is and give pricing information for it.”<sup>624</sup> Such an inconsistent response from HHI supports USDOC’s conclusion that HHI’s reporting as to its “accessories” was unreliable and, therefore, ultimately properly deemed to be necessary information missing from the record.

316. As USDOC explained, without this information USDOC could not “address {its} concern that there may be differences in costs between similar product CONNUMs reported by HHI based on certain components of an LPT that are considered accessories, and to ensure that product matches are based on accurate physical characteristics.”<sup>625</sup> USDOC explained further that:

Because the term “accessories,” by nature, indicates that these parts may not be essential to LPTs that are subject to the scope of this proceeding, we are

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<sup>619</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 4.

<sup>620</sup> Korea First Written Submission, para. 799.

<sup>621</sup> Korea First Written Submission, paras. 800-01.

<sup>622</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 10-11.

<sup>623</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 10.

<sup>624</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 12, fn 56.

<sup>625</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 9-10.

concerned that the same parts can be treated by {HHI} as accessories or not as accessories between sales both within each market and across markets, which can lead to manipulation.<sup>626</sup>

317. As a result, USDOC determined that, “despite the repeated requests . . . {HHI} did not provide the requested information”<sup>627</sup> and, therefore, “{HHI}’s failure to report the price and cost for accessories was part of the basis for the application of {facts available}.”<sup>628</sup> As such, USDOC found that HHI had withheld information and otherwise impeded this review.<sup>629</sup> Accordingly, USDOC’s resort to facts available was consistent with Article 6.8 and Annex II of the Anti-Dumping Agreement.

318. Regarding HHI’s understatement of gross unit prices, due to HHI’s insufficient responses and discrepancies in what HHI reported and its supporting documentation, USDOC found the record to be “ambiguous and there continues to be concern that the gross unit price may be understated.”<sup>630</sup> “In the absence of clear information and explanation, we find that: (1) {HHI}’s reporting of non-foreign like products is inaccurate; (2) there is inconsistent treatment of a certain item in its home market sales; and (3) by excluding this item, this could lead to the understatement of the home market gross unit price for certain sales.”<sup>631</sup> Without HHI’s accurately reported gross unit prices, USDOC was unable to accurately compare home market sales with export sales to the United States, thus demonstrating that this information was necessary.

319. Moreover, USDOC found that “Hyundai impeded this review by misreporting certain information according to its sales documentation such that Hyundai has improperly understated its home market gross unit prices.”<sup>632</sup>

320. With respect to HHI’s failure to disclose an affiliated sales agent, HHI initially asserted that “{HHI} is not affiliated with any of its sales agents.”<sup>633</sup> Despite this claim, USDOC found that HHI failed to disclose an affiliation with HHI’s sales agent, [\*\*\*].<sup>634</sup> Specifically,

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<sup>626</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 10.

<sup>627</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 11.

<sup>628</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 11.

<sup>629</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 14.

<sup>630</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 16.

<sup>631</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 16.

<sup>632</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 18.

<sup>633</sup> HHI Second Supplemental Section A Response (June 19, 2017) (Exhibit KOR-213 (BCI)) at 81.

<sup>634</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 19, citing Department of Commerce Preliminary Analysis Memorandum (HHI) (August 31, 2017) (Exhibit USA-43 (BCI)) at 5.

USDOC had found record evidence that demonstrated the “existence of an affiliation” because an employee of HHI’s sales agent, [[\*\*\*]], “uses an email address . . . that belongs to {HHI}.”<sup>635</sup> USDOC also had explained that record evidence demonstrated that this employee’s title, address, email, and phone number all identified him as an employee of HHI.<sup>636</sup> Accordingly, it became apparent to USDOC that HHI had failed to provide necessary requested information regarding its affiliations. USDOC explained in its I&D Memorandum that

Without the conclusive evidence to undermine/challenge USDOC’s preliminary finding, despite our multiple request{s} for complete and accurate information regarding its affiliation, {USDOC} determine{s} that {HHI} failed to provide complete and accurate information regarding its precise relationship with this sales agent as to whether this agent is affiliated or not; thereby preventing {USDOC} from examining whether the indirect selling expenses were reported accurately.<sup>637</sup>

321. USDOC therefore reasonably determined that HHI had failed to provide complete information regarding its affiliated sales agent and determined that HHI significantly impeded the proceeding in so doing.<sup>638</sup>

322. Korea claims that USDOC improperly rejected HHI’s response clarifying the relationship between HHI and the individual, but the record does not support such a finding.<sup>639</sup> USDOC determined that this information was untimely and unsolicited, and thus rejected the submission.<sup>640</sup> HHI’s argument regarding Commerce’s improper rejection of its “clarifying” information has no merit.

323. Accordingly, USDOC’s resort to facts available regarding HHI’s failure to disclose the precise relationship with an affiliated sales agent was consistent with Article 6.8 and Annex II of the Anti-Dumping Agreement.

324. Taken together, HHI’s failure to report prices and costs of “accessories,” its understatement of gross unit prices, and its failure to disclose an affiliated sales agent affected the entirety of HHI’s reporting. As a result, USDOC found that HHI failed to provide the

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<sup>635</sup> HHI Section A Response (February 2, 2017) (Exhibit KOR-150 (BCI)) at A-8 and Attachment A-4; LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 19.

<sup>636</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 19.

<sup>637</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 19.

<sup>638</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 19.

<sup>639</sup> Korea First Written Submission, paras. 816-17.

<sup>640</sup> Request to Reject and Remove File (October 4, 2017) (Exhibit KOR-151); *see also* 19 CFR § 351.302(d) (Exhibit USA-48) and 19 CFR § 351.104(a)(2) (Exhibit USA-49).

information requested, and otherwise significantly impeded the administrative review. USDOC further determined that HHI did not act to the best of its ability because of its failure to provide the necessary information as requested by USDOC throughout the proceeding.<sup>641</sup> USDOC therefore satisfied the conditions for resorting to using the facts otherwise available. In sum, Korea has not shown that in resorting to facts available, USDOC acted inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement.

325. As explained above, USDOC resorted to facts available with respect to Hyosung because Hyosung had withheld requested information and significantly impeded the review by failing to report service-related revenues, failing to explain an invoice covering multiple sales of subject merchandise over multiple administrative periods of review, and failing to report all relevant price adjustments and discounts.<sup>642</sup> Taken together, with these failures the record lacked necessary information and called into question the entirety of Hyosung’s reporting. Further, USDOC determined that “the record is incomplete and the lack of explanation regarding all three issues renders Hyosung’s reporting unreliable,” and that Hyosung, therefore, significantly impeded the proceeding.<sup>643</sup>

326. Korea’s arguments to the contrary are unsupported by the evidence and fail to demonstrate an inconsistency with Article 6.8 and Annex II of the Anti-Dumping Agreement.

327. Regarding information requested regarding reported service-related revenue of certain Hyosung sales through its affiliate, HICO America, Korea argues that USDOC improperly found that Hyosung had significantly impeded the proceeding because Hyosung understood that the “invoice should be the source of reporting” for such revenues and therefore it was “unclear {to Hyosung} why the {order acknowledgment forms} would be ‘necessary.’”<sup>644</sup>

328. The record does not support Korea’s position. In its initial questionnaire USDOC requested that Hyosung report service-related revenues in separate fields along with the associated service expenses.<sup>645</sup> Hyosung indicated that it had no service-related revenues to report except for those that appeared as line-items on an invoice.<sup>646</sup> Consequently, lacking a complete response, USDOC sent further supplemental questionnaires to try to understand how and where the relevant revenues were reported.<sup>647</sup> Hyosung responded with slightly more

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<sup>641</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 3-4, 14, 16-18, 19.

<sup>642</sup> I&D Memo (March 9, 2018) (Exhibit KOR-211) at 25-29, 30-31, 31-32.

<sup>643</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 32.

<sup>644</sup> Korea First Written Submission, paras. 824, 823.

<sup>645</sup> Department of Commerce Initial AD Questionnaire (January 5, 2017) (Exhibit USA-46) at C-1.

<sup>646</sup> Hyosung Sections B-D Response (February 27, 2017) (Exhibit KOR-153 (BCI)) at C-24.

<sup>647</sup> Hyosung Third Supplemental Questionnaire (May 26, 2017) (Exhibit KOR-155), *see, e.g.*, question 35.

documentation, but of those provided, the OAFs remained incomplete with missing pages, thus constituting an incomplete response from Hyosung.<sup>648</sup>

329. As explained above, even the partially-legible and incomplete OAFs illustrated that Hyosung, in fact, had allocated revenues to cover certain service-related expenses and that those revenues exceeded the associated expense.<sup>649</sup> Accordingly, USDOC determined that because the OAFs were incomplete, partially illegible, and the record lacked sufficient information to calculate estimated revenues and expenses related to services, information necessary to complete its calculations was missing from the record.<sup>650</sup>

330. Korea's arguments that USDOC "did not issue any follow up questionnaires or notify Hyosung of any deficiencies in its reporting of service-related revenue" or that "USDOC should have requested clarification from Hyosung in a supplemental questionnaire to resolve the matter" are meritless and completely unsupported by the record.<sup>651</sup> Indeed, the record shows that USDOC issued multiple supplemental questionnaires to Hyosung, providing multiple opportunities for Hyosung to cure the deficiencies.

331. Moreover, because USDOC gave Hyosung three separate opportunities to specifically report the relevant revenue-related information and Hyosung failed to do so, USDOC determined that Hyosung significantly impeded the proceeding.<sup>652</sup>

332. With respect to Hyosung's unexplained invoice covering multiple sales over multiple periods, Korea claims the issue was resolved with record information, and USDOC should have notified Hyosung of its deficient responses and issued supplemental questionnaires.<sup>653</sup> Korea's arguments are not supported by evidence and ignore USDOC's findings.

333. As USDOC explained, given Hyosung's description of its sales process, it was unclear how multiple sales could be contained on one invoice, and the lack of explanation renders Hyosung's reporting unreliable.<sup>654</sup> As USDOC articulated in the preliminary results, such a circumstance "raises concerns as to the accuracy and reliability of the quantity and value of sales reported to {USDOC}."<sup>655</sup> Further, as USDOC had explained, "Hyosung's failure to explain or

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<sup>648</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 25-29.

<sup>649</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 28-29.

<sup>650</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 28-29.

<sup>651</sup> Korea First Written Submission, para. 822.

<sup>652</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 4, 9-14; *see also* LPT I&D Memo (PDM) (August 31, 2017) (Exhibit KOR-140) at 6-8.

<sup>653</sup> Korea First Written Submission, paras. 826-27.

<sup>654</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 30-31.

<sup>655</sup> LPT I&D Memo (PDM) (August 31, 2017) (Exhibit KOR-140) at 10.

clarify these submissions significantly impeded {USDOC's} ability to calculate accurate antidumping duty margins and raises questions regarding the reliability of Hyosung's reporting."<sup>656</sup> In other words, the explanation for how multiple sales could be contained on one invoice was necessary to support the accuracy of the data reported – data necessary to USDOC's calculation of Hyosung's dumping margin.

334. Finally, with respect to Hyosung's failure to report certain discounts and price adjustments, Korea claims that no necessary information was missing and "all applicable discounts and price adjustments" were properly reported Hyosung's "total amount shown on the invoice, net of all discounts, was consistent with Hyosung's reported gross unit prices."<sup>657</sup> However, these claims are contradicted by the record.

335. USDOC had initially requested that Hyosung report all price adjustments, including discounts and rebates, in separate fields.<sup>658</sup> USDOC also had requested in a supplemental questionnaire that Hyosung provide complete documentation for certain U.S. sales.<sup>659</sup> As explained above, although Hyosung provided the requested documentation, Hyosung still failed to report certain price adjustments and discounts. As USDOC explained,

Reporting all such adjustments to the gross unit price allows Commerce to examine the veracity of each claimed adjustment, and the validity of the reported price, as well as examine the level of trade between the respondent and its customers. Failure to report all such adjustments impedes Commerce's analysis and calls into question the accuracy of the reported sales amounts.<sup>660</sup>

336. In other words, USDOC identified this information as necessary to its calculations, as it was necessary to confirm the accuracy of the reported data. Thus, Korea's argument that necessary information was not missing from the record therefore is meritless. Further, Korea's claim that USDOC "never made any follow-up inquiries or issue supplemental questionnaires regarding this issue" is not supported by the record. As discussed above, in its initial questionnaire and in supplemental questionnaires, USDOC requested that Hyosung report price adjustments.

337. Given the above, Korea has failed to demonstrate that USDOC acted inconsistently with Article 6.8 and Annex II of the Anti-Dumping Agreement regarding Hyosung's failure to report its information completely and accurately.

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<sup>656</sup> LPT I&D Memo (PDM) (August 31, 2017) (Exhibit KOR-140) at 10.

<sup>657</sup> Korea First Written Submission, paras. 829-830.

<sup>658</sup> Department of Commerce Initial AD Questionnaire (January 5, 2017) (Exhibit USA-46) at C-18.

<sup>659</sup> Hyosung Third Supplemental Questionnaire (May 26, 2017) (Exhibit KOR-155) at 13-14, question 66.

<sup>660</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 32.



338. Korea also claims for each of the purported reporting failures, that USDOC had no basis on which to conclude that Hyosung significantly impeded the proceeding.<sup>661</sup> To the contrary, USDOC explained in detail why it found that Hyosung had significantly impeded the proceeding:

For these reasons, we find that the record is incomplete and the lack of explanation regarding all three issues renders Hyosung’s reporting unreliable, and Hyosung has otherwise impeded this review. Thus, we find that the application of facts available is warranted. Further, we find that application of {facts available} is warranted because Hyosung was provided multiple opportunities to remedy these deficiencies, yet failed to do so. Therefore, Hyosung failed to put forth its maximum efforts to comply with requests for information, thereby failing to cooperate to the best of its ability. The application of {facts available} is, therefore, warranted.<sup>662</sup>

339. Given the above, USDOC properly satisfied the conditions for resorting to facts available with respect to Hyosung and acted consistently with Article 6.8 and Annex II of the Anti-Dumping Agreement.

340. In sum, Korea has failed to demonstrate any inconsistencies with Article 6.8 and Annex II of the Anti-Dumping Agreement in USDOC in resorting to facts available.

*ii. USDOC Properly Applied Facts Available in Accordance with Article 6.8 and Paragraphs 3 and 5 of Annex II.*

341. Despite the many flaws USDOC identified in HHI’s and Hyosung’s information, Korea claims that USDOC’s resort to the use of facts available regarding the results of the fourth administrative review was inconsistent with Article 6.8 and paragraphs 3 and 5 of Annex II because USDOC improperly rejected all of HHI’s and Hyosung’s reported information.<sup>663</sup> Specifically, Korea claims that USDOC failed to take into account all verifiable and substantiated facts provided by HHI and Hyosung, claiming that HHI had provided all relevant information in its various responses for the “accessories,” the gross unit prices, and the alleged non-disclosed affiliated sales agent and that Hyosung had provided all relevant information in its various responses for the order acknowledgment forms, the alleged overlapping invoice, and alleged failure to report certain price discounts and price adjustments.<sup>664</sup>

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<sup>661</sup> Korea First Written Submission, paras. 820, 823, 828, 831.

<sup>662</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 32.

<sup>663</sup> Korea First Written Submission, paras. 841-50.

<sup>664</sup> Korea First Written Submission, paras. 843-50.

342. These claims are unsupported by the record. As explained above, USDOC determined that neither HHI nor Hyosung acted to the best of its ability because of each company's failure to provide, in a timely manner, the information necessary for USDOC to calculate a weighted-average dumping margin for exports of subject merchandise.<sup>665</sup> As USDOC determined that HHI and Hyosung each failed to act to the best of its ability, USDOC's rejection of HHI's and Hyosung's reported information was not inconsistent with its obligations under Annex II or Article 6.8.

343. As detailed above, both HHI and Hyosung were afforded multiple opportunities and clarifications, but yet failed to provide requested and necessary information.<sup>666</sup> As a result of these failures, USDOC properly determined that HHI and Hyosung did not act to the best of their ability in responding to USDOC's requests for information.<sup>667</sup>

344. With respect to HHI, USDOC found,

that Hyundai has failed to cooperate to the best of its ability because it failed to comply with a request for information regarding the prices and costs for "accessories," provide complete and accurate information requested by the Department, thereby raising issues as to whether Hyundai understated home market price for certain sales, and disclose the relationship between Hyundai and its sales agent after requests to do so, which also questions the accuracy of its reporting. Taken together, Hyundai has failed to put forth its maximum effort to cooperate in this review.<sup>668</sup>

345. Regarding Hyosung, USDOC noted that it found that the record is incomplete and the lack of explanation regarding all three issues renders Hyosung's reporting unreliable, and Hyosung has otherwise impeded this review. Thus, we find that the application of facts available is warranted...because Hyosung was provided multiple opportunities to remedy these deficiencies yet failed to do so. Therefore, Hyosung failed to put forth its maximum efforts to comply with requests for information, thereby failing to cooperate {by not acting} to the best of its ability.<sup>669</sup>

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<sup>665</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 3-4, 14, 16-18, 19 (as regards HHI); 3-4, 24, 29, 31, 32 (as regards Hyosung).

<sup>666</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 3-4, 14, 16-18, 19 (as regards HHI); 3-4, 24, 29, 31, 32 (as regards Hyosung).

<sup>667</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 3-4, 14, 16-18, 19 (as regards HHI); 3-4, 24, 29, 31, 32 (as regards Hyosung).

<sup>668</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 4.

<sup>669</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 32.

346. Thus, Korea fails to demonstrate that USDOC’s application of facts available to both HHI and Hyosung was inconsistent with Article 6.8 and paragraphs 3 and 5 of Annex II of the Anti-Dumping Agreement.

*iii. USDOC Properly Selected a Replacement for the Missing Necessary Information.*

347. Korea claims that USDOC did not select the “best” information to use to replace HHI’s and Hyosung’s information<sup>670</sup> Moreover, Korea claims that USDOC did not provide adequate reasoning and explanation for its selection of the petition rate as the replacement rate, did not sufficiently corroborate that rate, that USDOC did not use special circumspection in selecting the rate, and finally, claims that its use of the rate was punitive.<sup>671</sup>

348. The record demonstrates the contrary. USDOC engaged in a process of reasoning and evaluation when it selected the alleged petition rate as a reasonable replacement for the missing necessary information for both HHI and Hyosung. Korea does not demonstrate that USDOC did not use the “best” available information to replace the missing information. Finally, its application of facts available was not punitive because USDOC used a relevant and reliable rate to replace HHI’s and Hyosung’s unreliable information that it properly corroborated in accordance with paragraph 7 of Annex II of the Anti-Dumping Agreement.

349. As HHI and Hyosung failed to provide necessary missing information and significantly impeded the proceeding, USDOC determined that it may resort to the use of facts available within the meaning of Article 6.8 and Annex II of the Anti-Dumping Agreement to determine their respective dumping margins. Despite numerous opportunities to correct the record, because USDOC determined it could not use HHI’s response, as it was unreliable and did not consist of a complete and accurate response to USDOC’s information requests,<sup>672</sup> nor Hyosung’s response, due Hyosung’s failure to report information essential to the calculation of the average U.S. price, USDOC assigned each mandatory respondent the rate of 60.81 percent, which was used as facts available in the third administrative review and also is the highest rate alleged in the petition.<sup>673</sup> The record evidence does not support Korea’s position, instead demonstrating that USDOC considered this information carefully and selected a reasonable replacement that adheres to the obligations of paragraph 7 of Annex II and Article 6.8.

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<sup>670</sup> Korea First Written Submission, paras. 861-864.

<sup>671</sup> Korea First Written Submission, paras. 861-864.

<sup>672</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 4.

<sup>673</sup> LPT I&D Memo (March 9, 2018) (Exhibit KOR-211) at 20-22; *Large Power Transformers From the Republic of Korea: Final Results of Antidumping Duty Administrative Review: 2015-2016*, 83 Fed. Reg. 11,679 (Dep’t of Commerce) (March 16, 2018) (Exhibit KOR-109).

350. The rate selected by USDOC in the fourth administrative review did not need to be corroborated separately for use in this review, as it was information used in a prior segment of the current proceeding, and had been properly corroborated during that review. Paragraph 7 contemplates the need for corroboration “if the authorities have to base their findings, including those with respect to normal value, on information from a secondary source.” USDOC corroborated the rate used here during the third administrative review (*see infra*, Section II.D.2.b.iii). There 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. Further, pursuant to certain domestic law, 19 U.S.C. § 1677e(c)(2), USDOC was “not {} required to corroborate” the selected rate because it had been “applied in a separate segment of the same proceeding.”

351. USDOC explained that it considered the record evidence of the review when determining the probative value of the selected rate. As explained in the preliminary I&D Memorandum, “when a respondent is not cooperative, such as Hyosung and Hyundai in this review, {USDOC} has the discretion to presume that the highest prior dumping margin is the most probative evidence of the current weighted-average dumping margin.”<sup>674</sup> USDOC further explained that, under certain domestic law, USDOC “may use any dumping margin from any segment of a proceeding under an antidumping order when applying an adverse inference, including the highest of such margins.” Thus, USDOC’s selection of the 60.81 percent rate used in the third administrative review was a reasonable replacement for HHI’s and Hyosung’s unreliable reporting.

352. While Korea asserts that USDOC did not select the “best” information to use to replace all of HHI’s information, it offers no alternative.<sup>675</sup> Moreover, as discussed below, the fact that HHI and Hyosung have been assigned a margin that is less favorable than what the companies would have gotten if they had cooperated to the best of their ability, is not inconsistent with paragraph 7 of Annex II.

353. Furthermore, Korea has not demonstrated that USDOC’s selection of the dumping margin used in the third administrative review was an improper replacement for the missing necessary information. In fact, Korea’s claim hinges on the improper use of the alleged petition rate in the third administrative review.<sup>676</sup> The United States submits that if the panel determines that Korea failed to demonstrate that USDOC selected facts available inconsistently with Article 6.8 and Annex II of the Antidumping Agreements in the third administrative review, the claims made with regard to the use of the same rate in the fourth administrative review are moot and should be rejected.

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<sup>674</sup> LPT I&D Memo (PDM) (August 31, 2017) (Exhibit KOR-140) at 6.

<sup>675</sup> Korea First Written Submission, para. 863.

<sup>676</sup> Korea First Written Submission, paras. 861-62.

354. Korea further claims that USDOC did not engage in a proper process of reasoning and evaluation in selecting the facts available.<sup>677</sup> However, Korea fails to support this statement with any specific evidence or further argument that might show that USDOC failed to comply with any particular provision of the Anti-Dumping Agreement. Here, neither HHI nor Hyosung have reliable or substantiated facts on the record that USDOC has somehow compelled to use by a provision of the Anti-Dumping Agreement. In short, Korea fails to demonstrate how USDOC failed to comply with its obligations under Article 6.8 and Annex II.

355. Finally, Korea argues that USDOC’s decision to select the petition rate when resorting to using facts available was done “simply to ensure that the results would be ‘sufficiently adverse’ to HHI and Hyosung, and thus to penalize them,” specifically claiming that that USDOC’s application of facts available was punitive.<sup>678</sup> This does not appear to be a separate legal argument, but rather a restatement of Korea’s views on whether USDOC properly selected the information used as facts available. As explained above, the record does not support Korea’s view. That the outcome is less favorable than Korea would have liked does not mean USDOC’s application of facts available inconsistent with Article 6.8.<sup>679</sup>

#### **E. Korea’s Dependent Claims under Articles 1, 9.3 and 18.1 of the Anti-Dumping Agreement**

356. Korea’s allegations that the United States is in breach of Articles 1, 9.3, and 18.1 of the Anti-Dumping Agreement are entirely consequential—that is, dependent on its substantive claims under Article 6.8 and Annex II of the Anti-Dumping Agreement. At the end of its arguments with respect to each anti-dumping investigation, Korea argues that, if the Panel accepts its separate substantive claim, this breach “automatically” results in the breach of Articles 1, 9.3, and 18.1.<sup>680</sup> Korea offers no argument or evidence to support any independent breach of those provisions.

357. If the Panel rejects Korea’s substantive claims, then by Korea’s own consequential logic and the absence of any argumentation or evidence, there would be no basis to find a breach of Articles 1, 9.3, or 18.1 of the Anti-Dumping Agreement. Therefore, if the Panel rejects Korea’s claim under Article 6.8 and Annex II of the Anti-Dumping Agreement, Korea’s consequential claims under Articles 1, 9.3, and 18.1 necessarily fail.

358. On the other hand, if the Panel agreed with Korea’s substantive allegations, there would be no basis to decide Korea’s consequential claims under Articles 1, 9.3, and 18.1 of the Anti-Dumping Agreement. As an initial matter, the United States does not concede that such breaches

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<sup>677</sup> Korea First Written Submission, para. 861.

<sup>678</sup> Korea First Written Submission, paras. 863-64.

<sup>679</sup> See *US – Carbon Steel (India) (AB)*, para. 4.426.

<sup>680</sup> Korea First Written Submission, paras. 204-205, 332-333, 519-520.

are “automatic.” In any event, it is by now widely accepted that a panel “need only address those issues which must be addressed in order to resolve the matter in issue in the dispute.”<sup>681</sup> Thus, it is appropriate for a panel to “to refrain from making multiple findings that the same measure is *inconsistent* with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute.”<sup>682</sup>

359. If the Panel agreed with Korea’s substantive claim, there would be no useful purpose in deciding what Korea acknowledges are entirely dependent claims under Articles 1, 9.3, and 18.1. Nor would deciding such claims provide any additional guidance that would be useful regarding implementation of any recommendations adopted by the DSB. Indeed, many previous panels have abstained from considering claims under these provisions for these exact reasons.<sup>683</sup> Therefore, if the Panel were to find a breach of Article 6.8 and Annex II of the Anti-Dumping Agreement, there is no basis to decide Korea’s claims under Articles 1, 9.3, and 18.1.

### **III. KOREA HAS FAILED TO ESTABLISH THAT USDOC’S APPLICATION OF FACTS AVAILABLE WAS INCONSISTENT WITH ARTICLE 12.7 OF AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES.**

#### **A. Legal Framework: Article 12 of the SCM Agreement**

360. Article 12.7 of the SCM Agreement provides that:

In cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.

361. Article 12.7 contains similar obligations to those under Article 6.8 of the Anti-Dumping Agreement.<sup>684</sup> Unlike the Anti-Dumping Agreement, however, the SCM Agreement does not contain an Annex with detailed rights and obligations regarding the use of facts available. In these circumstances, the detailed rules in the Anti-Dumping Agreement may be considered as

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<sup>681</sup> *US – Wool Shirts and Blouses (AB)*, p. 19. *See also* DSU, Art. 3.7 (“The aim of the dispute settlement mechanism is to secure a positive solution to a dispute.”).

<sup>682</sup> *Canada – Wheat and Grain Imports (AB)*, para. 133 (emphasis original). *See also* *Argentina – Import Measures (US) (AB)*, para. 5.190.

<sup>683</sup> *See* *Argentina – Poultry Anti-Dumping Duties (Panel)*, paras. 7.369-7.370; *Guatemala – Cement II (Panel)*, para. 8.296; *Mexico – Anti-Dumping Measures on Rice (Panel)*, para. 7.65; *US – Anti-Dumping Measures on Oil country Tubular Goods (Panel)*, para. 7.189; *US – Stainless Steel (Panel)*, para. 6.138; *US – Softwood Lumber V (Panel)*, para. 7.378; *US – Softwood Lumber VI (Panel)*, para. 7.147; *US – Zeroing (EC) (Panel)*, paras. 7.34, 7.109; *US – Zeroing (Japan) (Panel)*, paras. 7.171-7.175, 7.186.

<sup>684</sup> *See, e.g., Mexico – Anti-Dumping Measures on Rice (AB)*, para. 291.

context in interpreting Article 12.7 of the SCM Agreement. As the Appellate Body has noted, “it would be anomalous if Article 12.7 of the *SCM Agreement* were to permit the use of “facts available” in countervailing duty investigations in a manner markedly different from that in anti-dumping investigations.”<sup>685</sup> At the same time, the specific rules in Annex II of the Anti-Dumping Agreement cannot be imported directly into the SCM Agreement; if this were the intent of the drafters, the SCM Agreement would have repeated those same rules in the text of the SCM Agreement.

362. The Appellate Body has observed that Article 12.7 is “intended to ensure that the failure of an interested party to provide necessary information does not hinder an agency’s investigation.”<sup>686</sup> The requisite flexibility of investigating authorities to effectively concluded investigations even in the face of non-cooperative parties is further acknowledged and ensured by Article 12.1.1, which implicitly recognizes the flexibility investigating authorities require to set deadlines for submissions.

363. One scenario which may trigger resort to Article 12.7 of the SCM Agreement is where information is not provided within “a reasonable period.” “{I}f information is, in fact, supplied ‘within a reasonable period,’ the investigating authorities *cannot* use facts available, but must use the information submitted by the interested party.”<sup>687</sup> In considering the term “reasonable period,” the Appellate Body has reasoned that:

“reasonable” implies a degree of flexibility that involves consideration of all of the circumstances of a particular case. What is “reasonable” in one set of circumstances may prove to be less than “reasonable” in different circumstances. This suggests that what constitutes a reasonable period or a reasonable time, under Article 6.8 and Annex II of the *Anti-Dumping Agreement*, should be defined on a case-by-case basis, in the light of the specific circumstances of each investigation.<sup>688</sup>

364. Simultaneously, the SCM Agreement permits investigating authorities to establish deadlines for questionnaire responses to foreign producers or interested Members. Although it does not explicitly use the word “deadlines,” the first sentence of Article 12.1.1 contemplates that investigating authorities may impose appropriate time limits. Thus, with respect to Article 6.1.1 of the *Anti-Dumping Agreement*, which contains very similar language, the Appellate Body has “recognize{d} that it is fully consistent with the *Anti-Dumping Agreement* for

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<sup>685</sup> *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 295.

<sup>686</sup> *Mexico – Rice (AB)*, para. 293; *see also China – GOES (Panel)*, para. 7.296.

<sup>687</sup> *US – Hot-Rolled Steel (AB)*, para. 77 (emphasis in original).

<sup>688</sup> *US – Hot-Rolled Steel (AB)*, para. 84.

investigating authorities to impose time-limits for the submission of questionnaire responses,” and has emphasized that:

Investigating authorities must be able to control the conduct of their investigation and to carry out the multiple steps in an investigation required to reach a final determination. Indeed, in the absence of time-limits, authorities would effectively cede control of investigations to the interested parties, and could find themselves unable to complete their investigations within the time-limits mandated under the *Anti-Dumping Agreement* . . . “in the interest of orderly administration investigating authorities do, and indeed must establish such deadlines.”<sup>689</sup>

This reasoning applies equally to Article 12.7 of the SCM Agreement, read in light of Article 12.1.1.<sup>690</sup>

365. The “facts available” refer “to those facts that are in the possession of the investigating authority and on its written record.”<sup>691</sup> Thus, an Article 12.7 determination “cannot be made on the basis of non-factual assumptions or speculation.”<sup>692</sup> The extent to which the investigating authority must evaluate the possible “facts available,” and the form that evaluation may take, “depend{s} on the particular circumstances of a given case, including the nature, quality, and amount of the evidence on the record, and the particular determinations to be made in the course of an investigation.”<sup>693</sup>

366. In addition, the fact of an interested party’s non-cooperation may be relevant to the investigating authority’s selection of “facts available” under Article 12.7. Indeed, the Appellate Body has noted that “the knowledge of a non-cooperating party of the consequences of failing to provide information can be taken into account by an investigating authority, along with other

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<sup>689</sup> *US – Hot-Rolled Steel (AB)*, para. 73 (quoting *US – Hot-Rolled Steel (Panel)*, para. 7.54).

<sup>690</sup> See *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 295 (explaining that it would be “anomalous” if Article 12.7 of the SCM Agreement were to be interpreted “markedly different{ly}” from Article 6.8 of the Anti-Dumping Agreement).

<sup>691</sup> *US – Countervailing Measures (China) (AB)*, para. 4.178 (citing *US – Carbon Steel (India) (AB)*, para. 4.417).

<sup>692</sup> *US – Countervailing Measures (China) (AB)*, para. 4.178 (quoting *US – Carbon Steel (India) (AB)*, para. 4.417); see also *US – Carbon Steel (India) (AB)*, para. 4.428.

<sup>693</sup> *US – Carbon Steel (India) (AB)*, para. 4.421; see also *US – Countervailing Duties (China) (AB)*, para. 4.179 (citing *US – Carbon Steel (India) (AB)*, para. 4.421) (“the nature and extent of the explanation and analysis required will necessarily vary from determination to determination”).



procedure circumstances in which information is missing, in ascertaining those “facts available” on which to base a determination and in explaining the selection of facts.”<sup>694</sup>

367. Korea repeatedly relies on the phrase “comparative evaluation” as if it is text from the covered agreements.<sup>695</sup> However, Article 12.7 of the SCM Agreement does not contain the term “comparative evaluation.” The Appellate Body has reasoned that “the extent to which an ‘evaluation’ of the ‘facts available’ is required under Article 12.7, and the form it should take, depend on the particular circumstances of a given case, including the quantity and quality of the available facts on the record, and the types of determinations to be made in a given investigation.”<sup>696</sup> For example, as the Appellate Body noted, “a comparative approach to the evaluation required would not be feasible where there is only one set of reliable information on the record that is relevant to a particular issue and may thus serve as a factual basis for a determination.”<sup>697</sup>

368. The Appellate Body concluded: “Thus, we do not accept {the} argument that Article 12.7 of the SCM Agreement requires a comparative evaluation of the ‘facts available’ in every case.”<sup>698</sup> It continued:

We instead find that Article 12.7 requires an investigating authority to use “facts available” that reasonably replace the missing “necessary information”, with a view to arriving at an accurate determination, which calls for a process of evaluation of available evidence, the extent and nature of which depends on the particular circumstances of a given case.<sup>699</sup>

**B. Korea Has Failed to Establish that USDOC’s Use of Facts Available in the Cold-Rolled Steel and Hot-Rolled Steel Investigations was Inconsistent with Article 12.7 of the SCM Agreement.**

369. This section addresses Korea’s arguments regarding USDOC’s application of facts available in the cold-rolled steel (CRS) and hot-rolled steel (HRS) investigations. In the CRS and HRS investigations, USDOC applied facts available to POSCO for: (1) its failure to report certain cross-owned input suppliers; (2) the discovery at verification of facilities located in a free

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<sup>694</sup> *US – Carbon Steel (India) (AB)*, para. 4.426

<sup>695</sup> See, e.g., Korea First Written Submission, paras. 71, 76, 337, 440, 443, 450, 454, 586, 880-881, 924, 974, 1005.

<sup>696</sup> *India – Carbon Steel (AB)*, para. 4.434.

<sup>697</sup> *India – Carbon Steel (AB)*, para. 4.434.

<sup>698</sup> *India – Carbon Steel (AB)*, para. 4.434.

<sup>699</sup> *India – Carbon Steel (AB)*, para. 4.435.

economic zone (FEZ); (3) and DWI's failure to report certain loans.<sup>700</sup> The missing necessary information was discovered at the CRS verification. Following the discovery of the missing information in the CRS investigation, POSCO attempted to submit the information in the HRS investigation, but USDOC properly rejected the information as untimely and solicited.<sup>701</sup>

370. As the relevant facts regarding the USDOC's application of facts available in the CRS and HRS investigations are similar, and thus, so too are the reasons for USDOC resorting to facts available, we address the cases together. We first provide the relevant facts for the two investigations and then address Korea's arguments.

***1. POSCO and DWI Failed to Provide USDOC with Requested Information.***

371. On July 28, 2015, U.S. domestic CRS producers filed a countervailing duty application with USDOC, alleging that imports of CRS from Korea were subsidized and were causing injury to the U.S. CRS industry.<sup>702</sup> Subsequently, on August 11, 2015, U.S. domestic HRS producers filed a countervailing duty application with USDOC, alleging that imports of HRS from Korea were subsidized and causing injury to the U.S. HRS industry.<sup>703</sup>

372. In its final determinations in the CRS and HRS investigations, USDOC determined that POSCO, and POSCO's affiliate, DWI, withheld requested necessary information during the course of the investigations, impeded the proceedings, and through their actions prevented USDOC from being able to verify that information.<sup>704</sup> As noted above, USDOC determined to apply adverse facts available to POSCO for: (1) its failure to report certain cross-owned input suppliers; (2) the discovery at verification of facilities located in a FEZ; (3) and for DWI's failure to report certain loans.<sup>705</sup>

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<sup>700</sup> See CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 11; HRS I&D Memo (August 4, 2016) (Exhibit KOR-98) at 7-11.

<sup>701</sup> 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).

<sup>702</sup> See Petitions for the Imposition of Antidumping and Countervailing Duties: Certain Cold-Rolled Steel Flat Products from Brazil, the People's Republic of China, India, Japan, the Republic of Korea, Netherlands, Russia, and the United Kingdom (July 28, 2015) (Exhibit USA-50).

<sup>703</sup> See Petitions for the Imposition of Antidumping and Countervailing Duties: Certain Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, the Republic of Korea, the Netherlands, Turkey, and the United Kingdom (August 11, 2015) (Exhibit USA-51).

<sup>704</sup> See CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 7-11; HRS I&D Memo (August 4, 2016) (Exhibit KOR-98) at 10.

<sup>705</sup> See CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 11; HRS I&D Memo (August 4, 2016) (Exhibit KOR-98) at 7-11.

*a. POSCO Failed to Report Affiliated Input Providers,*

*i. Cold-Rolled Steel*

373. With its initial September 16, 2015 questionnaire, USDOC requested necessary information pertaining to POSCO's cross-owned affiliated input suppliers.<sup>706</sup> On September 30, 2015, POSCO filed its affiliation questionnaire response, stating that "no affiliated companies located in Korea provided inputs used in the production of subject merchandise."<sup>707</sup> In a supplemental questionnaire, USDOC asked POSCO to confirm that none of its cross-owned affiliates provided inputs in the production of subject merchandise during the period of the investigation. POSCO replied that "it had already responded to this question."<sup>708</sup>

374. One week prior to verification, USDOC instructed POSCO to make available original records substantiating the information reported in its questionnaire responses, and to "{b}e prepared to demonstrate that none of POSCO's other affiliated companies provided inputs for the production of cold-rolled steel or otherwise would fall under our attribution regulations" and cautioned that "verification is not intended to be an opportunity for the submission of new factual information."<sup>709</sup> USDOC stated that "information will be accepted at verification only when the information makes minor corrections to information already on the record or when information is requested by the verifiers, in accordance with the agenda below, to corroborate, support, and clarify factual information already on the record."<sup>710</sup>

375. On the first day of verification,<sup>711</sup> in response to USDOC's inquiries, POSCO reiterated that no affiliated or cross-owned companies provided inputs that were used in the production of

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<sup>706</sup> See Department of Commerce Investigation of Certain Cold-Rolled Steel Flat Products: Initial Countervailing Duty Questionnaire (September 16, 2015) (Exhibit USA-52).

<sup>707</sup> See Certain Cold-Rolled Steel Flat Products from Korea: Affiliated Companies Response, POSCO/Daewoo (September 30, 2015) (Exhibit KOR-73 (BCI)) at 4-5; see also CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 9.

<sup>708</sup> See Certain Cold-Rolled Steel Flat Products from Korea: Second Supplemental Questionnaire Response, POSCO/Daewoo (November 12, 2015) (Exhibit KOR-74 (BCI)) at 1; see also CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 9.

<sup>709</sup> See 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) (Exhibit USA-53 (BCI)).

<sup>710</sup> See 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) (Exhibit USA-53 (BCII)).

<sup>711</sup> USDOC conducted verification of POSCO's questionnaire responses from March 14 to March 18, 2016. 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) (Exhibit KOR-75(BCI)) at 1.

subject merchandise.<sup>712</sup> However, during verification, USDOC discovered that four additional companies listed on POSCO's affiliation chart provided raw material inputs that were used in the production of cold-rolled steel.<sup>713</sup> These four cross-owned companies were "listed as providing input in the 'Inputs for Cold-Rolled' exhibit submitted by POSCO at verification."<sup>714</sup> Upon review of these affiliates' financial statements, USDOC found that at least one of them received grants.<sup>715</sup>

376. On the last day of verification, POSCO offered a document that listed inputs used in the production of cold-rolled steel and the providers of such inputs. USDOC was unable to verify the new information due to the timing of POSCO's presentation of the information and the large amount of data required to establish the credibility of the submission.<sup>716</sup>

377. Because POSCO withheld necessary, requested information during the course of the investigation, impeded the proceeding, and through its actions, prevented USDOC from being able to verify and examine the full extent to which POSCO and all of its cross-owned affiliates benefitted from subsidies that are attributed to POSCO, the record was not complete, and USDOC thus lacked the necessary information to calculate an accurate margin.<sup>717</sup> Accordingly, USDOC determined the use of facts available warranted. And as POSCO did not act to the best of its ability in reporting affiliated companies, USDOC applied an adverse inference in selecting from the facts available with regard to the subsidies to POSCO's cross-owned input suppliers.<sup>718</sup>

*ii. Hot-Rolled Steel*

378. USDOC issued its initial questionnaire on September 24, 2015 and, as in CRS, requested necessary information pertaining to POSCO's cross-owned affiliated input suppliers.<sup>719</sup> On

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<sup>712</sup> See CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 9.

<sup>713</sup> See CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 65; Countervailing Duty Investigation: Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Verification Report: POSCO and Daewoo International Corporation (April 29, 2016) (Exhibit KOR-75(BCI)) Exhibit 3 at 65-72.

<sup>714</sup> See CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 65.

<sup>715</sup> 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) (Exhibit KOR-75 (BCI)) at 11.

<sup>716</sup> See CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 66-67; Countervailing Duty Investigation: Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Verification Report: POSCO and Daewoo International Corporation (April 29, 2016) (Exhibit KOR-75(BCI)) Exhibit 3 at 72-75.

<sup>717</sup> See CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 65.

<sup>718</sup> See CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 65.

<sup>719</sup> See Countervailing Duty Investigation Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Countervailing Duty Questionnaire (September 24, 2015) (Exhibit USA-54).

October 13, 2015, POSCO filed its affiliation questionnaire response and, as it had done in the CRS investigation, reported that “no affiliated companies located in Korea provided inputs to POSCO production of subject merchandise.”<sup>720</sup> However, following the discovery in the CRS verification of four unreported affiliated input suppliers, on April 13, 2016, nearly four months after the deadline for submitting new factual information had passed, POSCO attempted to include with a supplemental questionnaire response pertaining to a request for different information, untimely and unsolicited new factual information regarding the four unreported affiliated companies.<sup>721</sup> USDOC explained that it was rejecting the submission because the content “was not related to the information requested by the Department in its supplemental questionnaire.”<sup>722</sup> USDOC further explained that the regulatory deadline for the submission of new factual information was “30 days before the Preliminary Determination,” which was issued January 15, 2016.<sup>723</sup> USDOC then provided POSCO with an opportunity to resubmit the supplemental questionnaire response without the inclusion of the unsolicited and untimely information.<sup>724</sup> On May 3, 2016, POSCO again tried to submit the new factual information and USDOC again rejected the information.<sup>725</sup>

379. One week prior to verification, USDOC instructed POSCO to make available original records substantiating the information reported in its questionnaire responses, and to “{b}e prepared to demonstrate that none of POSCO’s other affiliated companies provided inputs for the production of cold{sic}-rolled steel or otherwise would fall under our attribution regulations” and cautioned that “verification is not intended to be an opportunity for the submission of new factual information.”<sup>726</sup> USDOC stated that “information will be accepted at verification only when the information makes minor corrections to information already on the record or when information is requested by the verifiers, in accordance with the agenda below, to corroborate,

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<sup>720</sup> See Countervailing Duty Investigation Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Affiliated Company Response POSCO/DWI (October 13, 2015) (Exhibit KOR-91 (BCI)) at 4-5; see also HRS I&D Memo (August 4, 2016) (Exhibit KOR-98) at 9.

<sup>721</sup> See Letter from Department of Commerce Rejecting POSCO’s Submission of New Factual Information (April 14, 2016) (Exhibit KOR-93).

<sup>722</sup> See Letter from Department of Commerce Rejecting POSCO’s Submission of New Factual Information (April 14, 2016) (Exhibit KOR-93).

<sup>723</sup> See Letter from Department of Commerce Rejecting POSCO’s Submission of New Factual Information (April 14, 2016) (Exhibit KOR-93).

<sup>724</sup> See Letter from Department of Commerce Rejecting POSCO’s Submission of New Factual Information (April 14, 2016) (Exhibit KOR-93).

<sup>725</sup> See Letter from Department of Commerce Rejecting POSCO’s Submission of New Factual Information (May 3, 2016) (Exhibit KOR-95).

<sup>726</sup> See Countervailing Duty Investigation Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Verification of POSCO and its Cross-Owned Affiliates’ Questionnaire Resp. (May 6, 2016) (Exhibit USA-55 (BCI)).

support, and clarify factual information already on the record.”<sup>727</sup> USDOC further stated that “{o}ur examination of proposed ‘minor corrections’ at verification does not guarantee that we will be able to use this information for the final determination.”<sup>728</sup>

380. Despite USDOC’s clear instruction on the proper scope of verification, POSCO again sought to provide the untimely information on the four affiliated companies.<sup>729</sup> Because of the untimely nature and large amounts of data required to fully establish the credibility of the untimely submission, USDOC was unable to verify this information.<sup>730</sup>

*b. POSCO Failed to Report a Facility Located in a Free Economic Zone (FEZ).*

*i. Cold-Rolled Steel*

381. Under Korea’s FEZ program, the GOK or local governments in Korea may provide various incentives to companies located in a FEZ.<sup>731</sup> Designation of an area as a FEZ is governed by the Special Act on Designation and Management of Free Economic Zones.<sup>732</sup> Companies located in a FEZ can be approved to receive: (1) Tax Reductions and Exemptions; (2) Exemptions and Reductions of Lease Fees; and (3) Grants and Financial Support.<sup>733</sup>

382. In its initial questionnaire response, POSCO reported that it “has no facilities located in an FEZ.”<sup>734</sup> At verification, however, USDOC discovered that a POSCO facility—POSCO Global R&D Center—was listed on the official Incheon FEZ government website as being

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<sup>727</sup> See Countervailing Duty Investigation Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Verification of POSCO and its Cross-Owned Affiliates’ Questionnaire Resp. (May 6, 2016) (Exhibit USA-55 (BCI)).

<sup>728</sup> See Countervailing Duty Investigation Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Verification of POSCO and its Cross-Owned Affiliates’ Questionnaire Resp. (May 6, 2016) (Exhibit USA-55 (BCI)) at 2.

<sup>729</sup> HRS I&D Memo (August 4, 2016) (Exhibit KOR-98) at 64.

<sup>730</sup> See HRS I&D Memo (August 4, 2016) (Exhibit KOR-98) at 63-65; Countervailing Duty Investigation Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Verification Report: POSCO and DWI (June 30, 2016) (Exhibit KOR-96 (BCI)) Exhibit VE-5.

<sup>731</sup> See CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 34.

<sup>732</sup> See CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 34.

<sup>733</sup> See CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 34.

<sup>734</sup> See Certain Cold-Rolled Steel Flat Products from Korea: Initial Questionnaire Response (October 23, 2015) (Exhibit KOR-70 (BCI)) at Appendix A-12; see also Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Response of the Government of Korea to Section II of the Department’s September 16, 2015, Questionnaire (October 30, 2015) (Exhibit KOR-84 (BCI)) at 108.

located in the FEZ.<sup>735</sup> When offered an opportunity to provide an explanation, POSCO officials presented a hand-drawn map and “stated that its facility was located outside of the hand drawn FEZ.”<sup>736</sup> However, when USDOC compared the borders of the hand-drawn FEZ with a map located on the official Korean government website, the borders of these respective maps did not align, and thus, USDOC declined to accept the hand-drawn map presented by company officials.<sup>737</sup> In another attempt to confirm POSCO’s non-use of the FEZ claim, USDOC “offered repeatedly to visit the facility as depicted on the Korean government website in order to clarify its location,” but POSCO officials declined.<sup>738</sup>

383. As USDOC was “unable to confirm POSCO’s statement that it has no facilities located in an {sic} FEZ, and therefore, did not receive benefits under this program,” USDOC relied on facts available.<sup>739</sup> Moreover, USDOC was unable to “verify any information with respect to subsidy use by POSCO Global R&D Center because POSCO provided no information in its questionnaire responses with respect to this entity.”<sup>740</sup> As such, USDOC determined that POSCO failed to cooperate to the best of its ability with respect to this information in its possession, and thus relied on facts otherwise available with an adverse inference to find that programs were used by POSCO.<sup>741</sup>

*ii. Hot-Rolled Steel*

384. In its initial questionnaire response, POSCO reported that it “has no facilities located in a Free Economic Zone.”<sup>742</sup> As noted above, it was discovered at the CRS verification that POSCO had a facility in a FEZ. As for the unreported affiliated companies, POSCO twice tried to put the untimely and unsolicited information on the record and twice the information was rejected.<sup>743</sup> And again, despite USDOC’s clear instruction that a verification could not be used for the submission of new information, POSCO again attempted to present information demonstrating

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<sup>735</sup> See CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 72-73.

<sup>736</sup> See CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 73.

<sup>737</sup> See CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 73.

<sup>738</sup> See CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 73.

<sup>739</sup> See CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 73.

<sup>740</sup> See CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 73.

<sup>741</sup> See CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 73.

<sup>742</sup> See *Certain Hot-Rolled Steel Flat Products from Korea: Initial Questionnaire Response* (November 2, 2015) (Exhibit KOR-90 (BCI)) at 45; see also *Countervailing Duty Investigation: Certain Hot-Rolled Steel Flat Products (Hot-Rolled Steel) from the Republic of Korea: Government Response*,” (November 4, 2015) (Exhibit KOR-100) at 68-69.

<sup>743</sup> 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).

on the POSCO Global R&D Center was located in the FEZ.<sup>744</sup> USDOC reasonably determined that the existence of POSCO’s Global R&D Center did not constitute a minor correction, but rather, consisted of impermissible new factual information.<sup>745</sup>

385. USDOC “officials explained to {POSCO} officials that {they} would not verify as to the use or non-use of alleged FEZ programs as its response only stated that the company had no facilities located in a FEZ.”<sup>746</sup> USDOC also explained that “information will be accepted at verification only when the information makes minor corrections to information already on the record or when information is requested by the verifiers, in accordance with the agenda below, to corroborate, support, and clarify factual information already on the record.”<sup>747</sup> USDOC reasonably found that POSCO’s new factual information did not corroborate, support, or clarify its previous submission of factual information, but rather constituted significant change.

*c. POSCO Failed to Report Certain Loans.*

*i. Cold-Rolled Steel*

386. The Korea Resources Corporation (KORES), which is responsible for the development of natural resources, and Korean National Oil Corporation (KNOC), which is responsible for the development of oil, have lending programs that provide long-term loans to Korean companies for the purpose of enhancing and stabilizing the supply of energy resources in Korea.<sup>748</sup>

387. POSCO’s cross-owned affiliate Daewoo International Corporation (DWI) initially reported receiving [[\*\*\*]] loans under these programs.<sup>749</sup> At verification, however, DWI presented what it claimed to be a minor correction that it received two additional loans under these programs that it did not report. Upon further examination, USDOC determined that the POSCO’s claim of “two loans” unreported loans was incorrect; and that in fact POSCO had failed to report [[\*\*\*]] *additional* loans (for a total of [[\*\*\*]] loans), more than [[\*\*\*]] as many

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<sup>744</sup> See HRS I&D Memo (August 4, 2016) (Exhibit KOR-98) at 68-69.

<sup>745</sup> See HRS I&D Memo (August 4, 2016) (Exhibit KOR-98) at 69.

<sup>746</sup> See HRS I&D Memo (August 4, 2016) (Exhibit KOR-98) at 69 (citing Countervailing Duty Investigation Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Verification Report: POSCO and DWI (June 30, 2016) (Exhibit KOR-96 (BCI)) at 3).

<sup>747</sup> See HRS I&D Memo (August 4, 2016) (Exhibit KOR-98) at 69.

<sup>748</sup> See CRS I&D Memo (PDM) (December 22, 2015) (Exhibit USA-56) at 23-24.

<sup>749</sup> See Certain Cold-Rolled Steel Flat Products from Korea: Second Supplemental Questionnaire Response, POSCO/Daewoo (November 12, 2015) (Exhibit KOR-74 (BCI)) Exhibits F-11, F-12.



as they initially reported.<sup>750</sup> Due to “the magnitude of change in the reported lending under the specified program,” USDOC found that the submission did not constitute minor corrections, and instead constituted new factual information.<sup>751</sup> As such, USDOC rejected the submission from the record.<sup>752</sup> Moreover due the extensive nature of the modifications, USDOC was not able to fully verify the use of the program.<sup>753</sup>

388. USDOC determined that DWI withheld necessary information requested regarding its use of this program and that, as a result, necessary information was missing from the record.<sup>754</sup> USDOC determined that the use of facts otherwise available was warranted in determining the countervailability of these programs.<sup>755</sup> Further, because DWI failed to provide necessary information regarding program usage, USDOC found that DWI failed to act to the best of its abilities in providing requested information that was in its possession, and that the application of an adverse inference in selecting from among the facts available was warranted in this case to determine the benefit under the program.

389. On July 29, 2016, USDOC published an affirmative final determination which included application of facts available with respect to the loans.<sup>756</sup>

*ii. Hot-Rolled Steel*

390. As in the CRS investigation, POSCO’s cross-owned affiliate DWI initially reported receiving [[\*\*\*]] loans under these programs.<sup>757</sup> As with the other information discovered at the CRS verification, POSCO twice tried to put the untimely and unsolicited information on the record, but the information was rejected.<sup>758</sup> At verification, DWI presented what it claimed to be

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<sup>750</sup> 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) (Exhibit KOR-75(BCI)) at 2-3.

<sup>751</sup> See CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 76.

<sup>752</sup> See Countervailing Duty Investigation: Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Request to Take Action on Certain Barcodes (April 21, 2016) (Exhibit USA-57 (BCI)).

<sup>753</sup> See CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 76.

<sup>754</sup> See CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 76.

<sup>755</sup> See CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 76.

<sup>756</sup> See CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 77.

<sup>757</sup> See Certain Hot-Rolled Steel Flat Products from Korea: Initial Questionnaire Response (November 2, 2015) (Exhibit KOR-90 (BCI)) Exhibits E-1, E-2.

<sup>758</sup> 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).

a minor correction that it received [[\*\*\*]] additional loans under the KORES program.<sup>759</sup> Because of the extensive nature of the corrections presented at verification, USDOC was not able to fully verify POSCO's use of the program.<sup>760</sup> USDOC determined that the submission did not constitute a minor correction, but rather, consisted of impermissible new factual information because of "the magnitude of change in the reported lending under the specified program."<sup>761</sup> As such, USDOC rejected the submission from the record, as the submission did not constitute a minor correction.<sup>762</sup>

391. USDOC determined that DWI withheld necessary information requested regarding its use of this program and that as a result, necessary information was missing on the record.<sup>763</sup> USDOC determined that the use of facts otherwise available was warranted in determining the countervailability of these programs.<sup>764</sup> Further, because DWI failed to provide necessary information regarding program usage, USDOC found that DWI failed to act to the best of its abilities in providing requested information that was in its possession, and that the application of an adverse inference in selecting from among the facts available was warranted.

## ***2. Korea Fails to Show That USDOC Improperly Resorted to Facts Available.***

### ***a. USDOC Properly Resorted to Facts Available with Respect to POSCO's Unreported Affiliated Input Providers.***

392. Korea alleges that USDOC acted inconsistently with Article 12.7 of the SCM Agreement in resorting to facts available with respect to POSCO's failure to provide necessary information pertaining to cross-owned affiliates in the CRS and HRS investigations.<sup>765</sup> Korea claims that POSCO did not refuse access to necessary information, provided all necessary information within a reasonable period of time, and that the missing information was not necessary for the investigation.<sup>766</sup> Additionally, Korea asserts that POSCO did not impede the investigation and

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<sup>759</sup> See Countervailing Duty Investigation Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Verification Report: POSCO and DWI (June 30, 2016) (Exhibit KOR-96 (BCI)) at 3.

<sup>760</sup> See HRS I&D Memo (August 4, 2016) (Exhibit KOR-98) at 72-73.

<sup>761</sup> See HRS I&D Memo (August 4, 2016) (Exhibit KOR-98) at 72-73.

<sup>762</sup> See HRS I&D Memo (August 4, 2016) (Exhibit KOR-98) at 72.

<sup>763</sup> See HRS I&D Memo (August 4, 2016) (Exhibit KOR-98) at 72.

<sup>764</sup> See HRS I&D Memo (August 4, 2016) (Exhibit KOR-98) at 72.

<sup>765</sup> Korea First Written Submission, paras. 391, 524.

<sup>766</sup> Korea First Written Submission, paras. 391-96, 590-95.

acted to the best of its abilities.<sup>767</sup> As the United States will explain, Korea’s claims are completely unsupported by the records in the investigations, and are thus without merit.

393. First, the records in the CRS and HRS investigations do not support Korea’s assertion that POSCO provided all relevant information within a reasonable time.<sup>768</sup> The record shows that in response to multiple requests for necessary information regarding POSCO’s cross-owned affiliated input suppliers,<sup>769</sup> POSCO repeatedly reported, in both the HRS<sup>770</sup> and CRS<sup>771</sup> investigations that “no affiliated companies located in Korea provided inputs used in the production of subject merchandise.”<sup>772</sup>

394. It was only at the CRS verification<sup>773</sup> that USDOC discovered that despite POSCO’s claim that no affiliated or cross-owned companies provided inputs used in the production of subject merchandise,<sup>774</sup> four additional cross-owned affiliates provided raw material inputs that were used in the production of cold-rolled steel.<sup>775</sup> Thus, although POSCO listed these entities on its affiliation chart, neither the chart nor other information POSCO provided prior to verification revealed that these companies produced inputs that could be used in the production

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<sup>767</sup> Korea First Written Submission, paras. 396-400, 606.

<sup>768</sup> Korea First Written Submission, paras. 392-394.

<sup>769</sup> See Department of Commerce Investigation of Certain Cold-Rolled Steel Flat Products: Initial Countervailing Duty Questionnaire (September 16, 2015) (Exhibit USA-52); see also Certain Cold-Rolled Steel Flat Products from Korea: Second Supplemental Questionnaire Response, POSCO/Daewoo (November 12, 2015) (Exhibit KOR-74 (BCI)) at 1; see also CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 9;

<sup>770</sup> See HRS I&D Memo (August 4, 2016) (Exhibit KOR-98) at 61; see also Countervailing Duty Investigation Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Affiliated Company Response POSCO/DWI (October 13, 2015) (Exhibit KOR-91 (BCI)) at 4-5.

<sup>771</sup> See Certain Cold-Rolled Steel Flat Products from Korea: Affiliated Companies Response, POSCO/Daewoo (September 30, 2015) (Exhibit KOR-73 (BCI)) at 4-5; Certain Cold-Rolled Steel Flat Products from Korea: Second Supplemental Questionnaire Response, POSCO/Daewoo (November 12, 2015) (Exhibit KOR-74 (BCI)) at 1; see also CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 9.

<sup>772</sup> See Certain Cold-Rolled Steel Flat Products from Korea: Affiliated Companies Response, POSCO/Daewoo (September 30, 2015) (Exhibit KOR-73 (BCI)) at 4-5; Certain Cold-Rolled Steel Flat Products from Korea: Second Supplemental Questionnaire Response, POSCO/Daewoo (November 12, 2015) (Exhibit KOR-74 (BCI)) at 1; see also CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 9.

<sup>773</sup> 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) (Exhibit KOR-75(BCI)) at 1.

<sup>774</sup> See CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 9.

<sup>775</sup> See CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 65; Countervailing Duty Investigation: Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Verification Report: POSCO and Daewoo International Corporation (April 29, 2016) (Exhibit KOR-75(BCI)) Exhibit 3.

of cold rolled steel.<sup>776</sup> In sum, contrary to Korea’s claim, POSCO did not provide the requested information within a reasonable period of time.

395. Undeterred by POSCO’s inaccurate responses, Korea attempts to shift blame onto USDOC by claiming, with respect to the CRS investigation, “that the USDOC did not focus on this issue until the very last juncture of the investigation, at verification.”<sup>777</sup> However, this argument overlooks POSCO’s repeated response that no cross-owned input suppliers provided inputs that could be used in the production of cold rolled steel.<sup>778</sup> In other words, based on POSCO’s response, no additional follow-up was necessary, with the exception of USDOC’s verification of POSCO’s response. Thus, there initially was no focus on the issue of affiliated suppliers because POSCO falsely claimed that no such affiliated suppliers existed.

396. USDOC determined that the timing of POSCO’s presentation of such information prohibited the authority to investigate further using the list of inputs and companies.<sup>779</sup> Because of the untimely nature and large amounts of data required to fully establish the credibility of the submission, USDOC was unable to verify this information.<sup>780</sup>

397. As explained above, USDOC provided POSCO with sufficient notice of the information it sought to verify and provided POSCO multiple opportunities to provide the requested information. By refusing to provide this information, POSCO placed USDOC in a position where it was unable to analyze whether these cross-owned affiliated input suppliers had availed themselves of certain subsidy programs. Thus, consistent with Article 12.7, USDOC resorted to facts available.

398. With respect to the HRS investigation, Korea claims that POSCO provided USDOC with information regarding affiliated input suppliers “within a reasonable period,” as it was submitted prior to verification.<sup>781</sup> However, USDOC properly rejected this information as being untimely and unsolicited.<sup>782</sup> Specifically, as noted above, the information was new factual information. In

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<sup>776</sup> See Certain Cold-Rolled Steel Flat Products from Korea: Affiliated Companies Response, POSCO/Daewoo (September 30, 2015) (Exhibit KOR-73 (BCI)); see also Certain Cold-Rolled Steel Flat Products from Korea: Initial Questionnaire Response (October 23, 2015) (Exhibit KOR-70 (BCI)) Exhibit 20.

<sup>777</sup> Korea First Written Submission, para. 395.

<sup>778</sup> See Certain Cold-Rolled Steel Flat Products from Korea: Affiliated Companies Response, POSCO/Daewoo (September 30, 2015) (Exhibit KOR-73 (BCI)); see also Certain Cold-Rolled Steel Flat Products from Korea: Initial Questionnaire Response (October 23, 2015) (Exhibit KOR-70 (BCI)) Exhibit 20.

<sup>779</sup> See CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 66-67.

<sup>780</sup> See CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 66-67.

<sup>781</sup> Korea First Written Submission, para. 595.

<sup>782</sup> Letter from Department of Commerce Rejecting POSCO’s Submission of New Factual Information (April 14, 2016) (Exhibit KOR-93).

rejecting the information, USDOC noted, under the Department’s regulations, the deadline for new factual information was 30 days before the preliminary investigation, which passed nearly four months prior to POSCO submitting the data.<sup>783</sup> Moreover, as USDOC noted, “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.”<sup>784</sup> In sum, Korea fails to demonstrate that USDOC’s finding that POSCO failed to submit the data “within a reasonable period” was inconsistent with Article 12.7 of SCM Agreement.

399. Korea also argues that it was inappropriate to apply adverse facts, given the negligible amounts that it claims the input suppliers provided.<sup>785</sup> However, nothing on the record indicates that the amounts were in fact negligible. POSCO also claims, that the inputs were not “primarily dedicated” to the production of cold rolled steel.<sup>786</sup> However, as USDCO notes, whether an input product is primarily dedicated to the production of a downstream product is a decision that can only be made by USDCO.<sup>787</sup> Because POSCO refused to provide the information when requested, the amounts provided by the affiliated companies were never reported and USDOC never had the opportunity to verify the data or decide whether the input product was primarily dedicated to CRS. The arguments are irrelevant. As previously noted, in response to USDOC’s question about whether inputs were provided by an affiliated company, POSCO responded “no affiliated companies located in Korea provided inputs used in the production of the subject merchandise.”<sup>788</sup> As USDOC noted, 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 only provided negligible amounts.<sup>789</sup>

400. This is a point that POSCO’s counsel appeared to understand during the investigation. At the public hearing before USDOC, POSCO’s counsel noted:

So POSCO also, in addition to these errors about the FEZ and the KoRes loans at DWI {sic} POSCO also reported that it didn’t have any Korean cross-zone affiliates that provided inputs that were used to produce the subject merchandise. Admittedly, this statement, when it’s just read in isolation, it seems categorical. POSCO was intending and should have said more clearly was that they didn’t

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<sup>783</sup> Letter from Department of Commerce Rejecting POSCO’s Submission of New Factual Information (April 14, 2016) (Exhibit KOR-93).

<sup>784</sup> HRS I&D Memo (August 4, 2016) (Exhibit KOR-98) at 64.

<sup>785</sup> Korea First Written Submission, paras. 396, 592.

<sup>786</sup> Korea First Written Submission, para. 397.

<sup>787</sup> See CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 67.

<sup>788</sup> See CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 64.

<sup>789</sup> See CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 64; HRS I&D Memo (August 4, 2016) (Exhibit KOR-98) at 61.

have any inputs that were primarily dedicated to the production of the downstream product, because that's the way that they interpreted the question.<sup>790</sup>

401. However, POSCO's "deliberate action to withhold input provider information precluded the Department from analysing input supplier information prior to discovering the information at verification."<sup>791</sup> Finally, contrary to Korea's argument, Korea's assertion that POSCO's "went to extraordinary lengths" during verification – a vague and ultimately unprovable contention – would not demonstrate that POSCO acted to the best of its ability in responding to USDOC's CVD questionnaire.<sup>792</sup>

*b. USDOC Properly Resorted to Facts Available with Respect to POSCO's Unreported Facility Located in a Free Economic Zone (FEZ).*

402. Korea alleges that POSCO did not refuse access to necessary information, acted to the best of its abilities, no necessary information was missing from the record, and in the alternative, that information on the record would have allowed USDOC to fill in the gap.<sup>793</sup> With respect to the CRS investigation, Korea also alleges that USDOC's request to visit the facility was unreasonable.<sup>794</sup> With respect to the HRS investigation, Korea alleges that USDOC had the information a month prior to verification and was thus provided "within a reasonable period."<sup>795</sup> Korea's arguments are not supported by the record.

403. Korea's argument that USDOC's request to visit the facility at the CRS verification was unreasonable overlooks the fact that the timing of USDOC's request was dictated by POSCO's failure to timely report the FEZ facility earlier in the investigation. USDOC provided POSCO with the opportunity to present information on the FEZ facility at the outset of this investigation. Nevertheless, in its initial questionnaire response, POSCO reported that it "has no facilities located in an FEZ."<sup>796</sup> If POSCO had initially reported that it had a facility in an FEZ, USDOC would have been given the opportunity to follow-up prior to verification.

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<sup>790</sup> See 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) (Exhibit USA-60).

<sup>791</sup> See CRS I&D Memo (July 20, 2016) (Exhibit KOR-77); HRS I&D Memo (August 4, 2016) (Exhibit KOR-98) at 61.

<sup>792</sup> Korea First Written Submission, para. 399.

<sup>793</sup> Korea First Written Submission, paras. 403-413, 611-622.

<sup>794</sup> Korea First Written Submission, para. 406.

<sup>795</sup> Korea First Written Submission, para. 406.

<sup>796</sup> See Certain Cold-Rolled Steel Flat Products from Korea: Initial Questionnaire Response (October 23, 2015) (Exhibit KOR-70 (BCI)) at Appendix A-12; see also Countervailing Duty Investigation of Certain Cold-

404. Even so, prior to verification, USDOC provided notice that it would examine possible use of FEZs during verification. USDOC’s verification agenda outline specifically identified the following programs to be verified: “*s. Tax Reductions and Exemptions in Free Economic Zones, t. Exemptions and Reductions of Lease Fees in Free Economic Zones, u. Grants and Financial Support in Free Economic Zones.*”<sup>797</sup> Thus, contrary to Korea’s assertion, this was not a “surprise inquiry,”<sup>798</sup> as USDOC provided POSCO with ample notice to prepare for verification.

405. Korea makes much of the fact that USDOC began its inquiry into the FEZ facility on the last day of the CRS verification, while it was conducting its verification of DWI.<sup>799</sup> However, it was only during DWI’s verification that USDOC discovered the additional facility.<sup>800</sup> In any event, at verification USDOC gave POSCO an opportunity to clarify the location and purpose of the facility.<sup>801</sup> Specifically, as the verification reports notes, after POSCO’s officials were unable to gather information on the facility’s operations and locations;

At this time we suggested we 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 our inquiry. POSCO officials declined this suggestion and stated that at this point, the verification was concluded.<sup>802</sup>

406. Korea also claims that record evidence demonstrated that no information was missing.<sup>803</sup> Specifically, Korea alleges that USDOC had already verified the FEZ program and found no issues and that GOK had reported that POSCO did not receive benefits due to its location in a FEZ.<sup>804</sup> However, as POSCO provided no information in its questionnaire about the FEZ

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Rolled Steel Flat Products from the Republic of Korea: Response of the Government of Korea to Section II of the Department’s September 16, 2015, Questionnaire (October 30, 2015) (Exhibit KOR-84 (BCI)) at 108.

<sup>797</sup> See 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) (Exhibit USA-53 (BCI)) at 12.

<sup>798</sup> Korea First Written Submission, para. 404.

<sup>799</sup> Korea First Written Submission, para. 404.

<sup>800</sup> See CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 73.

<sup>801</sup> CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 73.

<sup>802</sup> 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) (Exhibit KOR-75(BCI)) at 37-38.

<sup>803</sup> Korea First Written Submission, paras. 404, 409.

<sup>804</sup> Korea First Written Submission, paras. 407-411.

facility, USDOC was unable to verify any information with respect to subsidy use by the FEZ facility.<sup>805</sup> Contrary to Korea’s claim that the record confirmed that the FEZ facility did not produce CRS, the purpose and operations of the FEZ facility were never verified, and Korea points to nothing on the record to support its claim.<sup>806</sup> Finally, nothing supports Korea’s argument that as a Korean company, POSCO could not benefit from FEZ subsidies.<sup>807</sup> While certain FEZ subsidies were reportedly limited to foreign-invested enterprises, as USDOC noted, information on the record demonstrates that certain shareholders of POSCO do appear to be foreign and could have been eligible under the program.<sup>808</sup>

407. Korea makes similar arguments with respect to the HRS investigation.<sup>809</sup> These too should be rejected, for the reasons set out with respect to the CRS investigation.

408. Finally, with respect to Korea’s claim that in the HRS investigation it provided the missing information “within a reasonable period,” as it submitted the information to USDOC a month before verification.<sup>810</sup> However, as discussed above, this information was rejected as untimely and unsolicited. As POSCO failed to provide the requested material “within a reasonable time,” USDOC acted consistently with Article 12.7 in applying facts available.

*c. USDOC Properly Resorted to Facts Available with Respect to Unreported Loans with KORES and KNOC Lending Programs.*

409. Korea contends that USDOC’s application of facts available with respect to DWI’s failure to report certain KORES and KNOC loans was inconsistent with Article 12.7 of the SCM Agreement, as USDOC failed to provide a reasoned explanation that any “necessary” information was not provided, that DWI refused access to any “necessary” information, or that DWI significantly impeded the investigation by failing to cooperate.<sup>811</sup> With respect to the CRS investigation, Korea alleges that the information provided at verification only constituted minor corrections and thus should have been accepted.<sup>812</sup> With respect to the HRS investigation, Korea

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<sup>805</sup> See CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 73.

<sup>806</sup> Korea First Written Submission, para. 410.

<sup>807</sup> Korea First Written Submission, para. 409.

<sup>808</sup> CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 74.

<sup>809</sup> Korea First Written Submission, paras. 612-618.

<sup>810</sup> Korea First Written Submission, para. 406.

<sup>811</sup> Korea First Written Submission, paras. 415, 624.

<sup>812</sup> Korea First Written Submission, paras. 418-420.



alleges that POSCO provided the information “within a reasonable period.”<sup>813</sup> These arguments are not supported by the records in the investigations, and are without merit.

410. Korea’s characterization of POSCO’s reporting of the additional use of the loan program at the CRS verification as a minor correction ignores the facts. As noted above, in the CRS investigation DWI initially reported receiving [[\*\*\*]] loans under the KORES and KNOC programs.<sup>814</sup> At verification, DWI presented that it received two additional unreported loans under these programs. However, upon further examination, USDOC determined that POSCO’s characterization of the additional loans as “two loans” was incorrect; and that in fact POSCO had failed to report [[\*\*\*]] loans.<sup>815</sup> Thus, while Korea claims that DWI acted timely in “good faith” the [[\*\*\*]] additional loans that DWI did not report and were discovered by USDOC at verification, indicate that was not the case. Moreover, the facts are contrary to Korea’s claim that USDOC had the corrected data prior to verification and thus could have verified the additional loans.<sup>816</sup>

411. Additionally, as USDOC noted, the additional [[\*\*\*]] unreported loans “represented a significant change in the magnitude of the funding provided under the programs reported in the company’s questionnaire response.”<sup>817</sup> Given the extensive nature of the corrections presented at verification, USDOC was not able to fully verify the use of this program.<sup>818</sup> Thus, USDOC properly resorted to facts available.

412. With respect to the HRS investigation, Korea makes several arguments for why there was no basis for USDOC to resort to facts available. However, all of Korea’s arguments assume POSCO submitted the information “within a reasonable period” and that USDOC incorrectly rejected POSCO’s information. However, for the reasons discussed above, USDOC correctly rejected the unsolicited and untimely information. Moreover, as also discussed above, USDOC’s decision to reject the information was entirely consistent with Article 12.7, which allows administrative bodies to reject information that fails to provide “necessary information within a reasonable period.”

413. As the record shows, DWI withheld necessary information requested by USDOC and as a result, necessary information is missing from the record. Moreover, DWI failed to provide this

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<sup>813</sup> Korea First Written Submission, para. 626.

<sup>814</sup> See Certain Cold-Rolled Steel Flat Products from Korea: Second Supplemental Questionnaire Response, POSCO/Daewoo (November 12, 2015) (Exhibit KOR-74 (BCI)) Exhibits F-11, F-12.

<sup>815</sup> 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) (Exhibit KOR-75(BCI)) at 2-3.

<sup>816</sup> Korea First Written Submission, para. 431.

<sup>817</sup> CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 77.

<sup>818</sup> CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 76.

necessary information and despite USDOC’s requests, failed to act to the best of its abilities in providing requested information. Accordingly, USDOC properly determined that the use of adverse facts with an adverse inference was warranted. Korea has provided no evidence to demonstrate that USDOC acted inconsistently with Article 12.7 of the SCM Agreement in making its determinations.

**3. Korea Fails to Show that USDOC’s Application of Facts Available was Inconsistent with Article 12.7 of the SCM Agreement.**

414. USDOC’s application of facts available with respect to POSCO’s unreported affiliated input suppliers, POSCO’s facility located in a FEZ, and the extent of DWI’s loan usage under the KORES and KNOC program was consistent with Article 12.7 of the SCM Agreement. Korea’s arguments to the contrary are unsupported by the records in the investigation, as well as by the text of the SCM Agreement. Specifically, Korea has failed to show that USDOC rejected “verifiable, timely, and appropriately submitted data.” Korea’s arguments are thus without merit.

415. Korea argues that USDOC selected information for facts available in a manner that was inconsistent with Article 12.7 of the SCM Agreement.<sup>819</sup> Contrary to Korea’s assertions, Korea fails to establish that USDOC acted inconsistently with Article 12.7. As discussed above, the “facts available” refer “to those facts that are in the possession of the investigating authority and on its written record.”<sup>820</sup> An Article 12.7 determination “cannot be made on the basis of non-factual assumptions or speculation.”<sup>821</sup> Notably, Korea points to no record evidence to demonstrate that it was unreasonable for USDOC to conclude that POSCO’s affiliated companies benefited from the subsidy programs and that the FEZ programs were used by POSCO. In fact, USDOC correctly reasoned that, based on POSCO’s deficient responses and the discovery of contradictory evidence at verification, that POSCO’s affiliated companies did benefit from the subsidy programs and that the FEZ programs were used by POSCO.

416. As the record shows, POSCO failed to participate to best of its abilities in providing certain information to USDOC and as a result, there were gaps in the record. Specifically, while POSCO consistently stated that no affiliated companies located in Korea provided inputs used in the production of subject merchandise, at verification, those statements were found to be incorrect.<sup>822</sup> Moreover, POSCO failed to provide questionnaire responses for the affiliated

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<sup>819</sup> Korea First Written Submission, paras. 433.

<sup>820</sup> *US – Countervailing Measures (China) (AB)*, para. 4.178 (citing *US – Carbon Steel (India) (AB)*, para. 4.417).

<sup>821</sup> *US – Countervailing Measures (China) (AB)*, para. 4.178 (quoting *US – Carbon Steel (India) (AB)*, para. 4.417); see also *US – Carbon Steel (India) (AB)*, para. 4.428.

<sup>822</sup> CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 10.

suppliers.<sup>823</sup> As a result, the Department was not provided the opportunity to carefully examine the full extent to which POSCO and the affiliated companies benefited from the subsidies. Contrary to what Korea argues, nothing on the record contradicts this finding.

417. Similarly, Korea ignores the discovery at verification that POSCO had a facility in an FEZ and USDOC was “unable to confirm POSCO’s statement that it has no facilities located in an FEZ, and, therefore, did not receive benefits under this program.”<sup>824</sup> Additionally, with respect to DWI’s additional loans, POSCO failed to accurately report these loans and thus, USDOC was not able to fully verify the use of the program.

418. Regarding Korea’s claim that USDOC’s selection of facts available was with a view to obtaining a result adverse to the interests of POSCO, rather than making an accurate determination, Korea points to nothing on the record to demonstrate that USDOC’s determination is not accurate.<sup>825</sup> Moreover, Article 12.7 of the SCM Agreement, properly interpreted, “acknowledges that non-cooperation could lead to an outcome that is less favourable for the non-cooperating party.”<sup>826</sup>

419. Korea also alleges that in selecting facts available with respect to FEZ facility and DWI’s additional loans, USDOC does not provide any analysis as to why the rate applied to the FEZ facility is “appropriate and applicable to POSCO” or why the rate applied to the loans is “appropriate or relevant to DWI or POSCO.”<sup>827</sup> Korea alleges that USDOC failed to corroborate or apply the chosen information for facts available with special circumspection.<sup>828</sup>

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

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<sup>823</sup> CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 9.

<sup>824</sup> CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 73.

<sup>825</sup> Korea First Written Submission, para. 439.

<sup>826</sup> *US – Carbon Steel (India) (AB)*, para. 4.426 (discussing relevance of Annex II(7) of the Anti-Dumping Agreement in interpreting Article 12.7 of the SCM Agreement).

<sup>827</sup> Korea First Written Submission, paras. 442, 444.

<sup>828</sup> Korea First Written Submission, para. 445.

provide the necessary information, USDOC applies the higher calculated rate for the particular subsidy program at issue, unless information on the record indicates that that rate is inaccurate or inappropriate.

421. Contrary to what Korea argues, as POSCO and DWI are Korean companies benefitting from the same government subsidies as other Korean companies, using the benefits received by other companies is a completely reasonable selection of available facts to fill in the gap resulting from the respondent’s non-cooperation.

422. Because these proceedings were investigations, where USDOC looked at new subsidies never examined before, and thus found there were no subsidy rates available for some identical or similar programs, USDOC examined the subsidy rates from all countervailing duty proceedings involving Korea.<sup>829</sup> Korea’s argument that USDOC continue to seek and use the *best* information<sup>830</sup> from parties that have verifiably provided inaccurate responses is an unsustainable interpretation. Nothing in the text of Article 12.7 provides that rates initially determined in other investigations are somehow precluded from qualifying as an available fact. Further, this interpretation that would be contrary to Article 12.7 which, as the Appellate Body has observed, is “to ensure that the failure of an interested party to provide necessary information does not hinder an agency’s investigation.”<sup>831</sup>

423. In each case in which USDOC identified the particular subsidy rate to be applied as facts available, as a final step, it examined the reliability and relevance of such rates to the extent practicable.<sup>832</sup> In this investigation, no evidence on the record contradicted or raised a question about the subsidy rates that were to be applied as facts available. Thus, contrary to Korea’s assertion,<sup>833</sup> because the subsidy rate for each program was on a par with the same or similar subsidy programs, the rate provides a reasonable estimate of the level of subsidization provided by the government.

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<sup>829</sup> See CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 12.

<sup>830</sup> Korea First Written Submission, paras. 440-441, 443.

<sup>831</sup> *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 293.

<sup>832</sup> See CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 15; *see also*, Results of Redetermination Pursuant to Court Remand in *POSCO et al. v. United States*, pertaining to the cold-rolled steel investigation (in which USDOC explained, that in accordance with the statute, “when {USDOC} relies on secondary information rather than on information obtained in the course of an investigation or review,{USDOC}, shall, to the extent practicable corroborate that information from independent sources that are reasonably at their disposal.” “Corroborate means that the Secretary will examine whether the secondary information to be used has probative value.”) (June 6, 2018) (Exhibit USA-58) at 19. The court affirmed Commerce’s redetermination of POSCO’s subsidy rate in *POSCO et al. v. United States*, Slip Op. 18-115 (September 10, 2018) (Exhibit USA-59).

<sup>833</sup> Korea First Written Submission, para. 449-450.

424. Finally, with respect to Korea’s claim that in the HRS investigation USDOC failed to use the relevant “verifiable” information on the record, as discussed above, the information submitted prior to the HRS verification was properly found to be unsolicited and untimely.<sup>834</sup> Accordingly, the information was not, as Korea postulated, verifiable information on the record.

### **C. Korea’s Dependent Claims under Articles 10, 19.4, and 32.1 of the SCM Agreement**

425. Korea’s allegations that the United States is in breach of Articles 10, 19.4, and 32.1 of the SCM Agreement are entirely consequential—that is, dependent on its substantive claims under Article 12.7 of the SCM Agreement. At the end of its arguments with respect to each countervailing duty investigation, Korea argues that, if the Panel accepts its separate substantive claim, this breach “automatically” results in the breach of Articles 10, 19.4, and 32.1.<sup>835</sup> Korea offers no argument or evidence to support any independent breach of those provisions.

426. If the Panel rejects Korea’s substantive claims, then by Korea’s own consequential logic and the absence of any argumentation or evidence, there would be no basis to find a breach of Articles 10, 19.4, and 32.1 of the SCM Agreement. Therefore, if the Panel rejects Korea’s claim under Article 12.7 of the SCM Agreement, Korea’s consequential claims under Articles 10, 19.4, and 32.1 necessarily fail.

427. On the other hand, if the Panel agreed with Korea’s substantive allegations, there would be no basis to decide Korea’s consequential claims under Articles 10, 19.4, and 32.1 of the SCM Agreement. As an initial matter, the United States does not concede that such breaches are “automatic.” In any event, it is by now widely accepted that a panel “need only address those issues which must be addressed in order to resolve the matter in issue in the dispute.”<sup>836</sup> Thus, it is appropriate for a panel to “to refrain from making multiple findings that the same measure is inconsistent with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute.”<sup>837</sup>

428. If the Panel agreed with Korea’s substantive allegations, there would be no useful purpose in deciding what Korea acknowledges are entirely dependent claims under Articles 10, 19.4, and 32.1 of the SCM Agreement. Nor would deciding such claims provide any additional guidance that would be useful regarding implementation of any recommendations adopted by the

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<sup>834</sup> 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).

<sup>835</sup> Korea First Written Submission, paras. 452-453, 654-655.

<sup>836</sup> *US – Wool Shirts and Blouses (AB)*, p. 19. See also DSU, Art. 3.7 (“The aim of the dispute settlement mechanism is to secure a positive solution to a dispute.”).

<sup>837</sup> *Canada – Wheat and Grain Imports (AB)*, para. 133 (emphasis original). See also *Argentina – Import Measures (US) (AB)*, para. 5.190.

DSB. Indeed, previous panels have abstained from considering claims under these provisions for these exact reasons.<sup>838</sup> Therefore, if the Panel were to find a breach of Article 12.7 of the SCM Agreement, there is no basis to decide Korea’s claims under Articles 10, 19.4, and 32.1.

#### **IV. KOREA’S PURPORTED “AS SUCH” CHALLENGE TO AN ALLEGED UNWRITTEN MEASURE**

##### **A. Legal Framework: “As Such” Claims against Unwritten Measures**

429. As compared to an “as applied” challenge, an “as such” challenge requires that a complaining party prove additional elements—namely, that the challenged measure will necessarily result in a breach of a WTO obligation in all instances when applied in the future. The Appellate Body supports this view:

“{A}s such” challenges against a Member’s measures in WTO dispute settlement proceedings are serious challenges. By definition, an “as such” claim challenges laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member’s conduct—not only in a particular instance that has occurred, but in future situations as well—will necessarily be inconsistent with that Member’s WTO obligations. In essence, complaining parties bringing “as such” challenges seek to prevent Members ex ante from engaging in certain conduct. The implications of such challenges are obviously more far-reaching than “as applied” claims.<sup>839</sup>

Thus, to succeed on an “as such” claim, Korea must show that the relevant measure “will necessarily be inconsistent with {the United States’} WTO obligations.”<sup>840</sup>

430. Moreover, a challenge to an unwritten measure must meet a particularly high threshold, as the existence of an unwritten measure cannot be lightly assumed.<sup>841</sup> As the Appellate Body reasoned:

When an “as such” challenge is brought against a “rule or norm” that is expressed in the form of a written document – such as a law or regulation – there would, in most cases, be no uncertainty as to the existence or content of the measure that

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<sup>838</sup> See *US – Pipe and Tube Products (Panel)*, paras. 7.343, 7.347; *US – Lead and Bismuth II (Panel)*, para. 6.91.

<sup>839</sup> *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 172.

<sup>840</sup> *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 172. See also *EC – IT Products (Panel)*, para. 7.154 (“in general, measures challenged ‘as such’ should have general and prospective application, and ‘necessarily’ result in a breach of WTO obligations”).

<sup>841</sup> See *US – Zeroing (AB)*, paras. 196, 204.

has been challenged. The situation is different, however, when a challenge is brought against a “rule or norm” that is *not* expressed in the form of a written document. In such cases, the very existence of the challenged “rule or norm” may be uncertain.<sup>842</sup>

431. The Appellate Body further reasoned that:

In our view, when bringing a challenge against such a “rule or norm” that constitutes a measure of general and prospective application, a complaining party must clearly establish, through arguments and supporting evidence, at least that the alleged “rule or norm” is attributable to the responding Member; its precise content; and indeed, that it does have general and prospective application. It is only if the complaining party meets this high threshold, and puts forward sufficient evidence with respect to each of these elements, that a panel would be in a position to find that the “rule or norm” may be challenged, as such. This evidence may include proof of the systematic application of the challenged “rule or norm”. Particular rigour is required on the part of a panel to support a conclusion as to the existence of a “rule or norm” that is *not* expressed in the form of a written document. A panel must carefully examine the concrete instrumentalities that evidence the existence of the purported “rule or norm” in order to conclude that such “rule or norm” can be challenged, as such.<sup>843</sup>

432. Furthermore, “{d}epending on the specific measure challenged and how it is described or characterized by a complainant, however, other elements may need to be proven.”<sup>844</sup> Korea’s failure to identify a specific measure with even any level of clarity—in addition to meaning that no “as such” claim against an unwritten measure is properly within the Panel’s terms of reference—also makes it impossible to identify precisely which additional elements Korea would need to prove.

433. Korea also has raised the possibility of an unwritten measure in the form of so-called “ongoing conduct,” but only in the alternative. Specifically, Korea states, “{i}n the alternative, should the Panel consider that the use of AFA does not meet the criteria for being a rule or norm of general and prospective application, Korea considers that it in any case constitutes a form of ‘ongoing conduct’.”<sup>845</sup> The United States would note that it has serious concerns about the rationale articulated by the Appellate Body in *US – Continued Zeroing* for finding an entirely new type of “measure” to be subject to WTO dispute settlement. That rationale is best regarded

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<sup>842</sup> *US – Zeroing (AB)*, para. 197 (emphasis original).

<sup>843</sup> *US – Continued Zeroing (AB)*, para. 198.

<sup>844</sup> *Argentina – Import Measures (AB)*, para. 5.110.

<sup>845</sup> Korea First Written Submission, para. 941.

as *obiter dictum*, as any finding of breach was entirely consequential to the findings of inconsistency in relation to the series of existing determinations, adding nothing to the DSB recommendations. Furthermore, the alleged “ongoing conduct” was zeroing in antidumping proceedings, and zeroing had already been found to be an unwritten measure that could be challenged as such.

434. Moreover, the circumstances relied upon for a finding of “ongoing conduct” that could be challenged as a measure were narrow. The Appellate Body only made such findings with respect to four of 18 antidumping cases at issue in that dispute. Each of the four cases where the Appellate Body concluded that there was “a sufficient basis for {the Appellate Body} to conclude that the zeroing methodology would likely continue to be applied in successive proceedings”<sup>846</sup> included: (1) the use of the zeroing methodology in the initial less than fair value investigation; (2) the use of the zeroing methodology in four successive administrative reviews; and (3) reliance in a sunset review upon rates determined using the zeroing methodology.

435. Where there was “a lack of evidence showing that zeroing was used in one periodic review listed in the panel request” or “the sunset review determination was excluded from the Panel’s terms of reference,” the Appellate Body found that “the Panel made no finding confirming the use of the zeroing methodology in successive stages over an extended period of time whereby the duties are maintained.”<sup>847</sup> Consequently, the Appellate Body was “unable to complete the analysis on whether the use of the zeroing methodology exists as an ongoing conduct in successive proceedings.”<sup>848</sup>

436. In any event, the possibility of “ongoing conduct” constituting a measure that can be challenged is ultimately moot in the context of this dispute. Korea raises this allegation only in the alternative. It identifies no elements of proving the existence of ongoing conduct that differ from those necessary to prove the existence of a rule or norm. Therefore, where Korea failed to prove the existence of a rule or norm—the only scenario where its alternative allegation of ongoing conduct could theoretically become relevant—Korea necessarily would fail to prove the existence of ongoing conduct. For this reason, the United States addresses the alleged “unwritten measure,” and arguments should be understood to apply with equal force regardless of whether such an unwritten measure were characterized as a rule or norm or ongoing conduct.

**B. In Addition to Korea’s Failure to Clearly Identify the Measure It Purportedly Challenges, Korea Errs in Its Attempt to Establish that Any Unwritten Measure is**

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<sup>846</sup> *US – Continued Zeroing (AB)*, para. 191.

<sup>847</sup> *US – Continued Zeroing (AB)*, para. 194.

<sup>848</sup> *US – Continued Zeroing (AB)*, para. 194.



**“As Such” Inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement or Article 12.7 of the SCM Agreement.**

437. As Korea acknowledges,<sup>849</sup> a Member attempting to challenge an unwritten measure<sup>850</sup> “as such” must first establish the existence of the alleged unwritten measure, which requires showing (1) the precise content of the alleged rule or norm; (2) that this alleged measure is attributable to the responding Member; and (3) that this alleged measure has general and prospective application.<sup>851</sup> Moreover, if a complaining Member can establish the existence of an unwritten measure, to substantiate a breach “as such,” the Member must demonstrate that the measure—“not only in a particular instance that has occurred, but in future situations as well—will *necessarily* be inconsistent with {the responding} Member’s WTO obligations.”<sup>852</sup>

438. As stated previously, Korea has failed to clearly identify what alleged unwritten measure it is even attempting to challenge. This deprives the United States of the opportunity to put forward a full legal rebuttal. Nevertheless, to the extent that aspects of Korea’s arguments are comprehensible in the absence of any identification of the supposed unwritten measure, the United States addresses those arguments. In the event that Korea could somehow fix the incoherent description in the panel request of the alleged unwritten measure—a result that would be inconsistent with the DSU and procedural fairness—the United States reserves the right to make additional arguments with respect to the as such claim.

***1. Korea Fails to Demonstrate the Existence of an Unwritten Measure Capable of Being Challenged “As Such.”***

439. As discussed elsewhere, including in our preliminary ruling request, Korea fails to provide a coherent argument regarding an as such claim against an alleged unwritten measure. Nevertheless, for the sake of completeness, below the United States highlights this and additional errors where possible in the absence of a clearly identified measure, roughly following the taxonomy of Korea’s submission. This begins with Korea’s attempt to establish that an unwritten measure exists, including its precise content, its attribution to the United States, and its general and prospective application. Each of these elements is addressed in turn below.

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<sup>849</sup> See Korea First Written Submission, para. 886.

<sup>850</sup> To the extent Korea included “as such” claims against written measures in its panel request, it has abandoned any such claims. Accordingly, these potential “as such” claims against written measures no longer form part of this matter.

<sup>851</sup> See *US – Continued Zeroing (AB)*, para. 198. As discussed above, a separate discussion of an unwritten measure in the form of “ongoing conduct”—as opposed to a rule or norm—is inconsequential in this dispute. Indeed, Korea does not set out any elements that differentiate between the existence of a rule or norm and the existence of ongoing conduct.

<sup>852</sup> *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 172 (emphasis added).

a. *Rule or Norm of General and Prospective Application*

i. *Precise content*

440. The United States already demonstrated in the preceding preliminary ruling request that Korea failed to establish the existence of any unwritten measure with precise content. In Section V.3.1 of its first written submission in which Korea purports to address directly the requirement to establish the precise content of an unwritten measure, Korea asserts that “{t}he precise content of the AFA Norm is clear from both the text of Section 776, as amended by Section 502 of the TPEA, and the consistent practice of the USDOC.”<sup>853</sup> In addition to the errors already highlighted in the U.S. preliminary ruling request, it is nonsensical to attempt to prove the existence of an unwritten measure by referring to the content of a written measure. For the reasons stated in the U.S. preliminary ruling request, which the United States will not repeat here, Korea’s attempt to establish the “precise content” of an unwritten measure fails.

441. Moreover, in Section V.5.2.1 of its first written submission, Korea argues that the findings in the *US – Antidumping Methodologies* Appellate Body report confirm the precise content of the alleged unwritten measure here. This is absurd. The precise content of the unwritten measure in *US – Anti-dumping Methodologies* was as follows:

Whenever the USDOC considers that an NME-wide entity has failed to cooperate to the best of its ability, it systematically makes an adverse inference and selects, to determine the rate for the NME-wide entity, facts that are adverse to the interests of that fictional entity and each of the producers/exporters included within it.<sup>854</sup>

This measure has no relevance to this dispute, as USDOC has never treated Korea as a non-market economy. Therefore, there is no reasoning that would suggest the precise content of the measure in that dispute somehow proves different precise content supposedly at issue in this dispute. Accordingly, Korea’s discussion of this report offers no support to its “precise content” argument.<sup>855</sup>

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<sup>853</sup> Korea First Written Submission, para. 896.

<sup>854</sup> *US – Anti-Dumping Methodologies (AB)*, para. 5.109.

<sup>855</sup> Korea also argues in Section V.5.1 of its first written submission that *US – Carbon Steel* confirms the use of adverse inferences when resorting to facts available as a “practice.” See Korea First Written Submission, paras. 966-974. Korea does not explain what conclusions it requests the Panel to reach even if it could establish a “practice” as described in that dispute. In any event, that dispute did not consider an unwritten measure, which is what Korea is alleging here. In addition, as Korea recognizes, the claim there failed. That report offers no support to any potential as such claim in this dispute.

*ii. Attributable to the United States*

442. The analysis of this condition highlights the procedural unfairness of forcing the United States to mount a defense of an undefined measure. It is nearly impossible to rebut a claim that an unwritten measure is attributable to the United States without knowing what the unwritten measure might be.

443. Korea’s argument to the contrary asserts in its entirety:

There can be little doubt about the fact that the use of AFA by the USDOC, a U.S. government agency, is attributable to the United States. In fact, the USDOC’s use of the AFA Norm or AFA Ongoing Conduct is based on language from U.S. statute that provides for the development of this norm or ongoing conduct.<sup>856</sup>

444. Despite comprising just two sentences, Korea’s argument in this respect is itself inconsistent. The first sentence—a conclusory statement with no evidence in support—addresses “the use of AFA by the USDOC.” The second sentence, by contrast, refers to “the USDOC’s use of the AFA Norm or AFA Ongoing Conduct.” It is possible that the use of adverse inferences in resorting to facts available broadly is attributable to the United States, but that some alleged unwritten measure is not. Korea’s burden is to show that the unwritten measure it is supposedly challenging—whatever its precise content—is attributable to the United States. Unless Korea is challenging the USDOC’s use of adverse inferences when resorting to facts available generally (*i.e.*, in its entirety), it is irrelevant whether “the use of AFA by the USDOC” is attributable to the United States; rather, what is relevant is whether the measure Korea is supposedly challenging is attributable to the United States.

445. Moreover, Korea provides no evidence or argumentation to show that the U.S. statute provides for the development of some unwritten measure that is now being challenged. Of course, the United States cannot offer much reasoning in rebuttal due to the uncertainty surrounding what the alleged unwritten measure even is. However, the United States observes that there is no explicit direction in the statute for USDOC to develop a particular rule of any kind. And, again, if it is the statute that somehow supposedly requires the WTO inconsistency, then the appropriate challenge would be to the statute.

446. For these reasons—and especially because Korea has not even consistently addressed a single alleged measure with consistent “precise content”—Korea fails to establish that any unwritten measure is attributable to the United States.

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<sup>856</sup> Korea First Written Submission, para. 925.

iii. *General and prospective application*

447. Korea acknowledges that, to challenge an unwritten measure “as such,” the complaining party must show that it has general and prospective application.<sup>857</sup> Yet, the argument that follows underscores again the utter incoherence that stems from Korea’s failure to challenge an unwritten measure with consistent precise content.

448. In attempting to establish that the alleged unwritten measure has *general* application, Korea argues that “{n}othing in the U.S. statute limits the application of AFA to certain producers only.”<sup>858</sup> But Korea is not challenging the U.S. statute! This argument, at best, is relevant to whether the U.S. statute has general application. It is completely silent on whether some unwritten measure has general application.

449. Korea confuses the issue further by arguing next that 306 cases involving the use of adverse inferences when resorting to facts available cover a broad range of products and producers.<sup>859</sup> This argument, at best, is relevant to whether the use of adverse inferences when resorting to facts available has general application. If Korea is challenging the use of adverse inferences when resorting to facts available generally (*i.e.*, without more)—something that is clearly not in its panel request—it would need to be consistent throughout the analysis of various other elements required for sustaining an as such claim. Korea would need to demonstrate, *inter alia*, that the use of adverse inferences when resorting to facts available necessarily breaches Article 6.8 and Annex II of the AD Agreement and Article 12.7 of the SCM Agreement.

450. Conversely, if Korea intends to show that a more narrow rule or norm or ongoing conduct necessarily breaches these conditions, it would first need to show that this more narrow unwritten measure has general application. Korea utterly fails to attempt to substantiate its claim with any consistency in terms of the precise content of the alleged unwritten measure. Its argument regarding the supposed general application of the unwritten measure represents a part of this failure.

451. Korea’s argument regarding *prospective* application suffers from the same flaws. Korea argues that “the statutory language of Section 776 of the Tariff Act of 1930 on which the Norm is based applies to all current and future proceedings.”<sup>860</sup> Again, Korea does not challenge the statute. Therefore, even if Korea could establish that the statute has prospective application, it would be of no consequence.

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<sup>857</sup> See Korea First Written Submission, paras. 926-928.

<sup>858</sup> Korea First Written Submission, para. 930.

<sup>859</sup> See Korea First Written Submission, para. 931.

<sup>860</sup> Korea First Written Submission, para. 933.

452. Korea argues that “consistent references to this statutory basis in the more than 300 cases identified by Korea confirm that the AFA Norm is to be applied in the future.”<sup>861</sup> However, Korea fails to explain the relevance of repeated citations in USDOC determinations to the statute. The statute in question governs USDOC’s conduct of antidumping and countervailing duty investigations. There is nothing surprising or meaningful in such citations. If Korea were alleging that the statute required USDOC to engage in WTO-inconsistent behavior, then it would need to have challenged the statute. If the supposed WTO-inconsistent conduct is not required by the statute, then the prospective application of the statute is irrelevant.

453. Korea next alleges repeated USDOC references to USDOC’s alleged “‘practice’ of selecting a rate for the non-cooperating producer that is ‘sufficiently adverse’ to ensure that it does not obtain a result more favorable than if it had fully cooperated.”<sup>862</sup> However, in the very next sentence, Korea discusses USDOC’s supposed “practice” of selecting the highest margin alleged in the petition or the highest rate calculated in any of the proceedings.<sup>863</sup> This would be a different alleged practice. It is unclear if Korea is attempting to show that either of these different alleged “practices” constitutes an unwritten measure that Korea sought to challenge.

454. Korea alleges that “USDOC’s treatment of non-cooperating foreign producer{s} or exporter{s} in more than 300 determinations...reveals that the AFA Norm reflects an underlying policy that will continue in the future.”<sup>864</sup> This sentence seems to suggest that the challenged unwritten measure is that USDOC applies adverse inferences whenever a foreign producer or exporter fails to cooperate to the best of its ability. Again, however, Korea does not argue consistently with respect to such an alleged measure even within the section of its first written submission addressing the purported general and prospective nature of the unwritten measure.

455. Accordingly, the United States reiterates that Korea’s submission simply fails to present a coherent as such claim and deprives the United States of a fair opportunity to provide a clear legal rebuttal. Not only is Korea required to argue consistently with respect to a single alleged unwritten measure, but it was required to disclose what that measure is in its panel request. Its failure to do so renders any “as such” claim to an unwritten measure outside the Panel’s terms of reference.

456. Finally, in Section V.5.2.2 of its first written submission, Korea argues that the findings in the *US – Antidumping Methodologies* Appellate Body report demonstrate that the alleged unwritten measure here has general and prospective application. According to Korea, the measure at issue in that dispute and the one Korea purportedly challenges here share the

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<sup>861</sup> Korea First Written Submission, para. 933.

<sup>862</sup> Korea First Written Submission, para. 935.

<sup>863</sup> Korea First Written Submission, para. 935.

<sup>864</sup> Korea First Written Submission, para. 937.

“identical content.”<sup>865</sup> But this is obviously incorrect, even accounting for the many descriptions of the alleged unwritten measure in this dispute.

457. As discussed above,<sup>866</sup> the measure at issue in *US – Anti-dumping Methodologies* was, among other things, related to NME-wide entities, which are not even arguably relevant to this proceeding. Therefore, Korea’s discussion of this report offers no support to its argument that any alleged unwritten measure has general and prospective application.

*b. Ongoing Conduct*

458. Korea argues that “{i}n the alternative, should the Panel consider that the use of AFA does not meet the criteria for being a rule or norm of general and prospective application, Korea considers that it in any case constitutes a form of ‘ongoing conduct’.”<sup>867</sup> Korea argues that the elements for establishing the existence of an unwritten measure in the form of ongoing conduct overlap completely with the elements for establishing the existence of an unwritten measure in the form of a rule or norm with general and prospective application.<sup>868</sup>

459. If the inquiry does not include even a single condition that is not already covered by the rule or norm inquiry, it is difficult to see its utility. As an argument made entirely in the alternative, it would only be relevant if Korea fails to establish the existence of a rule or norm. But, in that scenario, the identical criteria would mean that Korea necessarily could not establish the existence of an unwritten measure in the form of ongoing conduct.

460. In any event, having no need to repeat the exact same argument it offered previously, Korea takes a marked detour and addresses at length three alleged methodologies that it describes as “specific examples of the USDOC’s AFA Ongoing Conduct.” It is unclear how distinct methodologies—none of which was raised in Korea’s panel request—could all serve as examples of a single measure, and Korea offers no such explanation.

461. Instead, Korea explains its understanding of these supposed methodologies and then summarily concludes that they breach the United States’ WTO obligations.<sup>869</sup> It is unclear how this discussion is relevant to the existence of an unwritten measure in the form of ongoing conduct.

462. Eventually, Korea concludes with the following reasoning:

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<sup>865</sup> Korea First Written Submission, para. 995.

<sup>866</sup> *See supra*, Section IV.B.1.a.i.

<sup>867</sup> Korea First Written Submission, para. 941.

<sup>868</sup> *See* Korea First Written Submission, paras. 942-943.

<sup>869</sup> Korea First Written Submission, paras. 949-957.

By repeatedly referring to such methodologies as its practice, the USDOC unequivocally declared that it would continue to apply such methodologies whenever triggered by particular circumstances.

Given their general application across product categories and countries, their repeated application and systematic use over time, and their acknowledged status as a standard “practice” of the USDOC, there is a great likelihood that these three specific iterations of the AFA Ongoing Conduct will also be applied in the future whenever particular situations arise. Moreover, in addition to satisfying the requirement as form of ongoing conduct, these three specific iterations of the AFA Ongoing Conduct evidently meet the requirements of being rules or norms of general and prospective application.<sup>870</sup>

463. This passage seemingly suggests that Korea is attempting to prove the likelihood of future use of three *different* alleged “methodologies.” But, again, Korea does not appear to be challenging these three methodologies as unwritten measures—and it cannot, as they are clearly outside the Panel’s terms of reference because Korea’s panel request unambiguously omits all three of these alleged “methodologies.”

464. Finally, in Section V.5.3 of its first written submission, Korea attempts to rely on the panel report in *US – Supercalendered Paper* to support the existence of a unwritten measure in the form of ongoing conduct. The unwritten measure at issue in that dispute consisted of “USDOC asking the ‘other forms of assistance’ question, and where the USDOC ‘discovers’ information that it deems should have been provided in response to that question, applying AFA to determine that the ‘discovered’ information amounts to countervailable subsidies.”<sup>871</sup>

465. This is not one of the many formulations of the alleged unwritten measure in Korea’s first written submission. Even Korea acknowledges that—whatever the measure is that Korea supposedly challenges here—it is not the measure at issue in *US – Supercalendered Paper*.<sup>872</sup>

466. Korea argues that “{t}he same reasoning applies to this dispute.”<sup>873</sup> However, after discussing the findings specific to the measure at issue in *US – Supercalendered Paper*, Korea fails to offer even a single sentence of analysis that would show that there is any valid basis to

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<sup>870</sup> Korea First Written Submission, paras. 958-959 (internal citation omitted).

<sup>871</sup> *US – Supercalendered Paper (Panel)*, para. 7.316.

<sup>872</sup> See Korea First Written Submission, paras. 997-1000.

<sup>873</sup> Korea First Written Submission, para. 1000.

reason by analogy in this dispute. Instead, Korea summarily asserts, with no evidence or analysis, that the same “reasoning” applies here.<sup>874</sup>

467. Thus, Korea also fails to establish the existence of any unwritten measure in the form of ongoing conduct.

**2. *Korea’s Argument that an Unwritten Measure Breaches Article 6.8 and Annex II of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement Suffers from Several Additional Flaws.***

468. Because Korea has failed to explain with any coherence what alleged unwritten measure it even attempts to challenge, the United States is limited in its ability to offer a full rebuttal. Indeed, this underscores the procedural unfairness arising from Korea’s failure to identify the alleged measure at issue. However, in addition to taking the unambiguous position that it maintains no unwritten measure, however described, that is as-such inconsistent with these provisions, the United States identifies below additional errors in Korea’s argument.

469. In Section V.6.1 of its first written submission, Korea argues that statistics confirm the existence of some sort of unwritten measure. The statistics Korea discusses, however, are wholly incapable of supporting Korea’s conclusion. Furthermore, by focusing on a few specific factual cases and characterizing what occurs “sometimes,” Korea effectively argues for a finding of WTO inconsistency “as applied,” despite that it is attempting to support its as such claim.

470. Korea refers to a chart of 319 cases in which USDOC allegedly used adverse inferences when resorting to facts available.<sup>875</sup> Korea alleges that, in all but 13 cases, “USDOC included some language regarding ‘failure to cooperate’.”<sup>876</sup> Korea then concludes that “non-cooperation equals the use of AFA.”<sup>877</sup>

471. As an initial matter, it is completely unclear how this vague assertion would support any sort of colorable argument regarding a supposed breach of the Anti-Dumping Agreement or the SCM Agreement. To the contrary, as discussed above in our section on the WTO legal framework, paragraph 7 of Annex II of the Anti-Dumping Agreement specifically states that “if an interested party does not cooperate,” the result of the investigation may be “less favorable to the party than if the party did cooperate.” The United States is simply at a loss to understand what Korea’s legal argument might be.

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<sup>874</sup> See Korea First Written Submission, para. 1000.

<sup>875</sup> Korea First Written Submission, para. 1009.

<sup>876</sup> Korea First Written Submission, para. 1011.

<sup>877</sup> Korea First Written Submission, para. 1011.



472. Furthermore, Korea’s approach is incapable as a logical matter of supporting the conclusion it draws regarding the existence of some sort of unwritten measure. Korea started with cases in which adverse inferences allegedly were applied. The fact that—according to Korea—all but 13 cases included some language regarding failure to cooperate simply shows the frequency of non-cooperation findings in those 319 cases. However, it is incapable of establishing the frequency with which USDOC applies adverse inferences when it finds non-cooperation. At minimum, one would need to start with the universe of instances in which USDOC found non-cooperation, and then measure how often within the context of those instances USDOC applied adverse inferences in resorting to facts available. (Moreover, the fact that—according to Korea’s own data—over a dozen of the cases did not cite a failure to cooperate refutes Korea’s argument.)

473. The United States is not suggesting any particular meaning that could be ascribed to that type of exercise. Rather, the United States merely points out that Korea’s approach, as a logical matter, is fundamentally incapable of demonstrating the conclusion it draws.

474. Korea next filters out instances of a complete or partial lack of response and cases involving NME producers, resulting in a subset of 105 cases.<sup>878</sup> Korea then reduces the subset to 90 cases by “limit{ing} the overview to situations where the interested parties provided responses, but USDOC found some elements of those responses to be deficient,” although it is unclear what Korea excludes in this step. As an initial matter, it is unclear for what purpose Korea is conducting this exercise.

475. Moreover, this is still just a subset of cases that were originally selected because adverse inferences were applied. Therefore, it remains difficult or impossible to draw conclusions about the correlation between some other factor and the use of such inferences.

476. In any event, after filtering the cases, Korea asserts:

In all of these 90 cases, the USDOC applied AFA in a mechanistic manner solely based on the finding that party failed to cooperate to the best of its ability and without engaging in the required comparative process of reasoning and evaluation and as assessment of the available facts on the record to identify the facts that lead to an accurate determination.<sup>879</sup>

Korea cites to no evidence to support its assertion and provides no explanation of how it reached this conclusion. Korea provides no further analysis of these 90 cases or the available facts on the

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<sup>878</sup> Korea First Written Submission, paras. 1013-1014.

<sup>879</sup> Korea First Written Submission, para. 1017.

90 separate records. Korea’s conclusory, statement has no probative value regarding any question that might be relevant to a panel’s analysis.

477. Korea does, however, make multiple assertions that misunderstand the function of an as such challenge. First, Korea states:

Korea is not suggesting that the use of AFA by the USDOC in situations of a complete lack of response or a complete failure to participate in an investigation or review is justified. However, again, it seeks to focus on the most egregious situation where the use of AFA as a Norm or as part of Ongoing Conduct is in any case not consistent with the relevant WTO obligations of the United States.<sup>880</sup>

478. Again, the United States is limited in what it can offer in rebuttal without knowing what exactly the supposed “AFA Norm” or “Ongoing Conduct” is. Nevertheless, Korea’s statement that it “seeks to focus on the most egregious situation where the {alleged unwritten measure} is in any case not consistent with the relevant WTO obligations of the United States,” implies that there are less egregious situations in which the alleged unwritten measure (whatever it is) *is* consistent with the United States’ WTO obligations. Korea implies that perhaps among these are “situations of a complete lack of response or a complete failure to participate.”

479. But this is the hallmark of a measure that is *not* WTO inconsistent “as such.” Rather, Korea is describing a measure that arguably is WTO inconsistent “as applied” in “the most egregious situation.”

480. Elsewhere, Korea states:

{E}ven assuming that the drawing of adverse inferences could be justified in situations of fraud or total lack of cooperation, the USDOC’s use of AFA is agnostic with respect to such considerations and selects adverse facts available in a similar way in all situations of non-cooperation.<sup>881</sup>

481. As an initial matter, in this passage, Korea seemingly focuses on an alleged failure to consider the presence of fraud or total lack of cooperation in choosing from among the facts available. This is yet another formulation of a potential measure, one that Korea has failed to develop legally or factually.

482. In any event, Korea appears to recognize that the use of adverse inferences in cases of fraud or total lack of cooperation would be justified. It alleges that USDOC is agnostic regarding these two considerations, and then implies that USDOC would not be justified in its

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<sup>880</sup> Korea First Written Submission, para. 1016.

<sup>881</sup> Korea First Written Submission, para. 1023.

use of adverse inferences in selecting facts available in cases where fraud or total lack of cooperation are absent. But, again, this is just another way of arguing that the use of facts available is justified in some situations, and not “as applied” in others. This argument effectively concedes that there is no measure that fits with any theory of an alleged “as such” breach.

483. In Section V.6.2 of its first written submission, Korea provides what it refers to as a “substantive analysis.” Korea argues on the basis of a table created by Korea that purports to summarize certain factors related to 12 of the 90 determinations Korea previously discussed. Korea does not indicate how it chose these 12 determinations or on what basis the Panel could conclude that they are representative of other determinations. Identifying 12 determinations, out of hundreds that Korea itself cites, simply cannot support the existence of some sort of unwritten measure of general and prospective application.

484. Korea then puts forward four arguments it derives from this table. First, according to Korea, USDOC in those 12 determinations resorted to the use of adverse inferences without considering the specific facts that led to the finding of non-cooperation.<sup>882</sup> Korea criticizes USDOC for failing to distinguish between, for example, “total lack of cooperation” and where requested information was not provided for reasons USDOC considered invalid.<sup>883</sup> However, Korea never even attempts to argue that the Anti-Dumping Agreement or the SCM Agreement requires investigating authorities to make such a distinction. Moreover, none of the many formulations of the alleged unwritten measure have described a prohibition on USDOC considering the facts surrounding the finding of non-cooperation.

485. Second, Korea argues that USDOC’s approach to facts available and adverse inferences serves a “punitive function.”<sup>884</sup> Korea offers no evidence of this. It relies on USDOC’s supposed references to the relevant statute, again without acknowledging that it is not challenging the statute.<sup>885</sup> Moreover, it recalls rulings by U.S. courts, but ignores that U.S. courts have stated unambiguously that, under U.S. law, application of adverse inferences in resorting to facts available *cannot be punitive*.<sup>886</sup>

486. Third, Korea argues that the facts selected invariably are adverse to the interests of the non-cooperating producer. It is unclear what, if anything, beyond the application of adverse inferences in resorting to facts available Korea contemplates when it uses the phrase “adverse to

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<sup>882</sup> Korea First Written Submission, para. 1023.

<sup>883</sup> Korea First Written Submission, para. 1023.

<sup>884</sup> Korea First Written Submission, para. 1024.

<sup>885</sup> See Korea First Written Submission, para.1024.

<sup>886</sup> 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 a punitive measure) (Exhibit USA-61).

the interests of the non-cooperating producer.”<sup>887</sup> If Korea imagines something beyond the mere application of adverse inferences, it does not explain it. If Korea simply means that USDOC drew an adverse inference, then the United States recalls that Korea is analyzing a subset of 12 cases drawn from a larger universe of cases that were literally chosen on the basis that they included the application of adverse inferences. It is unsurprising that, when reviewing adverse inference cases, USDOC invariably applies adverse inferences.

487. Korea continues by arguing that “the selection of the facts is consistently, where applicable, the ‘highest transaction-specific margin’, the ‘highest non-aberrational price’, highest headcount’, ‘highest home market price’, and ‘highest cost reported’.”<sup>888</sup> Each of these selected types of facts are *different*, so Korea’s assertion that these different determinations are somehow “consistent” is nonsensical.

488. Fourth, Korea alleges that the sampled determinations show that at no point in these determinations does USDOC engage in a comparative evaluation and assessment or seek to corroborate the information with a view to arriving at an accurate determination.<sup>889</sup> This again, however, is a conclusory characterization from Korea with nothing more. It cites no evidence. It discusses no details of any of the determinations.

489. Korea does allege that, “{s}ometimes, the USDOC does not even refer to any corroboration, in line with Section 776 of the Tariff Act of 1930, as amended, which does not require corroboration.”<sup>890</sup> To state the obvious, “sometimes” is insufficient for an as such claim. An as such claim requires demonstrating that a measure *necessarily* breaches the covered the agreements.<sup>891</sup> Therefore, even if what Korea describes is a breach of WTO provisions—and it is not—at best it would establish a premise for “as applied” claims in certain selected determinations.

490. Korea concludes this section by returning to the three alleged methodologies or “practices” it now labels “the “Total AFA – Highest Dumping Margin’ practice, the ‘Expenses AFA – Highest / Lowest Expenses’ practice, and the ‘Subsidy Program – Highest Rates AFA’ practice.”<sup>892</sup> However, Korea offers nothing more than conclusory statements about these alleged practices. And in any event, as the United States has already explained, the differences between these three alleged practices make clear that Korea cannot possibly be challenging a

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<sup>887</sup> Korea First Written Submission, para. 1025.

<sup>888</sup> Korea First Written Submission, para. 1026.

<sup>889</sup> Korea First Written Submission, para. 1027.

<sup>890</sup> Korea First Written Submission, para. 1027.

<sup>891</sup> See *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 172.

<sup>892</sup> See Korea First Written Submission, paras. 1029-1031.

single unwritten measure, and *none* of these three alleged practices was included in Korea's panel request.

### **CONCLUSION**

491. Based on the foregoing, and the United States' preliminary ruling request, the United States respectfully requests that the Panel grant the United States' preliminary ruling request and otherwise reject Korea's claims in this dispute.