

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

(DS539)

SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

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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 Determination</i> , 81 Fed. Reg. 78 (Dep’t of Commerce) (January 4, 2016)	

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USA-41	Large Power Transformers from South Korea: Second Cost Supplemental Response (July 24, 2017)	BCI
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USA-44	Administrative Review of the Antidumping Duty Order on Large Power Transformers from the Republic of Korea; 2015-2016: Hyosung First Sales Supplemental Questionnaire (April 12, 2017)	BCI

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USA-59	<i>POSCO et al. v. United States</i> , Slip Op. 18-115 (September 10, 2018)	
USA-60	USDOC Public Hearing, In The Matter Of: Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Republic of Korea, Case No. C-580-882, (June 17, 2016)	
USA-61	<i>Viet I-Mei Frozen Foods Co. v. United States</i> (U.S. Court of International Trade 2015)	
USA-62	<i>Final Affirmative Countervailing Duty Determination: Stainless Steel Bar From Italy</i> , 67 Fed. Reg. 3163, Jan. 23, 2002 (<i>Issues & Decision Memorandum</i> (Comment 1))	
USA-63	<i>Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Carbon-Quality Steel Plate from Indonesia</i> , 64 Fed. Reg. 73155, 73162, Dec. 29, 1999	
USA-64	<i>Final Results of Countervailing Duty Administrative Review; Certain In-Shell Pistachios from the Islamic Republic of Iran</i> , 70 Fed. Reg. 54027, Sep. 13, 2005	

USA-65	<i>Certain Oil Country Tubular Goods from the Republic of Korea</i> , 79 Fed. Reg. 41,983, July 18, 2014 (<i>Issues & Decision Memorandum</i> (Comment 22))	
USA-66	<i>Certain Corrosion-Resistant Steel Products from the Republic of Korea</i> , Case Brief on Behalf of United States Steel Corporation (April 22, 2016)	BCI
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USA-77	19 C.F.R. § 351.302	

USA-78	19 U.S.C. § 1677a	
USA-79	19 CFR § 351.102	
USA-80	<i>Large Power Transformers from the Republic of Korea</i> , Issues and Decision Memorandum (July 2, 2012)	
USA-81	<i>Ripe Olives from Spain</i> , Issues and Decision Memorandum (June 11, 2018)	
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USA-84	<i>Certain Lined Paper Products from India</i> , Issues and Decision Memorandum (August 8, 2006)	
USA-85	<i>Certain Cold-Rolled Flat Steel Products from the Russian Federation</i> , Issues and Decision Memorandum (July 20, 2016)	
*USA-86	19 U.S.C. § 1677f(a)(3)	
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USA-90	<i>Welded Line Pipe from the Republic of Korea</i> , Issues and Decision Memorandum (October 5, 2015)	
USA-91	<i>Non-Oriented Electrical Steel from Taiwan</i> , Issues and Decision Memorandum (October 6, 2014)	

USA-92	<i>Softwood Lumber from Canada</i> , Issues and Decision Memorandum (November 1, 2017)	
USA-93	<i>Certain Uncoated Paper from China</i> , Issues and Decision Memorandum (January 8, 2016)	
USA-94	<i>Large Residential Washers from Korea</i> , Issues and Decision Memorandum (September 8, 2015)	
USA-95	<i>Certain Uncoated Paper from Indonesia</i> , Issues and Decision Memorandum (January 8, 2016)	
USA-96	List of Duplicative Cases in Exhibit KOR-216	

*Exhibits that are new with this submission begin with Exhibit USA-86.

TABLE OF REPORTS

Short Title	Full Citation
<i>Egypt – Steel Rebar (Panel)</i>	Panel Report, <i>Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey</i> , WT/DS211/R, adopted 1 October 2002
<i>US – Anti-Dumping Methodologies (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 (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 – 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 – Zeroing (21.5) (AB)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS294/AB/RW and Corr.1, adopted 11 June 2009

INTRODUCTION

1. In this dispute, Korea largely recasts its dissatisfaction with particular U.S. Department of Commerce (“Commerce” or “USDOC”) determinations as breaches of the Anti-Dumping Agreement and the Agreement on Subsidies and Countervailing Measures (“SCM Agreement”). However, WTO panels do not provide appeals of investigating authority determinations. Korea expands its misguided effort further by pursuing a meritless as such claim against an alleged unwritten measure that simply does not exist.

2. It is not uncommon for respondent-companies, or the Members in whose territory respondents are based, to disagree with aspects of an investigating authority’s decision. However, there is no provision of the covered agreements that guarantees total agreement, or provides an additional avenue for appeal outside of the domestic legal system. The misuse of WTO dispute settlement is only worsened by the fact that each of these claims revolves around respondents that failed to cooperate to the best of their ability. Because Korea cannot establish any breach of the covered agreements, its claims should be rejected.

3. This dispute covers numerous as applied claims and covers six anti-dumping duty determination and two countervailing duty determinations by Commerce. Throughout this dispute, Korea’s arguments have failed to meaningfully address the specific rights and obligations provided in the covered agreements and ignored relevant facts from these eight determinations.

4. The records of the investigations and administrative reviews that are the subject of this dispute fully support USDOC’s findings that the Korean respondents failed to provide requested information and USDOC’s resort to facts available. As demonstrated in previous submissions, for each of the eight determinations, Korea fails to establish that in applying facts available, Commerce acted inconsistent with Article 6.8 and Annex II of the Antidumping Agreement or with Article 12.7 of SCM Agreement. Korea’s arguments to the contrary are without merit.

5. First, Korea’s arguments are based on mischaracterizations of the facts or omissions of evidence. Through its mischaracterizations of the facts, Korea attempts to expand the record that was before Commerce at the time of its determination and to blame Commerce for inconsistencies in the record and the failures of Korean respondents.

6. Second, Korea’s arguments attempt to substitute the judgment of Korean respondents for that of USDOC, despite that the latter is the investigating authority. Korea does not dispute Commerce’s findings that Korean respondents failed to provide the requested missing information. Rather, Korea takes the untenable position that Korean respondents are permitted to withhold requested information based on what they themselves determine to be necessary or relevant. In substituting their own views, Korean respondents deprived USDOC of an opportunity to examine requested information, and ultimately deprived Commerce of an opportunity to complete requisite calculations. Korea erroneously attempts to turn their failure to cooperate into WTO breaches. However, such attempts find no basis in the Anti-Dumping Agreement or SCM Agreement.

7. In fact, Korea’s arguments misunderstand the role of a WTO panel and reflect a misuse of WTO dispute settlement. Instead of demonstrating that Commerce’s findings are not findings that could be reached by an objective and unbiased investigating authority, Korea seeks to reargue the facts as if it were before an investigating authority, in an attempt to redo the underlying investigations and get different substantive findings from the Panel.¹ However, it is not for the Panel to review an investigating authority’s assessment of the facts *de novo* and come to its own conclusions. Rather, to succeed in its challenge to the U.S. anti-dumping and countervailing duty orders at issue in this dispute, Korea must show that an objective and unbiased investigating authority could not have come to the conclusions reached by USDOC. Korea has made no such showing with respect to the as applied claims in this dispute.

8. Moreover, Korea fails to establish that the alleged unwritten measure in its panel request even exists. Indeed, much of Korea’s argumentation in support of its as such challenge fails to address the alleged unwritten measure in its panel request—that is, the lone alleged unwritten measure that actually is within the Panel’s terms of reference.² Furthermore, numerous Commerce determinations demonstrate that Korea is wrong that, whenever USDOC finds a failure to cooperate, it adopts adverse inferences. In addition, numerous determinations further demonstrate that Korea is wrong that, whenever USDOC finds a failure to cooperate, it ceases to engage in any reasoning regarding the information likely to lead to an accurate result and instead uses the adverse inference as the “sole basis” for selecting facts on which to rely. The incoherence of Korea’s as such arguments also result in a failure to establish a *prima facie* case that the alleged unwritten measure in its panel request has general and prospective application. Furthermore, Korea’s attempts to demonstrate an as such breach of Article 6.8 and Annex II of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement—which seemingly are conflated with Korea’s arguments about the alleged existence of an unwritten measure—are equally meritless.

9. In previous U.S. submissions, the United States has described in detail why each of Korea’s claims must fail. In this second submission, the United States focuses on the arguments Korea has made (or failed to make) in its oral statement at the first substantive panel meeting and in its answers to the Panel’s questions following that meeting.

10. Section I reviews the standard of review that should be applied in this dispute, as discussed in the U.S. first written submission and not rebutted by Korea.³

11. Section II the addresses the lack of merit in Korea’s as applied claims, as follows:

¹ *US – Coated Paper (Indonesia) (Panel)*, paras. 7.3-7.7, 7.61, 7.83, 7.113, 7.193.

² The United States notes that it discusses the measure within the Panel’s terms of reference on the basis of the Panel’s preliminary ruling. As is the case with any panel finding, the United States reserves its right of appeal.

³ U.S. FWS, paras. 11-20.

- Section II.A demonstrates why Korea has failed to show that USDOC’s application of facts available in the antidumping investigations and administrative reviews was inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement. Korea’s claims regarding Corrosion Resistant Steel are addressed first (Section II.A.1), followed by Cold-Rolled Steel and Hot-Rolled Steel (Section II.A.2), and Large Power Transformers (Section II.A.3).
- Section II.B demonstrates Korea’s failure to establish that USDOC’s application of facts available in the countervailing duty investigation concerning Cold-Rolled and Hot-Rolled Steel was inconsistent with Article 12.7 of the SCM Agreement.

12. Finally, section III further explains why Korea’s “as such” challenge to an alleged unwritten measure must fail.

I. STANDARD OF REVIEW

13. As explained in the U.S. First Written submission, the Panel’s task in this dispute is to assess whether Commerce properly established the facts and evaluated them in an unbiased and objective manner.⁴ The Panel’s task is not to determine whether it would have reached the same results as Commerce. Put differently, the Panel’s task is to determine whether a reasonable, unbiased person, looking at the same evidentiary record as Commerce, could have—not would have—reached the same conclusions that Commerce reached.

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 an “*initial trier of fact*.”⁵ 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.⁶

15. Korea has not disagreed with any of these propositions regarding the appropriate standard of review in this proceeding.

⁴ See U.S. FWS, paras. See also, e.g., *US – Countervailing Measures on Certain EC Products (21.5) (Panel)*, para. 7.82 (referring to the Appellate Body report in *US – Cotton Yarn*).

⁵ *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 187-188 (emphasis original).

⁶ *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 188-190.

II. AS-APPLIED CLAIMS

A. Anti-Dumping Proceedings

1. *Corrosion Resistant Steel Products*

16. As the United States has explained, Korea failed in its first written submission to establish that USDOC acted inconsistently with Article 6.8 and Annex II of the Anti-Dumping Agreement in applying facts available in the investigation on corrosion resistant steel products.⁷ Korea’s additional arguments to the contrary ignore USDOC’s findings, mischaracterize the record, and is based on the untenable proposition that authorities are obligated to adopt methodologies favored by foreign producers or other interested parties.

a) Necessary Information Was Missing, and Korea Has No Basis for Asserting that USDOC Was Required To Adopt the Respondent’s Preferred Methodology.

17. In the corrosion resistant steel investigation, USDOC rejected Hyundai Steel’s request to apply an “alternative methodology” to Hyundai Steel’s further manufactured sales and required Hyundai Steel to submit a section E response and report Hyundai’s further manufactured sales. As Hyundai Steel failed to submit the requested data, USDOC determined that necessary information pertaining to Hyundai Steel’s further manufactured sales was missing. To recall, Korea contended in its first written submission that “{b}ecause Hyundai Steel’s reporting included all data points needed to implement any alternative methodology, there was no ‘necessary’ information lacking from the record or otherwise requiring the USDOC to resort to fact available.”⁸

18. As discussed in the U.S. first written submission, Korea’s argument has no legal basis. Nothing in the Anti-Dumping Agreement requires an administering authority to adopt any particular methodology advocated by an interested party in a proceeding. For this reason, panels have found it “apparent that it is left to the discretion of an investigating authority, in the first instance, to determine what information it deems necessary for the conduct of its investigation (for calculations, analysis, etc.), as the authority is charged by paragraph 1 to ‘specify ... the information required from any interested party.’”⁹ Thus, contrary to Korea’s theories, the relevant obligation in the Anti-Dumping Agreement is for the investigating authority to make an unbiased and objective examination of the facts, to make its own determination on what methodologies to employ—as long as those methodologies are not inconsistent with any of the relevant rules in the Anti-Dumping Agreement, and to pose any questions relevant to the outcome of the investigation. And if a Member seeks to challenge certain determinations, the

⁷ U.S. FWS, paras. 60-110.

⁸ Korea FWS, para.132.

⁹ *Egypt – Steel Rebar* (Panel), para 7.155.

Member must show that an unbiased and objective authority could not have made those determinations. Certainly, Korea has not shown that the only methodology that could have been adopted by an unbiased and objective authority was an alternative methodology preferred by the Korean producer.

19. Indeed, the record shows that USDOC considered and appropriately rejected Hyundai Steel’s proposal for an “alternative methodology.”¹⁰ Specifically, USDOC rejected Hyundai Steel’s request for USDOC to use the “special rule” or an alternative methodology for its further manufactured sales, because “Hyundai 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 imported coil.”¹¹ Moreover, USDOC found that Hyundai Steel’s calculations for applying the alternative methodology for further manufactured sales were flawed, overstating the amount of value added by affiliates.¹² In sum, Hyundai Steel’s “alternative methodology” was specifically rejected as a substitute for the requested information.¹³ As a result, on October 15, 2015, USDOC requested Hyundai Steel to revise its U.S. sales database to include all sales of further-manufactured merchandise and provide a section E response for these data.¹⁴

20. Korea’s new argumentation does nothing to advance its claim. To the contrary, Korea’s response to the Panel’s question on this point effectively acknowledges the opposite. In particular, Korea’s response focuses entirely on arguments on Hyundai Steel’s purported efforts and difficulty in providing the requested information—without any support for the proposition that USDOC was somehow required to adopt the methodology preferred by Hyundai Steel.¹⁵ Thus, Korea’s response does not advance Korea’s position that necessary information was not missing. In fact, by essentially arguing that such gaps were excusable, Korea supports the opposite conclusion—that necessary information was, in fact, missing.

21. Moreover, to apply Hyundai Steel’s “alternative methodology” also attempts to appropriate for the Korean respondent discretion that rests solely with the investigating authority. The argument suggests that the discretion to determine the methodology for reporting further

¹⁰ U.S. FWS, para. 64.

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

¹² *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Issues and Decision Memorandum for the Final Determination (May 24, 2016), pp. 13, 27 (“CORE I&D Memo”) (Exhibit KOR-5).

¹³ CORE I&D Memo, pp. 26-27 (Exhibit KOR-5); U.S. FWS, paras. 64-65.

¹⁴ *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Hyundai Steel Company’s Exclusion Request (October 15, 2015) (Exhibit KOR-11).

¹⁵ See Korea Response to Panel Question (“RPQ”) 1. The United States notes that Korea did not include paragraph numbering in its responses to Panel questions. Therefore, the United States is only able to cite to the question number of the relevant response.

manufactured sales, and thus the necessary data, lies with respondents and not the investigating authority.

22. Regarding the necessary data requested, USDOC found the raw data that Hyundai Steel submitted with its section E responses to be “unusable, unreliable, and unverifiable.”¹⁶ As Commerce explained, without the requested data it was unable “to reliably assess whether these sales would contribute to a pattern of differential pricing,”¹⁷ and it was “impossible for the Department to conduct its margin analysis of Hyundai Steel’s further manufactured sales.”¹⁸

23. Korea did not initially argue that the “raw data” could be used to apply the standard methodology. Rather, Korea argued the raw data could be used for “any alternative methodology.”¹⁹ In its responses to panel questions, Korea now seems to assert that the “the raw data” could have been used for the standard methodology.²⁰ Korea has no basis for this new position. In fact, in the very same question response, Korea concedes that application of a standard methodology “to Hyundai Steel’s further-manufactured sales was virtually impossible.”²¹

24. In sum, Korea has failed to establish that USDOC acted inconsistently with Article 6.8 of the Antidumping Agreement in finding that necessary information was missing.

b) USDOC Specified the Information Requested and Provided Hyundai Steel with Reasonable Time to Provide Specified Information and Meaningful Opportunity to Provide Further Explanations.

25. Contrary to the arguments in Korea’s responses to panel questions, USDOC provided Hyundai Steel with guidance, a reasonable time to provide specified information, and meaningful opportunity to provide further explanation. Korea’s arguments to the contrary mischaracterize the record and are an attempt to blame USDOC for Hyundai Steel’s failures.

26. As previously discussed, consistent with paragraphs 1 and 6 of Annex II of the Anti-Dumping Agreement, USDOC specified the information required and provided Hyundai with reasonable time to respond to its requests for information.²² Indeed, the record shows that

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

¹⁷ *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Decision Memorandum for the Preliminary Determination (December 21, 2015), p. 13 (Exhibit USA-8).

¹⁸ CORE I&D Memo (May 24, 2016), p. 14 (Exhibit KOR-5).

¹⁹ Korea FWS, para 132.

²⁰ Korea RPQ 1(a). Korea states that the “raw data constituted all ‘necessary’ information that Hyundai Steel could have provided in order for the USDOC to apply whatever methodology.”

²¹ Korea RPQ 1(a).

²² U.S. FWS, paras. 72-85.

Hyundai Steel was given numerous opportunities to provide USDOC with the requested information. In particular, USDOC held two meetings with Hyundai Steel to provide additional guidance on completing a section E,²³ issued a preliminary determination that identified deficiencies in Hyundai’s section E responses,²⁴ and issued three supplemental questionnaires.²⁵

27. In its responses to Panel questions, Korea presents some new arguments in an attempt to justify Hyundai Steel’s failure to respond; these arguments are not persuasive. Korea first argues that USDOC gave Hyundai Steel “no guidance” in reporting “further manufactured sales using the standard methodology.”²⁶ Korea’s argument relies on meeting memoranda on the record to assert that the guidance would have been included in the memoranda.²⁷ This reliance is misplaced. As we will explain, a meeting memorandum is just a record of a meeting, not a full summary of everything said at the meeting. This is clear from the relevant U.S. laws and regulations.

28. Under U.S. law, a meeting memorandum need only include “the identity of the persons present at the meeting, the date, time, and place of the meeting, and a summary of the matters discussed or submitted.”²⁸ The Commerce regulations cited by Korea merely state what Commerce’s official record as a whole must include, not what a meeting memorandum must contain.²⁹ Consistent with U.S. law, the meeting memoranda for the October 27, 2015, and November 24, 2015, meetings contain the required data.³⁰ Korea’s inference from the absence of

²³ *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Meeting with Counsel to Hyundai Steel Company (Hyundai) (October 27, 2015) (Exhibit KOR-14); *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Meeting with Counsel to Hyundai Steel Company (November 27, 2015) (Exhibit KOR-16).

²⁴ *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Decision Memorandum for the Preliminary Determination (December 21, 2015), pp. 10-14 (Exhibit USA-8).

²⁵ U.S. FWS, paras. 46-56; U.S. RPQ 1(b) and 2(b), paras. 3-10 and 14.

²⁶ Korea RPQ 2(a) (emphasis added).

²⁷ *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Meeting with Counsel to Hyundai Steel Company (Hyundai) (October 27, 2015) (Exhibit KOR-14); *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Meeting with Counsel to Hyundai Steel Company (November 27, 2015) (Exhibit KOR-16).

²⁸ 19 U.S.C. § 1677f(a)(3) (Exhibit USA-86).

²⁹ See 19 C.F.R. §351.104 (a), Exhibit KOR-233 (stating that an official record of proceedings must contain “government ... memoranda of *ex parte* meetings”).

³⁰ *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Meeting with Counsel to Hyundai Steel Company (Hyundai) (October 27, 2015) (Exhibit KOR-14); *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Meeting with Counsel to Hyundai Steel Company (November 27, 2015) (Exhibit KOR-16).

specific guidance in the memoranda rests on a misunderstanding of U.S. law and is, therefore, misplaced.

29. Moreover, Korea’s claim that “Hyundai Steel received no guidance from the USDOC” ignores the three supplemental questionnaires USDOC issued to Hyundai Steel. These supplemental questionnaires provided specific guidance to Hyundai Steel by identifying deficiencies with Hyundai Steel’s responses and providing questions to help Hyundai Steel correct or clarify its responses.

30. Korea next alleges that USDOC “suddenly” required Hyundai Steel to provide a section E response, as it had “delayed its instruction that such a response was required after it had itself originally indicated, at the start of the investigation, that *no* Section E questionnaire had to be completed.”³¹ Again, this is not an accurate representation of the facts.

31. First, contrary to what Korea asserts, USDOC never indicated that “*no* Section E had to be completed.” Rather, in its initial questionnaire, USDOC explained that Hyundai Steel was not *yet* required to provide information about its further-manufactured merchandise.³² USDOC explained that it “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.”³³ Additionally, in its requests for additional information from Hyundai Steel regarding Hyundai Steel’s request to be exempt from submitting a section E response, USDOC explained that it was still evaluating Hyundai Steel’s request and that, while Hyundai Steel was not required at that time to submit a section E response, USDOC “may ask for these sales in the future.”³⁴ Consistent with USDOC’s statements that Hyundai Steel may *yet* be required to submit a section E, on October 15, 2015, USDOC requested that Hyundai Steel submit a section E.³⁵

32. Second, the fact that USDOC did not initially insist that Hyundai Steel submit a section E stems from Hyundai Steel’s request to be exempt from submitting a section E and USDOC’s consideration of Hyundai Steel’s request. Specifically, following the submission of Hyundai Steel’s request for USDOC to apply the “special rule”³⁶ and exclude Hyundai from submitting a

³¹ Korea RPQ 3 (emphasis added).

³² U.S. FWS, paras. 40-46.

³³ *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Antidumping Questionnaire to Hyundai Steel (July 27, 2015), p. 2 (Exhibit KOR-6).

³⁴ *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Extension to Respond to Sections B through D of the Initial Questionnaire (September 11, 2015), p. 2 (Exhibit USA-3).

³⁵ *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Hyundai Steel Company’s Exclusion Request (October 15, 2015) (Exhibit KOR-11).

³⁶ 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) (Exhibit KOR-3). If the value added by the affiliate “is likely to exceed substantially” the

response to section E,³⁷ USDOC engaged with Hyundai Steel for nearly two months to clarify Hyundai Steel’s request and to provide Hyundai Steel guidance on the information Commerce required to substantiate Hyundai’s request.³⁸ This included a meeting with Commerce to discuss Hyundai Steel’s request for exemption,³⁹ a supplemental request from Commerce for additional information,⁴⁰ a telephone call to review Commerce’s request for additional information,⁴¹ followed by Commerce’s issuance of additional guidance,⁴² Hyundai Steel’s subsequent response,⁴³ and finally USDOC’s decision to reject Hyundai Steel’s request and require Hyundai Steel to submit a section E.⁴⁴ Thus, the timing of USDOC’s decision to require Hyundai Steel to submit a section E reflects USDOC’s efforts to give all due consideration to Hyundai Steel’s request.

33. Curiously, Korea also argues that USDOC “did not otherwise respond to Hyundai Steel’s exclusion request, until it *suddenly* on 15 October 2015 instructed that a full Section E response was required.”⁴⁵ The facts directly above do not support this assertion either.

34. As the United States has previously noted, from the issuance of USDOC’s initial questionnaires until October 15, 2015, at a minimum, Hyundai Steel was on notice that it may be

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) (Exhibit KOR-3). 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).

³⁷ *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Notice of Difficulty in Responding to Questionnaire and Request for Alternative Calculation Method by Hyundai Steel (August 17, 2015) (Exhibit KOR-7 (BCI)).

³⁸ U.S. FWS, paras. 41-46; U.S. RPQ 2(b), paras. 12-13.

³⁹ *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Ex Parte Meeting with Hyundai Steel Company (August 21, 2015), p. 1 (Exhibit KOR-8).

⁴⁰ *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Extension to Respond to Sections B through D of the Initial Questionnaire (September 11, 2015), p. 2 (Exhibit USA-3).

⁴¹ *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Teleconference with Hyundai Steel Company (September 14, 2015) (Exhibit KOR-9).

⁴² *Certain Corrosion-Resistant Steel Products from the Republic of 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).

⁴³ *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Response to the Department’s Request for Additional Information (September 28, 2015) (Exhibit KOR-10 (BCI)).

⁴⁴ *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Hyundai Steel Company’s Exclusion Request (October 15, 2015) (Exhibit KOR-11).

⁴⁵ Korea RPQ 3 (emphasis in original).

required to submit a section E. Korea argues that it “makes no sense” for the United States to argue that Hyundai Steel was on notice, “as no questionnaire response was required for the time being.” This argument defeats itself. By stating that no questionnaire was required “for the time being,” Korea recognizes that the decision was pending on whether a Section E response would be required.

35. Finally, Korea argues that USDOC did not provide Hyundai Steel with a meaningful opportunity to provide the requested information.⁴⁶ Again, Korea mischaracterizes the record in the proceeding. In the second supplemental questionnaire, Hyundai Steel was asked to provide a new database “which incorporates all changes resulting from the questions above.”⁴⁷ Hyundai Steel, however, provided unsolicited changes, in addition to changes related to the specific questions in USDOC’s second supplemental.⁴⁸ As USDOC explained, “{t}he unexplained changes were not related to the questions asked in {the} Department’s December 15, 2015 supplemental questionnaire.”⁴⁹ Specifically, with its response, Hyundai submitted four new databases, three of which were unsolicited, containing unsolicited changes: home market sales, U.S. sales, further manufactured U.S. sales, and the FURCOM database.⁵⁰ Thus, contrary to Korea’s assertion, Hyundai Steel was not faulted for providing a new section E response, but rather for submitting three additional and unsolicited databases.

36. With respect to the third supplemental questionnaire, Korea complains that this “was not an ‘opportunity’ to provide any new information...other than the limited question,” as Hyundai Steel was instructed not to submit any new datasets.⁵¹ However, Korea’s argument simply ignores that the third supplemental questionnaire was issued well beyond the deadline for new factual information in this investigation.⁵² While supplemental questionnaires are an exception to the deadlines for new factual information, responses, and any new factual information, must be limited to responding to the questions asked.⁵³

⁴⁶ Korea RPQ 3.

⁴⁷ *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Hyundai Steel’s Response to the Department’s Second Supplemental Section E Questionnaire (December 29, 2015), p. 10 (Exhibit Kor-19).

⁴⁸ *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Cancellation of Hyundai Steel Company’s Constructed Export Price (CEP) Verification of Further Manufactured Sales (March 8, 2016), p. 2 (Exhibit KOR-20).

⁴⁹ *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Cancellation of Hyundai Steel Company’s Constructed Export Price (CEP) Verification of Further Manufactured Sales (March 8, 2016), p. 2 (Exhibit KOR-20).

⁵⁰ CORE I&D Memo, p. 14 (Exhibit KOR-5).

⁵¹ Korea RPQ 3.

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

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

37. In other words, given the late stage of the proceeding, the third supplemental questionnaire was not an opportunity to provide new information outside the questions asked. It should also be noted that Hyundai Steel had already submitted three section E databases, and thus had already had two opportunities to correct its initial section E database.⁵⁴ With the third supplemental, issued more than three months after Hyundai Steel submitted its first section E database, USDOC sought clarification on a specific issue and reasonably limited Hyundai Steel's response to the specific question asked.

38. In sum, USDOC specified the information required and provided Hyundai Steel with reasonable time to respond to its requests for information, consistent with paragraphs 1 and 6 of Annex II of the Antidumping Agreement. Korea's claims to the contrary are erroneous.

c) Hyundai's Claims of Difficulty in Providing Requested Data were Rightly Rejected.

39. While Korea maintains that Hyundai Steel experienced difficulties in reporting further manufactured sales, as discussed at length in the U.S. responses to Panel questions and the U.S. first written submission, USDOC took into account the difficulties raised by Hyundai in reporting the information and provided Hyundai Steel additional guidance and numerous opportunities to sufficiently respond.⁵⁵ However, as discussed above, ultimately Hyundai Steel's responses failed to address USDOC's concerns and were found to be "unusable, unreliable, and unverifiable."⁵⁶ Additionally, USDOC rejected Hyundai Steel's claims of difficulty, finding that Hyundai Steel's claims were ultimately "discredited" or "inaccurate."⁵⁷ The U.S. responses to the Panel's questions review statements by Hyundai Steel, where Hyundai Steel initially reported that providing USDOC with requested information would be too complicated, too burdensome, or not possible, but subsequently Hyundai Steel was able to provide the requested information.⁵⁸

⁵⁴ CORE I&D Memo, p. 14 (Exhibit KOR-5).

⁵⁵ U.S. RPQ 2(a), paras. 11-15; *see also*, *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Extension to Respond to Sections B through D of the Initial Questionnaire (September 11, 2015) (Exhibit USA-3); *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Hyundai Steel Company's Exclusion Request (October 15, 2015) (Exhibit KOR-11); *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Second Supplemental Questionnaire to Sections B&C, and First Supplemental to Further Manufacturing (November 19, 2015) (Exhibit USA-5 (BCI)); *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Supplemental Questionnaire to Section E (2nd) (December 15, 2015) (Exhibit USA-10 (BCI)); *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Supplemental Questionnaire to Section E (3rd) (February 5, 2016) (Exhibit USA-9).

⁵⁶ CORE I&D Memo, p. 16 (Exhibit KOR-5).

⁵⁷ CORE I&D Memo, pp. 16, 30, and 41 (Exhibit KOR-5).

⁵⁸ *See* U.S. RPQ 2(b), paras. 16-21.

40. In sum, the record shows that USDOC took into account Hyundai Steel’s alleged reporting difficulties. Additionally, USDOC provided Hyundai Steel with multiple opportunities to correct its section E submissions, met with Hyundai Steel in person to discuss the alleged difficulties, and provided Hyundai Steel with specific guidance. Hyundai Steel’s credibility with respect to reporting difficulties was significantly undermined by repeated instances in which Hyundai Steel was able to subsequently respond to questions it had previously indicated were too complicated or to which it otherwise could not respond. Thus, USDOC reasonably concluded, “{t}he record demonstrates that Hyundai Steel has: submitted a series of inaccurate value added calculations with respect to the sales at issue; made claims of difficulty in gathering data which were inaccurate; and submitted Section E responses that were unusable, unreliable, and unverifiable.”⁵⁹ Because the record fully supports that this is a determination that could have been made by an unbiased and objective authority, Korea’s argument in this respect has no merit.

d) Korea Has Failed to Support its Claim that USDOC Acted Inconsistent with Paragraph 7 of Annex II.

41. In its responses to Panel questions, Korea challenges Commerce’s use of petition rates as facts available to replace the missing information resulting from the failure of Korean producers to adequately respond to questionnaires in the investigation. Korea’s arguments are not grounded in either the relevant WTO obligations, or in the record of the proceeding. Contrary to Korea’s assertion in its responses to Panel questions, USDOC did provide an “explanation in terms of the relevance or representativeness,” of the petition rates.⁶⁰

42. In determining to use the petition rates to replace the missing information, USDOC found the petition rates to be both reliable and relevant.⁶¹ To begin, USDOC “review{ed} the adequacy and accuracy of the information in the petition” and concluded that the petition rates had probative value and were reliable.⁶² USDOC then examined the relevance of the petition rates. USDOC found the rates to be relevant because they were derived from the CORE steel industry and based on information related to aggregate data involving the CORE steel industry.⁶³ Additionally, USDOC found the rates relevant to and representative of Hyundai Steel, as they were based on price quotes/offers for sales of CORE produced in and exported from Korea and had taken into account differences in the Korean industry.⁶⁴

⁵⁹ CORE I&D Memo, p. 41 (Exhibit KOR-5).

⁶⁰ Korea RPQ 6(b).

⁶¹ CORE I&D Memo, pp. 18-19 (Exhibit KOR-5).

⁶² CORE I&D Memo, p. 18 (Exhibit KOR-5).

⁶³ CORE I&D Memo, p. 18 (Exhibit KOR-5).

⁶⁴ CORE I&D Memo, pp. 18-19 (Exhibit KOR-5).

43. Furthermore, USDOC noted that Hyundai Steel’s margin program output showed product-specific margins for non-further manufactured coils, at or above the petition rate.⁶⁵ In other words, the rate used to replace the missing information was lower than some of the product-specific (coil) transaction rates that comprise the respondent’s own, actual sales and pricing behavior; it was not aberrational contrary to one premise of Korea’s argument.⁶⁶ Finally, USDOC found no circumstances or evidence that would render the petition margin not relevant.⁶⁷

44. Finally, Korea asserts that USDOC acted inconsistent with paragraph 7, because it “did not explain that it looked at all of the evidence on the record” before concluding that “the petitioner rate was the best or only information available that it could rely on.”⁶⁸ Korea then points to record evidence that it suggests weighs against USDOC’s use of the petition rate.⁶⁹

45. Nothing in Article 6.8 or paragraph 7 of Annex II requires that the investigating authority address every piece of evidence in the record before using secondary information and Korea has provided no support for this proposed interpretation of the terms of the Anti-Dumping Agreement. Additionally, USDOC in fact considered the facts available on the record and provided support for its reasoned result. Korea simply does not like that result and is asking this panel to reweigh the record evidence. However, the Panel’s task in this dispute is to determine whether a reasonable, unbiased person, looking at the same evidentiary record as Commerce, could have—not would have—reached the same conclusions that Commerce reached.

46. In sum, Korea can point to nothing in the record of the proceeding to show that USDOC acted inconsistently with Article 6.8 and Annex II of the Anti-Dumping Agreement in resorting and applying facts.

2. Cold-Rolled Steel and Hot-Rolled Steel

47. As explained in our first written submission, Korea failed to establish that USDOC acted inconsistently with Article 6.8 and Annex II of the Anti-Dumping Agreement in applying facts available with respect to Hyundai Steel’s failure to provide necessary information regarding affiliated service providers and to accurately report certain product specifications and the relevant CONNUMs.⁷⁰

⁶⁵ CORE I&D Memo, p. 19 (Exhibit KOR-5); see Final Determination Margin Calculation for Hyundai Steel Company (Hyundai) (May 31, 2016) (Exhibit USA-11 (BCI)).

⁶⁶ CORE I&D Memo, pp. 17-19 (Exhibit KOR-5).

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

⁶⁸ Korea RPQ 6(b).

⁶⁹ Korea RPQ 6(b).

⁷⁰ U.S. FWS, paras. 111-198.

48. In its subsequent submissions, Korea attempts to expand the record that was before USDOC by presenting arguments in this forum that were not presented to the investigating authority. Further, Korea argues without any legal basis that the WTO Agreement required USDOC to grant Hyundai Steel the right to decide what information was necessary to determine whether transactions with affiliated service providers were made at arm's-length. Neither a respondent, nor Korea *post hoc*, is entitled under the WTO Agreement to substitute its judgment for that of the investigating authority. Rather, Korea must show – and it certainly cannot – that the determinations made by USDOC were not those that could have been made by an unbiased and objective authority. In sum, Korea's arguments are fundamentally at odds with the proper standard of review in a WTO proceeding involving a claimed breach of the Anti-Dumping Agreement.⁷¹

a) *Korea Fails to Establish that USDOC's Application of Facts Available with Respect to Hyundai Steel's Affiliated Service Providers was Inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement.*

49. As previously detailed,⁷² the particular factual scenario in which USDOC found itself when considering whether Hyundai Steel's transactions with affiliated service providers were conducted at arm's-length caused USDOC to examine the affiliated service providers' contracts with unaffiliated customers, because Hyundai Steel reported there were no transactions between Hyundai Steel and unaffiliated companies during the POR.⁷³ Thus, the only comparison capable of demonstrating the arm's-length nature of the transactions in question was the affiliated service providers' contracts with unaffiliated customers.

50. Hyundai Steel failed to provide the requested contracts and other information. Therefore, USDOC determined Hyundai Steel had failed to demonstrate the arm's length nature of Hyundai Steel's transactions with its affiliated service providers.⁷⁴ As a result, USDOC determined that it was appropriate to rely on facts available for these expenses.⁷⁵

⁷¹ For a full discussion of the standard of review in this proceeding, please *see* Section I of the U.S. first written submission.

⁷² *See* U.S. RPQ 12, para. 45; U.S. RPQ 14, paras. 58-59.

⁷³ *Certain Cold-Rolled Steel Flat Products From the Republic of Korea*, Hyundai Steel's Section B Response (6 November 2015), p. B-30 (Exhibit KOR-36 (BCI)).

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

⁷⁵ CRS I&D Memo, p. 74 (Exhibit KOR-41).

i. *Necessary Information was Missing from the Records in the HRS and CRS Investigations Regarding the Arm’s Length Nature of Hyundai Steel’s Transactions with Affiliated Service Providers.*

51. Korea asserts there was no missing necessary information, because USDOC’s initial questionnaire provided for “various alternative ways of demonstrating the arm’s-length nature of the transactions” in question and Hyundai Steel had provided relevant evidence.⁷⁶ The United States does not understand what additional “various alternative ways” Korea is referring to. In any event, Korea’s argument must fail because nothing in the Anti-Dumping Agreement requires an administering authority to accept the views of an interested party on what information is – or is not – necessary for making a determination of dumping. Rather, Korea must show that USDOC’s determinations could not have been made by an unbiased and objective authority – and such a proposition is unsupportable on the record of the proceedings.

52. The record shows that USDOC reasonably found that information submitted by Hyundai Steel with respect to affiliated party transactions was insufficient to show that the transactions were at arm’s length.⁷⁷ Specifically, USDOC found the information Hyundai Steel submitted in its initial Sections B and C responses failed to establish that the transactions between [***] and Hyundai Steel were at arm’s length. In its supplemental Sections B-C questionnaire, USDOC noted: “The net profit information provided for [***] does not show that [***]”⁷⁸ Additionally, “you claim that Hyundai Steel ‘believes the rates paid to . . . [***] represent arms’ length prices. However, you never explained why the transactions between Hyundai Steel and [***] . . . are at arm’s-length.”⁷⁹ Hyundai Steel was then asked to “demonstrate how these transactions should be consider{ed} at arm’s length when its {sic} between two [***] companies.”⁸⁰

53. Korea mischaracterizes the record by claiming that USDOC “accepted” Hyundai Steel’s alternative method of demonstrating the arm’s-length nature of the transactions at the time of USDOC’s preliminary determination.⁸¹ USDOC used Hyundai Steel’s reported information for purposes of its preliminary determination simply because USDOC had not yet had the opportunity to review the accuracy and veracity of the information at verification—a step

⁷⁶ Korea RPQ 10(a).

⁷⁷ U.S. RPQ 12, paras. 47-48.

⁷⁸ *Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Supplemental Questions for Sections B-C (November 24, 2015), p. 3 (Exhibit USA-72 (BCI)).

⁷⁹ *Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Supplemental Questions for Sections B-C (November 24, 2015), p. 3 (Exhibit USA-72 (BCI)) (emphasis added).

⁸⁰ *Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Supplemental Questions for Sections B-C (November 24, 2015), p. 3 (Exhibit USA-72 (BCI)).

⁸¹ Korea RPQ 10(a).

USDOC intended to take prior to relying on the data for its final determination.⁸² And at verification, Hyundai Steel once again failed to provide requested information to demonstrate that transactions with Hyundai Steel’s affiliated service providers were at arm’s length, resulting in USDOC’s resort to the use of facts available.⁸³

54. Regarding Hyundai Steel’s reported “consideration”⁸⁴ and ultimate self-serving determination that the requested contracts were not “necessary,” nothing in the Anti-Dumping Agreement would require an investigating authority to accept such positions of an interested party in a proceeding. Such a determination lies solely, and properly, with the investigating authority, the party with the obligation to verify information as accurate and reliable through an objective process of examination and with the obligation to determine what information is “required to complete its determination.”⁸⁵ 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, regardless of a respondent’s opinion of whether such information is necessary.⁸⁶

ii. *Hyundai Steel Failed to Act to the Best of its Ability and Korea’s Baseless Assertions for Hyundai Steel Failing To Provide Necessary Information Should Be Rejected.*

55. USDOC properly determined in both the CRS and HRS investigations that Hyundai Steel failed to cooperate by not acting to the best of its ability in its responses to USDOC’s requests for necessary information regarding its affiliated service providers. As previously discussed, while Hyundai Steel responded that it was unable to provide the requested contracts, Hyundai Steel’s answers regarding its relationship with [***] and its reasons for not being able obtain the requested information from [***] were inconsistent.⁸⁷

56. For example, in the CRS investigation, USDOC observed that [***] “was willing to provide some information, *i.e.*, the contracts with its subcontractor, but was unwilling to provide

⁸² See, e.g., Affirmative Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 81 Fed. Reg. 15228 (22 March 2016) p. 15230 (Exhibit KOR-62) (“As provided in section 782(i) of the Act, we intend to verify information relied upon in making our final determination.”).

⁸³ CRS I&D Memo, pp. 73-74 (Exhibit KOR-41); *Certain Hot-Rolled Steel Flat Products from the Republic of Korea*, Issues and Decision Memorandum (August 4, 2016), pp. 18-19 (Exhibit KOR-67).

⁸⁴ Korea RPQ 15(b).

⁸⁵ *US – Carbon Steel (AB)*, para. 4.416 (information is necessary when it is “required to complete a determination”).

⁸⁶ *US – Steel Plate (Panel)*, para. 7.71; *EC – Salmon (Panel)*, para. 7.357.

⁸⁷ U.S. RPQ12, paras. 52-56.

the additional documentation” regarding the unaffiliated customers.⁸⁸ In other words, Hyundai Steel appeared to be selectively providing documents, and its explanations of what it could and could not provide were undermined by inconsistencies and confirmed inaccuracies. Moreover, Hyundai Steel’s claim of no “direct ownership” was contradicted by Hyundai Steel’s previous statement that [[***]] and Hyundai Steel were affiliated companies, as [[***]] and by evidence found at verification.⁸⁹

57. Korea now asserts that the reason why Hyundai Steel’s affiliated service providers could not provide Hyundai Steel with the requested contracts was due to the affiliates’ obligations under Korean corporate law.⁹⁰ However, as discussed in our responses to Panel questions, Hyundai Steel never asserted this reason. Citing no evidence, Korea tries to explain, that [[***]] reporting of “confidentiality and fiduciary concerns,” were a reference to [[***]] obligations under Korean corporate law.⁹¹ Korea then blames USDOC for not asking Hyundai Steel to elaborate on what [[***]] meant by its “confidentiality and fiduciary concerns,” implying that if USDOC had asked, Hyundai Steel would have provided a more complete explanation, including [[***]] obligations under Korean corporate law.⁹² This argument is not compelling. As we explain in our responses to Panel questions, if exposure to legal liability under Korean law was the impediment to Hyundai Steel being able to access [[***]] contracts with unaffiliated third parties, one would have expected Hyundai Steel to state as much to USDOC.⁹³ Indeed, Hyundai Steel made numerous representations about why it supposedly could not gain access to these documents—some of which later proved to be false—but this was not one of them.⁹⁴

58. Indeed, nowhere in its case or rebuttal briefs before USDOC did Hyundai Steel reference any disclosure liability risks arising from any provision of [[***]] transaction data to USDOC.⁹⁵

⁸⁸ *Certain Cold-Rolled Steel Flat Products From the Republic of Korea*, Department of Commerce, CEP Verification Report, Hyundai Steel (May 26, 2016), pp. 42-43 (Exhibit KOR-47 (BCI)).

⁸⁹ *Certain Cold-Rolled Steel Flat Products From the Republic of Korea*, Hyundai Steel’s Section A Response (October 16, 2015), A-12 (Exhibit KOR-28 (BCI)).

⁹⁰ Korea RPQ 15(b).

⁹¹ Korea RPQ 15(b).

⁹² Korea RPQ 15(b).

⁹³ U.S. RPQ 15(a), para. 63.

⁹⁴ See *Certain Cold-Rolled Steel Flat Products From the Republic of Korea*, Hyundai Steel’s Section B Response (November 6, 2015) (Exhibit KOR-36 (BCI)); *Certain Cold-Rolled Steel Flat Products From the Republic of Korea*, Hyundai Steel Supplemental Sections B-C Questionnaire Response (December 15, 2015) (Exhibit KOR-34); *Certain Cold-Rolled Steel Flat Products From the Republic of Korea*, Hyundai Steel Second Supplemental Sections B-C Questionnaire Response (February 2, 2016) (Exhibit KOR-37 (BCI)).

⁹⁵ *Certain Cold-Rolled Steel Flat Products From the Republic of Korea*, Hyundai Steel’s Case Brief (June 6, 2016) (Exhibit KOR-48 (BCI)) (no mention of [[***]]); *Certain Cold-Rolled Steel Flat Products From the Republic of Korea*, Hyundai Steel’s Rebuttal Brief (June 13, 2016) (Exhibit KOR-29 (BCI)) (no explanation of

Korea's *post hoc* argument must be rejected. They were not presented to USDOC during the proceeding, and thus have no relevance to the question of what an unbiased and objective authority could have determined during that proceeding.

59. Finally, as detailed in our responses to panel questions, Hyundai Steel was asked to provide information demonstrating the arm's-length nature of its transactions with its affiliated service providers no fewer than three times prior to verification, and each time, it failed to do so.⁹⁶ Korea's assertion that USDOC's request for information on the affiliated service providers was "significantly more expansive" in scope at verification than previous requests for "*all international freight contracts*" is simply not supported by the record.⁹⁷ USDOC's supplemental questionnaire of November 24, 2015 clearly requests Hyundai Steel to provide "copies of all international freight contracts between [***] and its unaffiliated customers."⁹⁸ Moreover, as previously noted, USDOC's request for international freight contracts was never limited to [***] contracts with unaffiliated parties for shipments to the United States. Rather, USDOC requested "all freight contracts with [***] and all unaffiliated freight providers that cover the full POI."⁹⁹

60. In sum, Korea has failed to demonstrate that USDOC's resort to facts available with respect to Hyundai Steel's affiliated service providers was inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement.

b) Korea Fails to Establish that USDOC's Application of Facts Available in the CRS Investigation with Respect to Hyundai Steel's Misreported CONNUM Information was Inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement.

61. In its responses to panel questions, Korea presents new arguments as to why USDOC's application of facts available with respect to Hyundai Steel's reporting of certain product

confidentiality or Korean domestic law as preventing Hyundai Steel from responding to USDOC's documentation requests).

⁹⁶ U.S. RPQ 10(b), paras. 39-41; *See also* Hyundai Steel's Section A Response (October, 16, 2015), p. A-13 (Exhibit KOR-28 (BCI)); Hyundai Steel Section B Response (December 6, 2016), p. 31 (Exhibit KOR-36 (BCI)); *Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Supplemental Questions for Sections B-C (November 24, 2015), p. 9 (Exhibit USA-72 (BCI)); Hyundai's Second Supplemental Sections B-C Questionnaire Response (February 2, 2016), p. 2 (Exhibit KOR-37 (BCI)).

⁹⁷ Korea's RPQ 10(a).

⁹⁸ *Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Supplemental Questions for Sections B-C (November 24, 2015), p. 9 (Exhibit USA-72 (BCI)).

⁹⁹ *Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Supplemental Questions for Sections B-C (November 24, 2015), p. 3 (emphasis added) (Exhibit USA-72 (BCI)).

specifications and the relevant CONNUMs were inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement. Korea’s arguments have no merit.

62. As reviewed in the U.S. first written submission,¹⁰⁰ during Hyundai Steel’s verification, USDOC discovered inconsistencies in Hyundai Steel’s reporting of certain product specifications and the relevant CONNUMs.¹⁰¹ CONNUM or product specification issues arising at verification included: prime versus non-prime merchandise designations, overruns, and specification designations with respect to certain specific products coded by the USDOC as Spec A, B, C, D, E, F, G, and H (thus coded to ensure protection of business confidential information in its public decision memoranda). USDOC provided, and Hyundai Steel took advantage of, an opportunity to explain those specification issues at verification, and successfully explained those relating to the prime versus non-prime merchandise designations, product overruns, and Spec A, B, F, and G product specification issues. USDOC determined that Hyundai Steel’s explanations as to those issues or the reasons given for the misreporting of the A, B, F, and G Specs were sufficient and, thus, USDOC did not need to resort to the use of facts available for these product specifications.¹⁰² Instead, it relied on the data reported by Hyundai Steel for those issues and product specifications.

63. However, Hyundai Steel was unable to provide sufficient explanations or reasons for misreported information as to why the sales for the C, D, E, and H product specifications in the observed database on-site were inconsistent with certain specifications reported to USDOC.¹⁰³ Given the inconsistencies with respect to Hyundai Steel’s reporting of certain CONNUMs, USDOC properly determined that the relevant CONNUM information could not be verified, and therefore could not use that information, and relied on facts available, when determining Hyundai Steel’s final antidumping margin.¹⁰⁴

i. Necessary Information Was Missing, and Korea’s Position is Based on the Untenable Theory that an Authority Must Accept The View of a Respondent on What Information Was Required.

64. Korea attempts to characterize the misreported sales information relating to the Spec A, D, E, and H products as “not necessary” and “not required for USDOC to complete its determination” because they involved a small volume of sales.¹⁰⁵ This is yet another instance of Korea – without any legal basis in the Anti-Dumping Agreement – arguing that the USDOC was

¹⁰⁰ U.S. FWS, paras. 130-136.

¹⁰¹ CRS I&D Memo, pp. 58-63 (Exhibit KOR-41).

¹⁰² CRS I&D Memo, pp. 59, 61-62 (Exhibit KOR-41).

¹⁰³ Verification of Hyundai Steel Corporation Sales Responses in Cold-Rolled Steel Flat Products from the Republic of Korea (May 26, 2016), p. 2 (Exhibit KOR-46 (BCI)).

¹⁰⁴ CRS I&D Memo (July 20, 2016) (Exhibit KOR-41) at 47-63.

¹⁰⁵ Korea RPQ 16(c).

somehow required to accept the self-evaluation of an interested party as to what information was “necessary” to complete a determination. Paragraph 1 of Annex II of the Anti-Dumping Agreement provides that “the investigating authority should specify in detail the information required from any interested party.” Respondents are not tasked with “investigating,” nor are they an “authority.”

65. Indeed, Korea’s arguments are fundamentally at odds with the proper standard of review in a WTO proceeding involving a claimed breach of the AD Agreement.¹⁰⁶

66. Furthermore, Korea’s characterization of the magnitude of the erroneously reported information does not bear upon the necessity of the information.¹⁰⁷ As the United States previously explained, the magnitude of the erroneously reported information, measured as a percentage of all reported sales, is not the standard against which information must be judged for its necessity; rather it is whether the information is “required to complete a determination.”¹⁰⁸ USDOC determined that without the properly reported CONNUMs, and without a plausible explanation or reason from Hyundai Steel, it could not verify the reported information, and therefore did not have verified information on which to rely for its margin calculation on the sales of each of those Spec classifications.¹⁰⁹ As USDOC explained in the initial questionnaire issued to Hyundai Steel, 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) in both the respondent’s home market and the U.S. market.¹¹⁰

ii. *USDOC Did Not Err in Determining that Certain Information Could Not Be Verified.*

67. Given the inconsistencies with respect to Hyundai Steel’s reporting of certain CONNUMs, Korea presents no argument evidence as to why USDOC’s determination that the relevant CONNUM information could not be verified could not have been made by an unbiased and objective authority.

¹⁰⁶ For a full discussion of the standard of review in this proceeding, please *see* Section I of the U.S. first written submission.

¹⁰⁷ Korea RPQ 16(c).

¹⁰⁸ United States FWS, para. 166.

¹⁰⁹ CRS I&D Memo, pp. 58-63 (Exhibit KOR-41).

¹¹⁰ 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).”

68. Korea mischaracterizes Hyundai Steel’s missing CONNUM data as “not really a situation where any information was missing.”¹¹¹ “Rather USDOC considered that Hyundai Steel misreported certain information.”¹¹² Additionally, Korea asserts that Hyundai Steel “fully explained any differences or alleged inconsistencies.”¹¹³ Yet again, Korea mischaracterizes the facts and asks the Panel to reweigh the record evidence.

69. As noted above, while Hyundai Steel did provide sufficient explanations for some misreported CONNUMs or product specifications that were at issue at verification, where the explanations were sufficient, USDOC found no need to resort to the use of facts available.¹¹⁴ Instead, it relied on the data reported by Hyundai Steel for those issues and product specifications. When Hyundai Steel was unable to provide sufficient explanations or reasons for inconsistencies in the reported data, as with sales for the C, D, E, and H product specifications, USDOC determined that the relevant CONNUM information could not be verified.¹¹⁵ In other words, contrary to Korea’s assertion, Hyundai Steel had not “fully explained any differences or alleged inconsistencies.” Moreover, USDOC provided detailed explanations as to why it rejected some of Hyundai Steel’s explanations.¹¹⁶

70. While Korea would like the Panel to reweigh the record evidence, that is not the Panel’s role. USDOC determined that “Hyundai Steel had no plausible explanation either at verification or in its case and rebuttal briefs for misidentifying these sales,” and the errors and inconsistencies were such that the information relating to those CONNUMs was unusable.¹¹⁷ In other words, the record shows that USDOC took into account all information that was verifiable and usable without undue difficulties. The covered agreements require nothing more in this respect.¹¹⁸

iii. USDOC’s Replacement of Missing Information is Consistent with Article 6.8 and Paragraph 7 of Annex II of the Anti-Dumping Agreement.

71. Korea’s characterization of USDOC’s replacement information as having been selected “for the sole purpose of reaching an adverse result” is unsupported by the record.¹¹⁹ As USDOC explained in its I&D Memorandum, because Hyundai Steel did not provide sufficient or

¹¹¹ Korea RPQ 16(c).

¹¹² Korea RPQ 16(c).

¹¹³ Korea RPQ 16(c).

¹¹⁴ CRS I&D Memo, pp. 59, 61-62 (Exhibit KOR-41).

¹¹⁵ CRS I&D Memo, pp. 47-63 (Exhibit KOR-41).

¹¹⁶ CRS I&D Memo, pp. 58-63 (Exhibit KOR-41).

¹¹⁷ CRS I&D Memo, p. 63 (Exhibit KOR-41).

¹¹⁸ Annex II of the AD Agreement, para. 3.

¹¹⁹ Korea RPQ 16(f).

plausible explanations at verification as to why it had failed to accurately report information, USDOC found that Hyundai Steel had failed to cooperate to the best of its ability and used an adverse inference when selecting the reasonable replacement information. USDOC ultimately replaced the missing necessary information with values reported by Hyundai Steel itself for the relevant CONNUM product specifications. 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.¹²⁰

72. Further, in its responses to the Panel’s questions following the first substantive meeting of the parties, Korea makes much of the selection of the highest calculated dumping margin as the replacement information for the Spec C sales.¹²¹ In an attempt to demonstrate the “aberrational nature of the sales” used by USDOC, which Korea characterizes as “phased out” products, Korea goes so far as to create an entirely new table that was never presented to USDOC when it made its determination.¹²² What Korea neglects to explain or even mention is that, regardless of the reasons behind Hyundai Steel’s sale of this product, it made these sales to a U.S. customer during the period of review, and it made these sales at less than fair value.¹²³ These sales are precisely the type of sales the WTO disciplines were designed to address; in fact, the use of this margin as reasonable replacement information is supported by the record because it represents actual sales made by the respondent.

73. In sum, Korea has failed to establish any breach of USDOC’s WTO obligations under the Anti-Dumping Agreement. USDOC selected reasonable replacement information for each type of missing necessary information: it replaced the missing information with the highest calculated margin for other reported Hyundai U.S. sales,¹²⁴ and for the Spec D, H, and E home market sales, USDOC revised the reported product characteristics and CONNUMs, as described in detail in the I&D Memorandum, and assigned to the appropriate CONNUMs the highest reported total cost of manufacturing for the CONNUMs in question.¹²⁵ Nothing in paragraph 7 of Annex II requires a different result, and Korea’s mere dissatisfaction with the selected values does not establish a WTO inconsistency.

¹²⁰ See *US – Carbon Steel (AB)*, para. 4.426.

¹²¹ Korea RPQ 16(f), n.58.

¹²² Korea RPQ 16(f), n.58.

¹²³ CRS I&D Memo, p. 63 (Exhibit KOR-41), *citing* USDOC Final Calculation Memo for Hyundai Steel (July 20, 2016) (Exhibit KOR-49 (BCI)).

¹²⁴ CRS I&D Memo, p. 63 (Exhibit KOR-41), *citing* USDOC Final Calculation Memo for Hyundai Steel (July 20, 2016), p. 6 (Exhibit KOR-49 (BCI)).

¹²⁵ CRS I&D Memo, p. 63 (Exhibit KOR-41), *citing* USDOC Final Calculation Memo for Hyundai Steel (July 20, 2016), p. 5 (Exhibit KOR-49 (BCI)).

3. *LPTs*

74. Korea has failed to establish that USDOC acted inconsistently with the Article 6.8 and Annex II of the Anti-Dumping Agreement in applying facts available in the administrative reviews regarding large power transformers. As the United States has previously demonstrated, Korea’s arguments to the contrary ignore the record evidence and are an attempt to blame USDOC for the failures of Korean respondents.

75. In addressing Korea’s claims, we further refute Korea’s argument that USDOC’s treatment of Hyundai’s service-related revenue in the second period of review (POR2) and the third period of review (POR3) was somehow flawed. Next, we show that Korea has failed to refute the record evidence that Hyundai refused to provide USDOC with requested information regarding “accessories” in POR3 and in the fourth period of review (POR4). We then rebut Korea’s arguments that USDOC did not corroborate the petition rate used in POR3 and POR4. Finally, we further explain that Korea has no legal basis for its Article 9.4 claim regarding USDOC’s “all others” rate in POR4.

a) *Korea Fails to Establish that USDOC’s Treatment of Hyundai’s Service-Related Revenue in POR2 and POR3 Breaches the Anti-Dumping Agreement.*

76. Notably, Korea makes no argument that USDOC’s requirement to cap service-related revenue is inconsistent with any WTO obligation. Nor does Korea dispute that capping revenue by the amount of expenses is necessary to obtain an accurate, undistorted dumping margin. Moreover, Korea fails to acknowledge that USDOC capped the other respondent’s (Hyosung) revenue in the same manner.¹²⁶

77. Rather, Korea’s argument rests entirely on the premise that USDOC had a “practice” with respect to capping service-related revenue that only applied to Hyundai, and that USDOC suddenly changed this “practice,” without notice, to the detriment of Hyundai.¹²⁷ This argument fails. Most fundamentally, Korea can point to no obligation in the AD Agreement for an authority to adopt or follow “practices.” The only question before a WTO panel is whether Korea can show that an unbiased and objective authority could not have reached the determinations made by Commerce in the two reviews. Korea can make no such showing. To the contrary, the records in the two proceedings fully support Commerce’s determinations.

78. As the United States demonstrated in its first written submission and in response to the Panel’s first set of questions, USDOC did not change its treatment with respect to treatment of

¹²⁶ *Final Results of the Administrative Review of the Antidumping Duty Order on Large Power Transformers from the Republic of Korea, 2014-2015*, Issues and Decision Memorandum (March 6, 2017) (“LPT I&D Memo (March 6, 2017)”), p. 23 (Exhibit KOR-121).

¹²⁷ Korea RPQ 35.

service-related revenue between the original investigation and initial POR2 final determination, on one hand, and the POR2 remand determination and POR3 on the other.¹²⁸ (Although, to be sure, no WTO obligation of ‘consistency’ exists.) Rather, USDOC consistently applied the statute and regulations, treating service-related revenues in all segments in accordance with U.S. law. What changed was USDOC’s understanding of Hyundai’s transactions and accounting. Korea can point to no provision of the Anti-Dumping Agreement that requires an investigating authority to ignore the import of particular facts in a proceeding simply because its understanding of equivalent facts was less developed in an earlier segment of the investigation. USDOC’s better understanding was appropriately reflected in the outcome of applying U.S. law to Hyundai’s facts in later proceedings.¹²⁹

79. For an administering authority to make a determination based on its understanding of the facts on the record of a particular proceeding at the time it makes the determination is precisely how one would expect an unbiased and objective authority to make decisions. Korea thus has no basis for any assertion that USDOC was not unbiased or lacked objectivity in evaluating the cap for Hyundai’s service-related revenue in the two proceedings at issue.¹³⁰

80. In an effort to support its claim, Korea implies that it was somehow wrong for Commerce to issue with respect to POR3, an additional supplemental questionnaire asking HHI to report additional information with respect to ‘separately-negotiated service and non-subject merchandise’. This argument has no legal basis: Korea can point to no obligation under the Anti-Dumping Agreement forbidding an authority from issuing a supplemental questionnaire.

81. Furthermore, and although not legally relevant to any WTO obligation, the United States strongly disagrees with Korea’s contention that USDOC’s issuance of a supplemental questionnaire was somehow a surprise to Hyundai. To the contrary, the record shows that Commerce persistently inquired about these issues throughout the proceeding.

- In response to USDOC’s initial request that Hyundai Steel report service revenues separately, Hyundai refused to provide the requested information, and instead cited USDOC’s determination from the original investigation.¹³¹
- In a supplemental, USDOC made a second request that Hyundai report service-related revenues and corresponding expenses, separately.¹³²

¹²⁸ U.S. RPQ 35, paras. 131-139.

¹²⁹ U.S. RPQ 35, para. 139.

¹³⁰ See U.S. RPQ 35, paras. 131-139.

¹³¹ Hyundai’s Questionnaire Response (January 27, 2016), pp. B-3 and B-4 (Exhibit KOR-122).

¹³² LPT I&D Memo (March 6, 2017), p. 19 (Exhibit KOR-121), citing Supplemental Questionnaire for Hyundai Heavy Industries Co., Ltd., (July 27, 2016), p. 7, para. 24 (Exhibit KOR-124). (USDOC stated: *Please clarify whether HHI or Hyundai USA received revenue related to international freight, inland freight, oil,*

- In light of information in Hyundai’s first supplemental, in a second supplemental USDOC requested for a third time that Hyundai report service-related revenues and the related expenses separately.¹³³
- In response to USDOC’s third request, Hyundai Steel provided a worksheet, but USDOC found the worksheet “incomplete and casts serious doubt on the reliability of such information” and thus was unable to “examine the validity of Hyundai’s reporting at this late stage of the review.”¹³⁴

82. In sum, Korea’s assertion that after the Preliminary Results USDOC suddenly and *for the first time* issued a supplemental questionnaire requesting data on service-related revenue cannot be reconciled with the facts on the record.

83. Korea has told an incomplete story in attempting to develop its argument that USDOC suddenly changed its “practice” in POR3, without notice, and to the detriment of Hyundai. In fact, Hyundai had several opportunities to provide the requested information, and failed to do so. Hyundai repeatedly ignored USDOC’s requests for information, and interpreted USDOC’s requests in its own way, arguing with USDOC, and ultimately blaming USDOC for deficiencies in the record.

84. There is nothing wrong with a party like Hyundai making arguments to USDOC about how it should treat a particular factual situation. But those arguments are not a valid substitute for the information USDOC has requested. By refusing to provide requested information, Hyundai goes beyond making arguments, by crediting those arguments and reaching a determination that reflects them. This is not a respondent’s proper role. Korea now would have the Panel turn a respondent’s recalcitrance into a WTO breach. Obviously, such a result has no basis in the covered agreements.

85. In sum, Korea has failed to establish its claim with respect to service-related revenue in both POR2 and POR3.

a. Hyundai Refused to Provide USDOC with Requested Information Regarding “Accessories” in POR3 and POR4.

installation, or any other expenses on U.S. sales. If so, please report this revenue in a field separate from the related expense.)

¹³³ LPT I&D Memo (March 6, 2017), p. 20 (Exhibit KOR-121) (emphasis in original), citing Supplemental Questionnaire for Hyundai Heavy Industries Co., Ltd., (October 7, 2016) p. 6, para. 17 (Exhibit KOR-118). (USDOC instructed Hyundai to “[p]lease revise your U.S. sales database to report all such expenses and revenues for these sales in separate fields.”)

¹³⁴ LPT I&D Memo (March 6, 2017), pp. 21-22 (Exhibit KOR-121).

86. Korea continues to insist that USDOC is to blame for Hyundai’s refusal to provide the requested information pertaining to the “accessories” that Hyundai sold to its customers.¹³⁵ This position is baseless. As we demonstrated in our first written submission and in our responses to Panel questions, once Commerce made the request for information, Hyundai either had to report the requested information pertaining to accessories, or accept that its non-cooperation would result in the application of facts available.¹³⁶ In addition to the arguments in our prior submission, the United States makes the following observations.

87. In its response to the Panel’s questions, Korea correctly recognizes that “interested parties are to respond to the best of their abilities to requests for information. This includes trying to give a proper meaning to certain terms in respect of which information is requested.”¹³⁷ Korea contends that “HHI explained that the term ‘accessories’ was not a standard term used by HHI and could have different meanings.”¹³⁸ Korea goes on to note that HHI “informed the USDOC of the lack of uniform meaning of this term.”¹³⁹ Based upon these statements, it is clear that HHI did not treat “accessories” according to a single definition of the term, but rather that the meaning varied by customer. In other words, Hyundai alone had possession of, and understood, the information that pertains to the term “accessories” as used in its dealings with its customers. In these circumstances, which Korea itself acknowledges, Korea’s position makes no sense. Given that the respondent itself stated that the term “accessories” had a special, shifting definition under HH’s business practices, Korea does not explain – and cannot explain – how or why USDOC should have defined the term in the USDOC questionnaire.

88. To be clear, the United States recognizes the obligation in paragraph 1 of Annex II that investigating authorities “should specify in detail the information required from any interested party, and the manner in which that information should be structured by the interested party in its response.” However, this is not a requirement that the investigating authority provide ever more granular detail regardless of the factual circumstances.¹⁴⁰ There is no question that the Korean company understood why USDOC sought the requested information pertaining to accessories. On the facts here, the company that uses this term in its sales documentation is by far in the best position to understand how that term is used. If the company was concerned about whether its understanding of the term was valid, it could have shared that understanding, along with the provision of the requested information according to its stated understanding.

¹³⁵ Korea RPQ 36(a).

¹³⁶ U.S. FWS, paras. 245-247; U.S. RPQ 36(a), paras. 140-141.

¹³⁷ Korea RPQ 36(a).

¹³⁸ Korea RPQ 36(a).

¹³⁹ Korea RPQ 36(a).

¹⁴⁰ The United States also notes that Korea treats the practice described in paragraph 1 of Annex II as if it is mandatory in all cases, despite that paragraph 1 contains the more permissive “should,” rather than the mandatory term “shall.”

89. Instead, it failed to provide the requested information. As USDOC noted, “Hyundai is obligated to submit the requested information whether it agreed with the request or not.”¹⁴¹ USDOC was well within its discretion to find such refusal to be a failure to cooperate to the best of its ability. Accordingly, Korea has failed to demonstrate that USDOC’s determination was inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement.

b. Korea Fails to Establish that USDOC Erred in Relying on Petition Rates in POR3 and POR4.

90. Korea challenges the rates USDOC applied in POR3 and POR4, claiming both determinations were inconsistent with the requirements of Article 6.8 and paragraph 7 of Annex II of the Anti-Dumping Agreement. We rebut below the new arguments presented by Korea on these issues.

91. Korea seems to argue that USDOC relied upon the petition rate in POR3 and POR4 based on the USDOC’s examination of the accuracy and adequacy of the petition for purposes of initiating the investigation.¹⁴² This argument is misplaced for several reasons.

92. First, this dispute is not about whether the obligations set forth in Article 5.3 are distinct from the directives contained in paragraph 7 of Annex II. No party disputes that these obligations are separate. However, as a logical matter, there is no reason why the actions of an investigating authority that satisfy Article 5.3 could not also satisfy the separate obligation in paragraph 7 of Annex II. Rather, the issue is whether or not a petition rate was corroborated, regardless of when that corroboration occurred (e.g., at the time of initiation, or the time of application of facts available).

93. In any event, Korea has misrepresented the facts in these administrative reviews. Contrary to Korea’s assertions, USDOC did not simply rely on its assessment of the petition at the time it initiated the investigation. Specifically, in POR3, USDOC did not rely on the rate from the petition solely on the ground that the petition rates were examined during the pre-initiation phase of the investigation.¹⁴³ Rather, in examining whether the petition rate has probative value for purposes of the final results, USDOC’s first step was to revisit the adequacy and accuracy of the information “for purposes of the final results.”¹⁴⁴ In particular, USDOC noted that it confirmed the accuracy and validity of the information underlying the derivation of the dumping margins alleged in the petition by examining source documents and publicly available information. USDOC stated it “obtained no other information that calls into question

¹⁴¹ LPT I&D Memo (March 6, 2017), p. 27 (Exhibit KOR-121).

¹⁴² Korea RPQ 39(a).

¹⁴³ LPT I&D Memo (March 6, 2017), p. 7 (Exhibit KOR-121).

¹⁴⁴ LPT I&D Memo (March 6, 2017), p. 7 (Exhibit KOR-121).

the validity of the sources of information or the validity of the information supporting the export price and normal value calculations provided in the petition.”¹⁴⁵

94. Further, USDOC examined the information obtained from a cooperating respondent in POR3 (*i.e.*, from Hyosung), which comports with the directive in paragraph 7 to check the information with “information obtained from other interested parties during the investigation.”¹⁴⁶ In this case, that meant the same review—*i.e.*, POR3. In comparing the petition rate to the transaction-specific data for Hyosung, USDOC found that the highest transaction-specific rate related to sales by Hyosung exceeded the dumping margin alleged in the petition.¹⁴⁷

95. Korea’s attempts to dismiss USDOC’s check of the information, asserting that “the fact that one aberrational margin of another producer is higher than the highest margin in the petition” is not “a reasonable way of testing the accuracy of the information to be used from the petition.”¹⁴⁸ This argument is unconnected with the actual record in the proceeding. In particular, Korea points to nothing on the record to support its bald assertion that the rate used to validate the petition rate was aberrational or otherwise did not have probative value. As the record reflects, the rate used for corroboration purposes reflects a cooperating respondent’s actual data with respect to its participation in the U.S. market during the period of review at issue. In sum, USDOC’s examination is fully consistent with paragraph 7 of Annex II.

96. With respect to POR4, Korea claims the USDOC incorrectly justified its reliance on the margin from the petition by the fact that it was relied upon in POR3.¹⁴⁹ Once again, Korea’s argument is meritless. USDOC encountered repeated failures to cooperate in successive reviews. The petition rate used in the previous review remains valid—and perhaps predictable—for purposes of facts available in the ensuing review. If information indicates the petition rate is no longer valid, USDOC is free to consider that information and reject the petition rate, where warranted, for use as facts available. But, as noted above, the application of facts available and the examination of such information is limited based on the available information.

97. In POR4, both respondents failed to cooperate to the best of their ability, thereby severely limiting information on the record.¹⁵⁰ As noted, USDOC previously corroborated the petition rate during the previous administrative review, and Korea is unable to point to any information on the record of POR4 that was not considered and calls into question the validity of the petition rate. Accordingly, again in this “as applied” challenge to USDOC’s application of the rate from

¹⁴⁵ LPT I&D Memo (March 6, 2017), p. 7 (Exhibit KOR-121).

¹⁴⁶ LPT I&D Memo (March 6, 2017), p. 6 (Exhibit KOR-121).

¹⁴⁷ LPT I&D Memo (March 6, 2017), p. 6 (Exhibit KOR-121).

¹⁴⁸ Korea FWS, para. 859.

¹⁴⁹ Korea RPQ 39(a).

¹⁵⁰ LPT I&D Memo (March 9, 2018), p. 4 (Exhibit KOR-211).

the petition, Korea has failed to demonstrate USDOC’s determination was inconsistent with the requirements of Article 6.8 and Annex II of the Anti-Dumping Agreement.

c. Korea Fails to Establish that USDOC Acted Inconsistently with Article 9.4.

98. As the United States has shown, Korea fails to make out a *prima facie* case with respect to its claim that the all others rate used in POR4 breaches Article 9.4 of the Anti-Dumping Agreement.¹⁵¹ Article 9.4 contains a single directive—that the all-others rate, in certain circumstances, shall not exceed a cap set by a methodology contained in that provision. Korea has not even alleged what the cap was in that review, which is a pre-requisite to establishing that the all others rate exceeded the cap. Accordingly, its claim fails.

99. Article 9.4 requires that facts available rates and zero or *de minimis* rates be excluded from the calculation of the cap. In the LPT POR4 proceeding, there would be no rates left once rates based on facts available are disregarded. Korea attempts to rely on what the Appellate Body has referred to as a lacuna in Article 9.4.¹⁵²

100. As an initial matter, the United States has serious concerns about the Appellate Body statements in this regard. A perceived lacuna—or gap—in an agreement means that the Members have not, in fact, agreed on any disciplines in the relevant area. “Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.”¹⁵³ To the extent that a “gap” exists, only the Members are permitted to address it. In the case of Article 9.4, where no cap can be calculated, by its own terms agreed to by the Members, the provision is inoperative. The Members have not agreed on any alternative cap.

101. In the *US – Zeroing* report relied upon by Korea, the Appellate Body ultimately found that, as the participants failed to suggest an alternative methodology to calculate the maximum allowable all others rate (*i.e.*, cap), it did not need to resolve the issue in that appeal.¹⁵⁴ Thus, its problematic reasoning is best understood as *obiter dictum*. In any event, as in that case, the parties here also have not proposed any alternative methodology for calculating the cap in Article 9.4 (likely because there is not one based in the text of the Agreement). Therefore, Korea has failed to make out a *prima facie* case, and the Panel need not resolve the issue to dispose of Korea’s claim.

¹⁵¹ See U.S. Oral Statement, paras. 55-58.

¹⁵² Korea FWS, para. 869.

¹⁵³ DSU, Art. 3.2.

¹⁵⁴ *US—Zeroing (EC) (21.5) (AB)*, para. 453.

B. CVD Proceedings

102. The panel will recall that in the cold-rolled steel (CRS) and hot-rolled steel (HRS) investigations, USDOC applied facts available because 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 verifying the withheld information.¹⁵⁵ The record simply does not support Korea's contention that USDOC's application of facts available with respect to this missing information was inconsistent with Article 12.7. The arguments presented by Korea subsequent to its First Written Submission are without merit, and do not provide any further support for its Article 12.7 claims.

103. In the first three sections below the United States emphasizes key facts and addresses specific arguments of Korea with respect to the CRS investigation and pertaining to (1) POSCO's failure to report cross-owned input suppliers, (2) Commerce's discovery at verification of an unreported facility located in a free economic zone (FEZ), and (3) DWI's failure to timely report requested information pertaining to certain loans. In the fourth section we address USDOC's determination to reject the same information in the HRS investigation as untimely and unsolicited.

1. USDOC Properly Resorted to Facts Available with Respect to POSCO's Cross-Owned Input Suppliers.

104. In its September 30, 2015 affiliation questionnaire response to USDOC's initial questionnaire, POSCO reported that it did not have any affiliates that supplied such inputs.¹⁵⁶ In a supplemental questionnaire, POSCO confirmed that it provided responses for all cross-owned companies, including those that produced inputs for POSCO.¹⁵⁷ At verification, however, USDOC discovered that four companies in POSCO's affiliation chart provided raw material inputs that reportedly were used in the production of cold-rolled steel.¹⁵⁸ Because USDOC

¹⁵⁵ *Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Issues and Decision Memorandum (July 20, 2016), pp. 9-11 ("CRS I&D Memo (CVD)") (Exhibit KOR-77); *Certain Hot-Rolled Steel Flat Products from the Republic of Korea*, Issues and Decision Memorandum (August 4, 2016), pp. 9-11 ("HRS I&D Memo (CVD)") (Exhibit KOR-98).

¹⁵⁶ *Certain Cold-Rolled Steel Flat Products from Korea*, Case No. C-580-882: Affiliated Companies Response (September 30, 2015), pp. 4-6 (Exhibit KOR-73 (BCI)); CRS I&D Memo (CVD), p. 9 (Exhibit KOR-77).

¹⁵⁷ *Certain Cold-Rolled Steel Flat Products from Korea: Second Supplemental Questionnaire Response*, POSCO/Daewoo (November 12, 2015), p. 1 (Exhibit KOR-74 (BCI)); CRS I&D Memo (CVD), p. 9 (Exhibit KOR-77); *Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products: Supplemental Questionnaire for POSCO* (November 5, 2015), p. 3 (Exhibit KOR-85).

¹⁵⁸ CRS I&D Memo (CVD), p. 9 (Exhibit KOR-77); *Countervailing Duty Investigation: Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Verification Report: POSCO and Daewoo International Corporation* (April 29, 2016), p. 2, 10-14 (Exhibit KOR-75 (BCI)).

determined that it could not verify the information that POSCO proffered on the last day of verification, USDOC could not rely on the unverified data in its final determination.¹⁵⁹

105. As POSCO failed to reply accurately and completely to requests for necessary information, 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 from POSCO to calculate POSCO's countervailing duty rate.¹⁶⁰ Accordingly, USDOC determined the use of facts available were warranted.

106. In its responses to Panel questions Korea challenges USDOC's resort to facts available on the basis that POSCO followed USDOC's regulations and supposed "practice" to determine for itself that POSCO's affiliated input suppliers did not produce inputs "primarily dedicated" to the production of the downstream product, and thus the information requested by USDOC regarding POSCO's affiliated input suppliers was not relevant to the investigation.¹⁶¹ There are many flaws in Korea's argument.

107. In deciding for itself that production by POSCO's affiliated input suppliers was not "primarily dedicated" to production of the downstream product, POSCO effectively tried to substitute itself as the investigating authority. However, USDOC is the only investigating authority, and nothing in the SCM Agreement supports the proposition that an authority must accept the respondent's view as to what information is required in a CVD proceeding.¹⁶²

108. To support its position, Korea attempts to equate USDOC's "primarily dedicated" analysis with a respondent's responsibility of reporting affiliated parties.¹⁶³ According to Korea, respondents use certain "parameters established in the relevant law and practice" to report to USDOC affiliated parties.¹⁶⁴ Thus, according to Korea, it was reasonable for POSCO to do the same and base its response regarding affiliated input providers on USDOC's "regulation and practice regarding 'primarily dedicated.'"¹⁶⁵ Korea's reasoning is erroneous.

¹⁵⁹ CRS I&D Memo (CVD), pp. 65-67 (Exhibit KOR-77); Countervailing Duty Investigation: Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Verification Report: POSCO and Daewoo International Corporation (April 29, 2016), p. 2 (Exhibit KOR-75 (BCI)).

¹⁶⁰ See CRS I&D Memo (CVD), p. 64-65 (Exhibit KOR-77).

¹⁶¹ Korea RPQ 21.

¹⁶² U.S. RPQ 20, para. 93.

¹⁶³ Korea RPQ 21.

¹⁶⁴ Korea RPQ 21.

¹⁶⁵ Korea RPQ 21.

109. “Affiliated persons” are defined by U.S. law. The question of whether an input is “primarily dedicated” to a downstream product is decided on a case-by-case basis, with no bright lines to define what is “primarily dedicated.”¹⁶⁶ Additionally, USDOC requested that respondents identify affiliated parties; it did not request that respondents perform a “primarily dedicated” analysis. Respondents’ role was to provide the requested information, which would then have enabled USDOC to fulfill its role of conducting legal analyses and reaching corresponding determinations. As noted, nothing in the SCM Agreement requires an authority to accept a respondent’s view of what information an authority should request or receive to calculate a rate of subsidization.

110. Nothing more needs to be said to establish that Korea simply has no legal argument under the SCM Agreement. Nonetheless, we will note why, as a practical matter, it would make no sense to conduct proceedings in which the respondent decided for itself what information should or should not be provided to an authority. As previously noted,¹⁶⁷ Korea’s assertion that USDOC uses a 30 percent bright line for determining “primarily dedicated” is inaccurate, meaning POSCO’s analysis was erroneous.¹⁶⁸ Indeed, USDOC has never established a bright line threshold for primary dedication; USDOC makes such a determination after evaluating the record, including the information provided by the respondent companies, on a case-by-case basis. Korea’s interpretation of USDOC’s supposed “practice” relies on an argument by a respondent in a case from 1992, not a USDOC determination.¹⁶⁹ Moreover, Korea has not pointed to one instance in which USDOC has allowed a respondent to make that determination on its behalf, and then withhold requested information on that basis.¹⁷⁰

111. Korea also attempts to convince the Panel that the inputs were not “primarily dedicated” because the percentages of the affiliates sales to POSCO are small when measured against POSCO’s total cost of production for cold-rolled products.¹⁷¹ However, because POSCO failed to report the affiliated input suppliers to USDOC, this information was not on the record. Rather, 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.”¹⁷² As USDOC noted, had POSCO not responded in

¹⁶⁶ 19 U.S.C. § 1677(33) (Exhibit USA-87).

¹⁶⁷ U.S. RPQ 20, paras. 93-97.

¹⁶⁸ Korea FWS, para. 352.

¹⁶⁹ U.S. RPQ 20, para. 95; *Countervailing Duty Expedited Reviews of 13 Companies Covered by the August 14, 2002 Notice of Preliminary Results in Certain Softwood Lumber Products from Canada*, Issues and Decision Memorandum (November 5, 2002), Comment 1, p.23 (Exhibit KOR-82)).

¹⁷⁰ U.S. RPQ 20, para. 96 (citing *Countervailing Duty Investigation of Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea*, Issues and Decision Memorandum, (March 16, 2012), p. 3 (Exhibit KOR-79)).

¹⁷¹ Korea RPQ 21.

¹⁷² See CRS I&D Memo (CVD), p. 64 (Exhibit KOR-77).

the negative, USDOC would have had the opportunity to follow-up and verify POSCO's claim that the affiliated companies only provided small amounts.¹⁷³

112. Responses to the Panel's questions by third parties support the U.S. position that respondents must respond fully and accurately to questionnaires issued by investigating authorities, and that authorities are not obligated to accept a respondent's self-determination as to what information is relevant. Norway observes that a determination in the first instance is up "to the discretion of the investigating authority", who determines "what information it deems necessary for the conduct of its investigation."¹⁷⁴ Japan likewise concludes, "it is the investigating authority that determines what would be required to complete or make a determination."¹⁷⁵

113. Although a respondent may, in some limited instances, decline to provide information requested by an investigating authority, the EU and Canada explain how the respondent should proceed in such circumstances. For instance, Canada explains, "an interested party should seek clarification . . . and provide an explanation of the reasons why it believes the information . . . is not necessary."¹⁷⁶ The EU opines that, if an interested party simply chooses not to respond, "the investigating authority will not be aware of the reasons why the interested party has not replied." Thus, "even if the information at stake is indeed not particularly relevant . . . the investigating authority will be justified in treating that interested party as non-cooperative."¹⁷⁷ In the present case, POSCO provided an affirmative response, with no additional explanation, and did not seek guidance to determine whether the information it improperly determined not to be relevant, was in fact relevant.

114. In summary, Korea's assertion—that Commerce was required to accept POSCO's decision that it could refuse to cooperate based on POSCO's own evaluation of what information Commerce required—is untenable.

2. *Korea Fails to Establish that USDOC's Reliance on Facts Available with Respect to POSCO's Facility Located In a Free Economic Zone is Inconsistent with Article 12.7 of the SCM Agreement.*

115. As Korea acknowledges in its responses to panel questions, POSCO did not "ultimately" inform USDOC about the FEZ facility until the fifth supplemental questionnaire in the hot-rolled

¹⁷³ See CRS I&D Memo (CVD), p. 64 (Exhibit KOR-77); HRS I&D Memo (CVD), p. 61 (Exhibit KOR-98).

¹⁷⁴ Norway Third Party Submission, para. 8.

¹⁷⁵ Japan RPQ 5, para. 14.

¹⁷⁶ Canada RPQ 5, para. 14.

¹⁷⁷ E.U. RPQ 5, para.18.

steel investigation.¹⁷⁸ (At this late point in the proceeding, USDOC appropriately rejected this information because it was unsolicited and untimely.¹⁷⁹) Despite Korea’s acknowledgment of POSCO’s failure to provide this information in a timely fashion, Korea advances a somewhat different argument. Namely, Korea argues that POSCO “reported that it had certain facilities located in FEZs, but that none of these received any FEZ benefits, as POSCO is not a foreign-invested enterprise.”¹⁸⁰ The record does not support Korea’s assertion.

116. Contrary to Korea’s argument, POSCO’s original questionnaire responses did not report that it “had certain facilities located in FEZs, but that none of these received any FEZ benefits.” Rather, in its original questionnaire responses, POSCO reported that, “POSCO has no facilities located in a free economic zone (“FEZ”) and thus was not eligible for and did not receive any tax reductions, exemptions, grants or financial support under any of the three programs listed in the Department’s question.”¹⁸¹

117. Korea also attempts to blame USDOC for POSCO’s failure to provide timely information on POSCO’s FEZ facilities, arguing that the question did not ask POSCO to “list all facilities located within {sic} the FEZ,” but rather whether it benefitted from any FEZ assistance and the answer to that is “no.”¹⁸² But the issue is not the wording of USDOC’s question, it is whether the information provided by POSCO in response was accurate. And, the response was not accurate: POSCO’s response that it did not benefit from any FEZ programs because it has “no facilities located in a free economic zone (“FEZ”) and *thus* was not eligible” simply was not correct.¹⁸³ Indeed, it turned out that POSCO did have a facility in an FEZ, but because POSCO responded that it did not, USDOC was denied the opportunity to examine whether POSCO benefitted from FEZ assistance.

118. Korea also points to the government of Korea’s response and notes that it “clearly explained in its questionnaire response that POSCO did not and could not receive any FEZ

¹⁷⁸ Korea RPQ 25.

¹⁷⁹ See Letter from Department of Commerce Rejecting POSCO’s Submission of New Factual Information (April 14, 2016) (Exhibit KOR-93).

¹⁸⁰ Korea RPQ 25.

¹⁸¹ *Certain Cold-Rolled Steel Flat Products from Korea*, Case No. C-580-882: Initial Questionnaire Response (October 23, 2015), pp. 52-53 (Exhibit KOR-70 (BCI)); *Certain Hot-Rolled Steel Flat Products from Korea*: Initial Questionnaire Response (November 2, 2015) p. 45 (Exhibit KOR-90 (BCI)); *Certain Cold-Rolled Steel Flat Products*: Initial Countervailing Duty Questionnaire (September 16, 2015), Section II, p. 18 (Exhibit USA-52); U.S. FWS, para. 381-383; CRS I&D Memo (CVD), pp. 72-73 (Exhibit KOR-77); Response of the Government of Korea to Section II of the Department’s September 16, 2015 Questionnaire (October 30, 2015), pp. 107-108 (Exhibit KOR-84 (BCI)).

¹⁸² Korea RPQ 25.

¹⁸³ *Certain Cold-Rolled Steel Flat Products from Korea*, Case No. C-580-882: Initial Questionnaire Response (October 23, 2015), pp. 52-53 (Exhibit KOR-70 (BCI)); *Certain Hot-Rolled Steel Flat Products from Korea*: Initial Questionnaire Response (November 2, 2015) p. 45 (Exhibit KOR-90 (BCI))

benefits.”¹⁸⁴ As the United States has already pointed out, USDOC found the government of Korea’s statement to be ambiguous as to what it means by “investigation period.”¹⁸⁵ As provided in U.S. regulations, the period of investigation or “POI” in a countervailing duty investigation is normally the most recently completed fiscal year for the government and exporters or producers in question, subject to certain exceptions.¹⁸⁶ On the other hand, non-recurring subsidies may be allocated over the average useful life (“AUL”) of the subsidized product. Thus, a portion of a non-recurring subsidy received several years before the period of investigation would be allocated to the 12-month period of investigation for purposes of calculating a CVD rate. Thus, the receipt of subsidies prior to the POI will affect the POI CVD rate.

119. Korea argues that “under either reading of the term, the GOK confirmed that no FEZ benefits were conferred to POSCO.”¹⁸⁷ However, as USDOC explained, “the GOK uses the term ‘investigation period’ throughout its initial questionnaire response to refer to the period of investigation. Therefore, we do not have an affirmative claim of non-use of this program for the remainder of the 15-year AUL period from the GOK.”¹⁸⁸

120. Korea also faults USDOC for not doing its own investigation into verifying whether POSCO benefitted from this program. Specifically, Korea explains that “USDOC could simply have asked for information or checked itself whether POSCO was registered under the relevant FEZ program.”¹⁸⁹ It is not clear who Korea is suggesting that USDOC should have asked, and in any event, Korea ignores that USDOC found POSCO’s FEZ facility while seeking additional information on the FEZ program on an official government website.¹⁹⁰ Moreover, when offered an opportunity to provide an explanation, POSCO officials could have presented materials to show that they did not benefit from the FEZ program, but instead provided a hand-drawn map and “stated that {its} facility was located outside of the hand-drawn FEZ.”¹⁹¹ In other words, rather than demonstrate that they did not benefit from having the facility in the FEZ, POSCO denied having the facility.

121. Korea also faults USDOC for failing to verify the FEZ facility to determine the facility’s purpose and operation.¹⁹² In response to a question from the Panel regarding the record in the

¹⁸⁴ Korea RPQ 25.

¹⁸⁵ U.S. RPQ 26, para. 113.

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

¹⁸⁷ Korea RPQ 25.

¹⁸⁸ CRS I&D Memo (CVD), p. 81 (Exhibit KOR-77).

¹⁸⁹ Korea RPQ 25.

¹⁹⁰ See CRS I&D Memo (CVD), pp. 72-73 (Exhibit KOR-77).

¹⁹¹ See CRS I&D Memo (CVD), p. 73 (Exhibit KOR-77).

¹⁹² Korea RPQ 25(b).

cold-rolled steel investigation and the record information relating to the purpose and operation of the FEZ, Korea attempts to mislead the Panel by pointing to USDOC’s refusal to verify the facility during the hot-rolled steel verification.¹⁹³ As discussed below, in the hot-rolled steel investigation, the information regarding the facility was submitted late, was not part of the record, and thus not verified.¹⁹⁴ However, with respect to the cold-rolled steel investigation, the record shows that USDOC attempted to verify the facility.¹⁹⁵ After rejecting POSCO’s hand drawn map, USDOC “suggested that 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.”¹⁹⁶

122. In sum, as USDOC was unable to confirm POSCO’s statement “that it has no facilities located in an FEZ and, therefore, {that POSCO} did not receive benefits under this program,” USDOC resorted to facts available.¹⁹⁷ Nothing in the SCM Agreement requires USDOC to accept information submitted well after the factual deadline. For these reasons, Korea fails to establish that USDOC’s resort to facts available was inconsistent with Article 12.7 of the SCM Agreement.

3. Korea Fails to Establish that USDOC’s Reliance on Facts Available Regarding Certain Loans to DWI Was Inconsistent with Article 12.7 of the SCM Agreement.

123. Korea fails to establish that USDOC reliance on facts available concerning additional loans to POSCO’s cross-owned affiliate DWI was inconsistent with Article 12.7 of the SCM Agreement. POSCO’s cross-owned affiliate DWI initially reported receiving [[[***]]] loans under the KORES loan program.¹⁹⁸ At verification, DWI presented what it claimed to be a minor correction, consisting of two additional loans that it did not report. Upon further examination, USDOC determined that POSCO’s characterization of “two” unreported loans was incorrect; and

¹⁹³ Korea RPQ 27.

¹⁹⁴ See HRS I&D Memo (CVD), p. 69 (Exhibit KOR-98) (citing *Countervailing Duty Investigation Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Verification Report: POSCO and DWI* (June 30, 2016), p. 3 (Exhibit KOR-96 (BCI))).

¹⁹⁵ See CRS I&D Memo (CVD), p. 73 (Exhibit KOR-77).

¹⁹⁶ *Countervailing Duty Investigation: Certain Cold-Rolled Steel Flat Products from the Republic of Korea, Verification Report: POSCO and Daewoo International Corporation* (April 29, 2016), p. 39 (Exhibit KOR-75 (BCI)).

¹⁹⁷ U.S. FWS, para. 383; CRS I&D Memo (CVD), p. 73 (Exhibit KOR-77).

¹⁹⁸ See *Certain Cold-Rolled Steel Flat Products from Korea, Second Supplemental Questionnaire Response, POSCO/Daewoo* (November 12, 2015), Exhibits F-11, F-12 (Exhibit KOR-74 (BCI)).

that in fact POSCO had failed to report [[***]] *additional* loans.¹⁹⁹ Due to “the magnitude of change in the reported lending under the specified program,” USDOC found that the submission did not constitute a minor correction, and instead constituted new factual information.²⁰⁰ Accordingly, USDOC rejected the submission from the record.²⁰¹ Due to the extensive nature of the modifications, USDOC was not able to fully verify the use of the program, resulting in USDOC’s application of facts available.²⁰²

124. In responses to Panel questions, Korea further alleges that USDOC overstates the “magnitude” of POSCO’s minor corrections, as USDOC uses the wrong “metric” to count loans, noting that with its minor corrections, POSCO submitted only [[***]] loans, with [[***]] disbursements, and that initially POSCO submitted only [[***]] loans with [[***]] disbursements.²⁰³

125. However, the record does not support Korea’s “metric” of calculating the number of loans. Documents submitted by POSCO confirm that POSCO initially submitted [[***]] loans and subsequently submitted [[***]] loans.²⁰⁴ What Korea considers one loan corresponds to multiple different dates listed for [[***]], indicating different agreements, with different currencies (either [[***]]) listed under [[***]].²⁰⁵

126. Nonetheless, even using Korea’s metric, the total number of loans still increases by [[***]] percent. Furthermore, the magnitude of the additional loans (or disbursements according to Korea) becomes apparent when examining the value of the additional loans reported. The loans included in POSCO’s initial questionnaire had a total value of [[***]] loans and [[***]]

¹⁹⁹ 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), p. 2 (Exhibit KOR-75 (BCI)).

²⁰⁰ See CRS I&D Memo (CVD), p. 76 (Exhibit KOR-77).

²⁰¹ 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)).

²⁰² See CRS I&D Memo (CVD), p. 76 (Exhibit KOR-77).

²⁰³ Korea RPQ 28.

²⁰⁴ *Certain Cold-Rolled Steel Flat Products from Korea*, Second Supplemental Questionnaire Response, POSCO/Daewoo (November 12, 2015), Exhibit F-12 (Exhibit KOR-74 (BCI)); *Certain Cold-Rolled Steel Flat Products from Korea*, Minor Corrections Presented at DWI’s Verification (March 22, 2016), Attachment A (Exhibit KOR-86).

²⁰⁵ *Certain Cold-Rolled Steel Flat Products from Korea*, Second Supplemental Questionnaire Response, POSCO/Daewoo (November 12, 2015), Exhibit F-12 (Exhibit KOR-74 (BCI)); *Certain Cold-Rolled Steel Flat Products from Korea*, Minor Corrections Presented at DWI’s Verification (March 22, 2016), Attachment A (Exhibit KOR-86).

loans.²⁰⁶ The loans submitted at verification had a total value of [[***]] loans and [[***]] loans.²⁰⁷ Thus, with the additional loans, the total value of DWI’s loans increased from [[***]] loans and [[***]] loans, an increase of more than [[***]] percent and [[***]] percent, respectively.²⁰⁸ Korea’s view that these corrections are minor is dubious. In any event, Korea certainly has not established that every objective, unbiased authority would have found them to be so.

127. Korea also argues that, regardless of the “magnitude of the change,” the loans are “entirely unrelated to the production of the subject merchandise in question.”²⁰⁹ However, as discussed in our responses to Panel questions, sufficient information had not been submitted to demonstrate that the verified KORES loans were tied to non-subject merchandise, and there was nothing on the record to indicate that the [[***]] additional loans submitted at verification were not tied to subject merchandise.²¹⁰

128. In sum, USDOC’s determination that, due to “the magnitude of change in the reported lending under the specified program,” the additional loans submitted at verification did not constitute a minor correction and instead constituted new factual information, evidences no bias or lack of objectivity.²¹¹ Thus, Korea has failed to show that USDOC’s determination in this respect is inconsistent with Article 12.7.

4. Korea Fails to Demonstrate that POSCO Submitted Certain Data Within a Reasonable Period in the Hot-Rolled Investigation.

129. Korea asserts that, in the hot-rolled steel investigation, POSCO submitted requested information regarding (1) affiliated input suppliers, (2) the existence of an R&D facility located in an FEZ, and (3) additional loans to DWI within a reasonable period of time. The record

²⁰⁶ *Certain Cold-Rolled Steel Flat Products from Korea*, Second Supplemental Questionnaire Response, POSCO/Daewoo (November 12, 2015), Exhibit F-12 (Exhibit KOR-74 (BCI)); *Certain Cold-Rolled Steel Flat Products from Korea*, Minor Corrections Presented at DWI’s Verification (March 22, 2016), Attachment A (Exhibit KOR-86).

²⁰⁷ *Certain Cold-Rolled Steel Flat Products from Korea*, Second Supplemental Questionnaire Response, POSCO/Daewoo (November 12, 2015), Exhibit F-12 (Exhibit KOR-74 (BCI)); *Certain Cold-Rolled Steel Flat Products from Korea*, Minor Corrections Presented at DWI’s Verification (March 22, 2016), Attachment A (Exhibit KOR-86).

²⁰⁸ *Certain Cold-Rolled Steel Flat Products from Korea*, Second Supplemental Questionnaire Response, POSCO/Daewoo (November 12, 2015), Exhibit F-12 (Exhibit KOR-74 (BCI)); *Certain Cold-Rolled Steel Flat Products from Korea*, Minor Corrections Presented at DWI’s Verification (March 22, 2016), Attachment A (Exhibit KOR-86).

²⁰⁹ Korea RPQ 28.

²¹⁰ U.S. RPQ 28, para. 119.

²¹¹ See CRS I&D Memo (CVD), p. 76 (Exhibit KOR-77).

shows otherwise, and USDOC’s decision to reject POSCO’s untimely data was consistent with Article 12.7 of SCM Agreement.

130. Korea argues that POSCO submitted the requested information within a reasonable time because it was well in advance of verification.²¹² Korea does not explain why it was “well in advance of verification,” but the record shows that POSCO’s initial attempt to submit the data was on April 14,²¹³ four months after the December 2015 deadline for new information in the hot-rolled steel investigation.²¹⁴ This deadline was set according to USDOC’s regulations.²¹⁵

131. As we have previously noted, it is unclear why Korea considers that, as long as it views the time between a delinquent submission and verification as sufficient, POSCO is not bound by the regulations and deadlines that apply to all of the other parties in the proceeding. Article 12.12 clearly recognizes the legitimate interest investigating authorities have in proceeding expeditiously to reach a final determination. Moreover, Paragraph 1 of Annex II of the Anti-Dumping Agreement acknowledges that administering authorities may, and therefore can, resort to facts available if information is not submitted in a timely manner.²¹⁶

132. Korea asserts that “there can be circumstances when an interested party provides information within a reasonable period of time although outside the investigating authority’s deadline.”²¹⁷ To the extent that Korea is arguing that in certain circumstances, authorities are obligated to accept late information, Korea presents no support in the text of the SCM Agreement for this proposition.²¹⁸

133. Korea’s argument relies in part on certain Appellate Body findings in *US - Hot-Rolled Steel*:

In considering whether information is submitted within a reasonable period of time, investigating authorities should consider, in the context of a particular case,

²¹² Korea RPQ 29.

²¹³ See Letter from Department of Commerce Rejecting POSCO’s Submission of New Factual Information (April 14, 2016) (Exhibit KOR-93).

²¹⁴ 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).

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

²¹⁶ See also Anti-Dumping Agreement, Annex II, para. 3 (also reflecting the legitimate interest in timeliness of submissions).

²¹⁷ Korea RPQ 30.

²¹⁸ The United States notes that USDOC’s regulations provide for limited exceptions to the factual deadlines. These exceptions, however, are not required by WTO rules. In any event, POSCO’s submission did not fall under any of these exceptions. See 19 C.F.R. § 351.301(c)(1-4) (Exhibit USA-76).

factors such as: (i) the nature and quantity of the information submitted; (ii) the difficulties encountered by an investigated exporter in obtaining the information; (iii) the verifiability of the information and the ease with which it can be used by the investigating authorities in making their determination; (iv) whether other interested parties are likely to be prejudiced if the information is used; (v) whether acceptance of the information would compromise the ability of the investigating authorities to conduct the investigation expeditiously; and (vi) the numbers of days by which the investigated exporter missed the applicable time-limit.²¹⁹

134. As an initial matter, to the extent that Korea argues that this list of 6 factors somehow imposes or effects the obligations which apply to WTO Members, the United States has serious concerns with such a proposition. The DSU is clear that dispute settlement findings cannot add to or diminish rights under the covered agreements. And, these 6 factors are not set out in the WTO Agreement. Rather, the issue in WTO dispute settlement is whether an unbiased and objective authority could have reached the determination at issue in the dispute.

135. In any event, to the extent the above-quoted reasoning is in any way helpful in terms of interpreting the obligations actually set out in the WTO Agreement, nothing in this reasoning indicates any flaw in USDOC's determination.

136. Korea begins by asserting that the information was not essential.²²⁰ While this is not one of the factors examined by the Appellate Body in *US - Hot-Rolled Steel*, whether the requested information was essential is not known, as POSCO deprived USDOC of an opportunity to review the information. Korea also asserts that the information could have been verified, as it was provided "long" before verification, and USDOC was still collecting information.²²¹ The record does not support Korea's assertion.

137. While USDOC was continuing to collect data from POSCO, the supplemental questionnaires covered very specific and limited questions to clarify POSCO's previous answers.²²² By contrast, the additional information POSCO attempted to submit late did not. With respect to the unreported affiliated companies, USDOC explained, it was not able to accept this information for consideration "due to untimely presentation of the data and the large amount of analysis required."²²³ Korea asserts that verification of the FEZ facility was just "a matter of

²¹⁹ *US – Hot-Rolled Steel (AB)*, para 85.

²²⁰ Korea RPQ 30.

²²¹ Korea RPQ 30.

²²² See *Certain Cold-Rolled Steel Flat Products from Korea*, Fifth Suppl. Questionnaire Response (April 13, 2016) (Exhibit KOR-92 (BCI)); *Certain Cold-Rolled Steel Flat Products from Korea*, Supplemental New Subsidy Allegation Questionnaire Response (May 3, 2016) (Exhibit KOR-94 (BCI)).

²²³ *Final Determination in the Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products from the Republic of Korea*, Issues and Decision Memorandum (August 4, 2016), p. 64 (Exhibit KOR-98).

one phone call to organize a visit.”²²⁴ This is a curious argument for Korea to advance given that, when USDOC attempted to visit the facility during the cold-rolled verification, it was denied the opportunity.²²⁵ And, while Korea asserts that the volume of additional loans was small, they would have increased DWI’s loans from [[***]] loans and [[***]] loans.²²⁶

138. Conveniently, Korea ignores the sixth factor in the list of factors which Korea otherwise considers relevant, namely, “the number of days by which the investigated exporter missed the applicable time-limit.”²²⁷ As explained above, POSCO missed USDOC’s deadline by nearly four months. Moreover, accepting the information at such a late stage in the investigation, after USDOC has issued its preliminary determination, would have likely compromised USDOC’s ability to conduct the investigation expeditiously. It also would have been grossly unfair to other parties, and would have incentivized further delinquent behavior in future proceedings, thereby undermining the effectiveness and efficiency of such proceedings to an even greater degree.

139. In sum, USDOC found that POSCO’s information was untimely, an objective fact based on published deadlines according to published regulations. Korea’s view—without regard to USDOC’s need to run an orderly investigation that is fair to all parties—that USDOC was obligated to make a *sui generis* exception for POSCO is not supported by Article 12.7 (or any other provision) of the SCM Agreement.

III. “AS SUCH” CLAIM AGAINST AN ALLEGED UNWRITTEN MEASURE

A. Korea Fails To Establish the Existence of the Unwritten Measure Described in Its Panel Request.

1. *Korea’s Arguments Often Fail to Even Address the Alleged Unwritten Measure Described in its Panel Request.*

140. In its preliminary ruling, the Panel explains that the unwritten measure challenged by Korea “as such” that is within the Panel’s terms of reference is described in Section I.C of

²²⁴ Korea RPQ 30.

²²⁵ *Countervailing Duty Investigation: Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Verification Report: POSCO and Daewoo International Corporation (April 29, 2016), p. 39 (Exhibit KOR-75 (BCI)).

²²⁶ *Certain Cold-Rolled Steel Flat Products from Korea*, Second Supplemental Questionnaire Response, POSCO/Daewoo (November 12, 2015), Exhibit F-12 (Exhibit KOR-74 (BCI)); *Certain Cold-Rolled Steel Flat Products from Korea*, Minor Corrections Presented at DWI’s Verification (March 22, 2016), Attachment A (Exhibit KOR-86).

²²⁷ *US – Hot-Rolled Steel (AB)*, para. 85.

Korea’s panel request.²²⁸ Specifically, Korea alleges that the United States maintains the following unwritten measure:

Under this ongoing conduct or norm, whenever the USDOC makes a finding that a producer or exporter has failed to cooperate by not acting to the best of its ability, it adopts adverse inferences and, in determining the duty rate for this producer or exporter, selects facts from the record that are adverse to the interests of this producer or exporter without establishing (i) that such inferences can reasonably be drawn in light of the degree of cooperation received, and (ii) that such facts are the “best information available” in the particular circumstances.²²⁹

However, Korea’s arguments bounce around wildly, addressing a multitude of “measures” that do not match the one in its panel request—that is, the lone alleged unwritten measure within the Panel’s terms of reference.

141. For example, Korea argues that the precise content is reflected in the U.S. statute, as amended by the TPEA.²³⁰ However, to state the obvious, Korea has not pursued a claim against any provision of the U.S. statute, which of course is a written measure. Therefore, the contents of this statute do not support the alleged existence of an *unwritten* measure with the precise content reflecting Korea’s description in its panel request.

142. Korea also references USDOC’s Antidumping Manual.²³¹ But even Korea only alleges that the manual indicates that USDOC *may* make an adverse inference if a respondent has not cooperated to the best of its ability.²³² Therefore, it fails to support the existence of any of the elements of the alleged measure included in Korea’s panel request.²³³

143. In addition, Korea attempts to establish the existence of the alleged unwritten measure by arguing that the unwritten measure identified in the *US – Antidumping Methodologies* Appellate Body report and the alleged unwritten measure Korea challenges here have “identical content.”²³⁴ The precise content of the unwritten measure in *US – Anti-dumping Methodologies* was as follows:

²²⁸ Preliminary Ruling, para. 2.1.

²²⁹ Korea Panel Request, para. 9.

²³⁰ See Korea FWS, paras. 897-909.

²³¹ See Korea FWS, para. 912; Korea RPQ 40(a).

²³² See Korea FWS, para. 912.

²³³ Furthermore, it specifically contains a disclaimer that “{t}his manual cannot be cited to establish DOC practice.” See U.S. Antidumping Manual, p.1 (Exhibit KOR-226).

²³⁴ Korea FWS, para. 995. See *ibid.*, paras. 980-996.

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.²³⁵

Therefore, the existence of a measure with that precise content in *US – Anti-dumping Methodologies* offers no support for the existence the markedly different alleged measure in Korea’s panel request. Korea’s reliance on *US – Supercalendered Paper* is erroneous for the same reason.²³⁶

144. Many of Korea’s arguments, including in its responses to Panel questions, imply that the challenged measure consists of a resort to adverse inferences upon a finding of non-cooperation, and nothing more.²³⁷ However, Korea’s panel request cannot be read as challenging the use of adverse inferences broadly, as it clearly describes elements beyond the mere drawing of adverse inferences.²³⁸ Therefore, arguments that address the existence of a measure that consists only of resort to adverse inferences upon a finding of non-cooperation, and nothing more, are manifestly insufficient.

145. Furthermore, Korea raises three alleged “methods” or “practices” regarding USDOC’s selection of AFA in distinct and narrow factual circumstances, such as when missing information concerns expenses.²³⁹ Korea describes these “methodologies” as “specific examples of the USDOC’s AFA Ongoing Conduct.”²⁴⁰ 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. Thus, these arguments too fail to address the existence of the alleged measure that is actually within the Panel’s terms of reference, and therefore also are irrelevant to Korea’s as such claim.

146. Korea also has created enormous confusion about the role of the TPEA in its as such claim. For the first time at the first meeting with the Panel, Korea indicated that the TPEA served as a firm cut-off date for the measure it is challenging. To start with the most obvious

²³⁵ *US – Anti-Dumping Methodologies (AB)*, para. 5.109.

²³⁶ See Korea FWS, paras. 997-1000.

²³⁷ See, e.g., Korea RPQ 40(a) (“Korea’s claim is based on a long history of resort to AFA as a rule or norm, or an ongoing conduct by the USDOC as confirmed in other WTO dispute settlement proceedings to which Korea has made reference in its first written submission. The unwritten measure of resorting to AFA whenever a finding of non-cooperation has existed for much longer.”).

²³⁸ Korea Panel Request para. 9 (“it adopts adverse inferences *and...*”) (emphasis added).

²³⁹ See Korea FWS, paras. 947-957.

²⁴⁰ Korea FWS, para. 946.

point, Korea is not challenging the TPEA, which is a written measure, as WTO-inconsistent. Moreover, Korea’s panel request gives no indication that the enactment of the TPEA provides any such cut-off for assessing its allegation that an unwritten measure is as such WTO-inconsistent. Korea is not permitted to amend its claim in this respect during the pendency of proceeding.

147. In any event, Korea still has not explained *why* that date serves as a cut-off point. Korea is not arguing that the alleged unwritten measure came into existence at the time of the TPEA enactment. Indeed, Korea asserts that the unwritten measure has been in existence for a long time.²⁴¹ Likewise, Korea has suggested that the TPEA merely confirmed the *continuation* of a “long-standing” measure.²⁴² However, Korea also advances no arguments that any aspect of the TPEA rendered a previously WTO consistent measure WTO-inconsistent.

148. Moreover, various elements of the TPEA discussed by Korea do not apply to all cases. For a measure to be “as such” WTO-inconsistent, it must necessarily breach a provision of the covered agreements.²⁴³ Therefore, it simply would not make sense to argue that some unwritten measure of the United States necessarily breaches the SCM Agreement or Anti-Dumping Agreement due to provisions of the TPEA that are only relevant in a sub-set of cases.

149. To be clear, the United States strongly maintains that no provision in the TPEA, whether in isolation or in combination with another provision, breaches the covered agreements. The United States merely points out that, because the various TPEA provisions raised by Korea are inherently limited to particular contexts that do not exist in all or even most cases, they most certainly cannot be relied upon to demonstrate the as such WTO-inconsistency of an unwritten measure. This is especially true when Korea has not even attempted an explanation for how such a WTO inconsistency would materialize.

150. Korea’s only even arguably relevant statement on the role of the TPEA is its assertion that “Korea considers that any possible checks and balances that may have existed in the past, have been removed by the TPEA amendments.”²⁴⁴ However, Korea fails to elaborate on this cryptic statement, much less offer argument and evidence to support it, rendering it an entirely inadequate basis on which to rest a claim.

151. As these examples show, much of Korea’s argumentation in this proceeding is irrelevant—and therefore lends no support—to the existence of the alleged unwritten measure that is within the Panel’s terms of reference.

²⁴¹ See Korea RPQ 40(c).

²⁴² Korea FWS, para. 996.

²⁴³ See *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 172.

²⁴⁴ Korea PRQ 40(a).

2. *Korea Is Wrong that, Whenever USDOC Makes a Non-Cooperation Finding, It Resorts to Adverse Inferences.*

152. One element of the alleged unwritten measure in Korea’s panel request is that, whenever USDOC makes a finding that a producer or exporter has failed to cooperate by not acting to the best of its ability, it adopts adverse inferences.²⁴⁵ Because this is demonstrably false, Korea’s attempt to prove the existence of the alleged unwritten measure fails.

153. As an initial matter, the term “adverse inferences” is based in U.S. law and has no particular meaning under the covered agreements. Moreover, the U.S. statute and USDOC’s regulations *do not require* the use of adverse inferences in selecting among the facts available.²⁴⁶ In promulgating its regulations, USDOC expressly rejected the proposal to make an adverse inference mandatory in cases of non-cooperation and instead retained in all cases its discretion to decide whether to apply an adverse inference on a case-by-case basis.²⁴⁷

154. In rejecting the proposal to mandate adverse inferences for all instances of non-cooperation, USDOC explained that USDOC “does not agree that the imposition of adverse inferences is mandatory” and emphasized the use of the term “*may*” in the governing statutory provision.²⁴⁸ In other words, USDOC expressly rejected what Korea suggests is now an aspect of an unwritten measure.²⁴⁹

155. In fact, in *US – Carbon Steel*, the Appellate Body examined the relevant statutory and regulatory provisions and found that they are not “as such” inconsistent with Article 12.7 of the SCM Agreement.²⁵⁰ In reaching that finding, the Appellate Body emphasized the discretionary

²⁴⁵ See Korea Panel Request, para. 9.

²⁴⁶ See Korea FWS, para. 900 (representing that 19 USC § 1677e(b)(1)(A) states that the administering authority “*may* use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available,” although Korea had never actually placed a copy of the statute or the relevant regulation on the record of this proceeding (emphasis added)).

²⁴⁷ Antidumping Duties; Countervailing Duties; Final Rule, 62 Fed. Reg. 27296, 27340 (May 19, 1997) (Exhibit USA-88)

²⁴⁸ Antidumping Duties; Countervailing Duties; Final Rule, 62 Fed. Reg. 27296, 27340 (May 19, 1997) (Exhibit USA-88)

²⁴⁹ See Antidumping Duties; Countervailing Duties; Final Rule, 62 Fed. Reg. 27296, 27340 (May 19, 1997) (“Other commenters proposed that the regulations provide that when a respondent fails to cooperate, the imposition of adverse inferences should be mandatory, not discretionary. . . . The Department does not agree that the imposition of adverse inferences is mandatory.”) (Exhibit USA-88).

²⁵⁰ *US – Carbon Steel (AB)*, para. 4.483.

nature of these provisions.²⁵¹ The TPEA did not change the discretionary nature of the statute, and Korea has not demonstrated otherwise.

156. Furthermore, and perhaps most importantly, the record evidence in this dispute does not support that USDOC has adopted some sort of unwritten measure that requires the use of adverse inferences whenever a respondent fails to cooperate. To the contrary, numerous examples (both before and after the enactment of the TPEA) prove that Korea simply is incorrect that, whenever a party fails to cooperate, USDOC applies adverse inferences.

157. In *Stainless Steel Bar from Italy*, a respondent refused to respond to USDOC's questionnaire and provide necessary information, as requested, and USDOC determined that the company failed to cooperate to the best of its ability.²⁵² However, USDOC did not apply adverse inferences. USDOC instead relied on other information on the record that allowed it to accurately calculate the subsidy rate.²⁵³ USDOC explained that, “{a}lthough CAS failed to cooperate to the best of its ability in refusing to respond to our questionnaire, we cannot ignore the information reported to us by the GOI and EC regarding subsidies given to CAS.”²⁵⁴ Therefore, despite a finding of non-cooperation, USDOC did not apply any adverse inferences.

158. In *Olives from Spain*, a respondent failed to report plantilla fixed price adjustments for the home market accurately.²⁵⁵ Instead, the respondent allocated 12 months of expenses over 15 months of sales, which is distortive on its face.²⁵⁶ There was no non-distortive allocation on the record. Accordingly, for the home market, as facts available, Commerce multiplied the reported discounts by 1.25 (ratio of 15 months/12 months) to derive the replacement information.²⁵⁷ Commerce did not apply an adverse inference in deriving the replacement information.

159. In the 2014-2015 administrative review regarding *Aluminum Extrusions from China*, one respondent, Jangho, withdrew from participation.²⁵⁸ Accordingly, USDOC determined that

²⁵¹ See *US – Carbon Steel (AB)*, para. 4.483.

²⁵² *Stainless Steel Bar From Italy*, Issues & Decision Memorandum (January 23, 2002), Comment 1. (Exhibit USA-62).

²⁵³ *Stainless Steel Bar From Italy*, Issues & Decision Memorandum (January 23, 2002), Comment 1. (Exhibit USA-62).

²⁵⁴ *Stainless Steel Bar From Italy*, Issues & Decision Memorandum (January 23, 2002), Comment 1. (Exhibit USA-62).

²⁵⁵ *Ripe Olives from Spain*, Issues and Decision Memorandum (June 11, 2018), Comment 9 (Exhibit USA-81).

²⁵⁶ *Ripe Olives from Spain*, Issues and Decision Memorandum (June 11, 2018), p. 21 (Exhibit USA-81).

²⁵⁷ *Ripe Olives from Spain*, Issues and Decision Memorandum (June 11, 2018), p. 21 (Exhibit USA-81).

²⁵⁸ See *Aluminum Extrusions from China*, Issues and Decision Memorandum (November 21, 2016), p. 6 (Exhibit USA-89).

Jangho failed to cooperate to the best of its ability.²⁵⁹ The petitioners in the case urged USDOC to apply a rate of 86.01 percent, which was the rate calculated for mandatory respondent Union in the 2013-2014 administrative review.²⁶⁰ However, USDOC did not do so.

160. Instead, USDOC reasoned that Jango was not entitled to a separate rate, and therefore Jango was properly considered part of the PRC-wide entity.²⁶¹ No party had requested a review of the PRC-wide entity rate, so that rate therefore was not under review in the 2014-2015 administrative review.²⁶² Accordingly, USDOC assigned Jangho the 33.28 percent PRC-wide entity rate from the previous administrative review, which was not subject to review.²⁶³ Thus, USDOC did not draw any adverse inferences against Jangho despite its clear failure to cooperate.²⁶⁴

161. In *Welded Line Pipe from Korea*, Commerce similarly applied facts available without adverse inference.²⁶⁵ Specifically, USDOC discovered at verification several unreported subsidies, including exemptions from the local education tax.²⁶⁶ However, USDOC determined that the use of facts available without an adverse inference was warranted.²⁶⁷ Even though USDOC did not collect the information from the respondent at verification, in selecting among facts available, USDOC calculated the benefit based on information that the government of Korea reported in its questionnaire response, including the formula used to calculate the local

²⁵⁹ See *Aluminum Extrusions from China*, Issues and Decision Memorandum (November 21, 2016), p. 6 (Exhibit USA-89).

²⁶⁰ See *Aluminum Extrusions from China*, Issues and Decision Memorandum (November 21, 2016), pp. 6, 9 (Exhibit USA-89).

²⁶¹ See *Aluminum Extrusions from China*, Issues and Decision Memorandum (November 21, 2016), pp. 8-9 (Exhibit USA-89).

²⁶² *Aluminum Extrusions from China*, Issues and Decision Memorandum (November 21, 2016), p. 8 (Exhibit USA-89).

²⁶³ *Aluminum Extrusions from China*, Issues and Decision Memorandum (November 21, 2016), p. 9 (Exhibit USA-89).

²⁶⁴ See *Aluminum Extrusions from China*, Issues and Decision Memorandum (November 21, 2016), p. 9 (Exhibit USA-89).

²⁶⁵ *Welded Line Pipe from the Republic of Korea*, Issues and Decision Memorandum (October 5, 2015), pp. 34-35 (Exhibit USA-90).

²⁶⁶ *Welded Line Pipe from the Republic of Korea*, Issues and Decision Memorandum (October 5, 2015), pp. 34-35 (Exhibit USA-90).

²⁶⁷ *Welded Line Pipe from the Republic of Korea*, Issues and Decision Memorandum (October 5, 2015), pp. 34-35 (Exhibit USA-90).

education tax.²⁶⁸ Therefore, contrary to Korea's claim, USDOC did not automatically apply adverse inferences in response to the respondent's failure to cooperate.

162. In *Korea CRS CVD* and *Korea Hot-Rolled CVD*, POSCO failed to cooperate, including by failing to report cross-owned input suppliers.²⁶⁹ USDOC applied adverse inferences to determine that POSCO benefitted from several programs.²⁷⁰ However, USDOC did not apply adverse inferences to determine that POSCO benefitted from provision of electricity for less than adequate remuneration.²⁷¹ Rather, Commerce relied on information provided by the government of Korea and determined on that basis that the program provided no benefit to POSCO.²⁷² Thus, these cases too disprove Korea's claim.

163. In *Non-Oriented Electrical Steel from Taiwan*, Leicong did not respond to the CVD questionnaire issued to it.²⁷³ However, USDOC did not apply adverse inferences to determine that Leicong benefitted from certain tax programs.²⁷⁴ Instead, USDOC relied on record information not submitted by Leicong to determine that Leicong did not use any of the income tax programs at issue in that investigation.²⁷⁵ In other words, with respect to those tax programs, USDOC did not draw any adverse inferences against Leicong despite its clear failure to cooperate.

²⁶⁸ *Welded Line Pipe from the Republic of Korea*, Issues and Decision Memorandum (October 5, 2015), pp. 34-35 (Exhibit USA-90).

²⁶⁹ See *Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Issues and Decision Memorandum, pp. 11, 42 (Exhibit KOR-77); *Certain Hot-Rolled Steel Flat Products from the Republic of Korea*, Issues and Decision Memorandum (August 4, 2016), pp. 10, 38-39 (Exhibit KOR-98).

²⁷⁰ See *Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Issues and Decision Memorandum, pp. 12-15 (Exhibit KOR-77); *Certain Hot-Rolled Steel Flat Products from the Republic of Korea*, Issues and Decision Memorandum (August 4, 2016), pp. 12-15 (Exhibit KOR-98).

²⁷¹ See *Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Issues and Decision Memorandum, pp. 45-46 (Exhibit KOR-77); *Certain Hot-Rolled Steel Flat Products from the Republic of Korea*, Issues and Decision Memorandum (August 4, 2016), pp. 38-39 (Exhibit KOR-98).

²⁷² See *Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Issues and Decision Memorandum, pp. 45-46 (Exhibit KOR-77); *Certain Hot-Rolled Steel Flat Products from the Republic of Korea*, Issues and Decision Memorandum (August 4, 2016), pp. 38-39 (Exhibit KOR-98).

²⁷³ *Non-Oriented Electrical Steel from Taiwan*, Issues and Decision Memorandum (October 6, 2014), p. 9 (Exhibit USA-91).

²⁷⁴ *Non-Oriented Electrical Steel from Taiwan*, Issues and Decision Memorandum (October 6, 2014), p. 11 (Exhibit USA-91).

²⁷⁵ *Non-Oriented Electrical Steel from Taiwan*, Issues and Decision Memorandum (October 6, 2014), p. 11 (Exhibit USA-91).

164. In *Softwood Lumber from Canada*, two respondents, Resolute and JDIL, did not report certain subsidy programs in response to a question from USDOC.²⁷⁶ They later, after the factual deadline passed, attempted to submit this information, but it was rejected as untimely.²⁷⁷ Nevertheless, in light of the specific facts of that case, USDOC exercised its discretion to not apply adverse inferences.²⁷⁸

165. To conclude, the evidence refutes Korea’s allegation that whenever the USDOC makes a finding that a producer or exporter has failed to cooperate by not acting to the best of its ability, it automatically adopts adverse inferences. Because this is an element of Korea’s alleged unwritten measure, the only possible conclusion is that Korea has failed to establish the existence of the alleged unwritten measure identified in its panel request, and its as such claim must be rejected.

3. *Korea is Wrong that, Whenever USDOC Makes a Non-Cooperation Finding, It Ceases To Engage in Any Reasoning Regarding the Information Likely to Lead to an Accurate Result and Instead Uses the Adverse Inference as the “Sole Basis” for Selecting Facts.*

166. Additional elements of Korea’s alleged unwritten measure are that Commerce “selects facts from the record that are adverse to the interests of this producer or exporter without establishing (i) that such inferences can reasonably be drawn in light of the degree of cooperation received, and (ii) that such facts are the “best information available” in the particular circumstances.”²⁷⁹ As with respect to the alleged resort to an adverse inference in all cases of non-cooperation, Korea has not and cannot establish the existence of these elements of its alleged unwritten measure.

167. As an initial matter, because the reasonableness of the inferences drawn in light of the degree of cooperation received, and the best information available in the particular circumstances, are both relative concepts that depend explicitly on the facts of each individual case, these elements are inherently incompatible with an as such claim. It is nonsensical to challenge a measure as such, based on a theory that it consists of treatment that is too harsh in light of the specific facts of each individual case; what is too harsh in one case has no bearing on what is too harsh in another.

²⁷⁶ *Softwood Lumber from Canada*, Issues and Decision Memorandum (November 1, 2017), p. 26 (Exhibit USA-92).

²⁷⁷ *Softwood Lumber from Canada*, Issues and Decision Memorandum (November 1, 2017), p. 26 (Exhibit USA-92).

²⁷⁸ See *Softwood Lumber from Canada*, Issues and Decision Memorandum (November 1, 2017), pp. 26-27 (Exhibit USA-92).

²⁷⁹ Korea Panel Request, para. 9; Preliminary Ruling, para. 2.1.

168. Furthermore, contrary to Korea’s claim, upon finding non-cooperation, USDOC does not abandon all reasoning and pursuit of an accurate result in favor of selecting facts solely on the basis of an adverse inference.²⁸⁰ The numerous cases in the preceding section, in which USDOC opted not to apply adverse inferences at all, disprove Korea’s claim. Below are still more cases that disprove Korea’s claim by showing that USDOC does not abandon all reasoning and pursuit of an accurate result after a finding of non-cooperation.

169. In *Certain Cold-Rolled Steel Flat Products from the Russian Federation*, USDOC initiated a CVD investigation with respect to a Tax Deduction for Exploration Expenses program.²⁸¹ A respondent, the Severstal Companies, reported that they did not claim any exploration deductions on the tax return filed during the period of investigation.²⁸² However, at verification, USDOC determined that expenses included in line 040 of the Severstal Companies’ tax return did include exploration deductions that the Severstal Companies failed to accurately report to USDOC.²⁸³

170. Therefore, USDOC found that the Severstal Companies failed to act to the best of their ability, warranting adverse inferences.²⁸⁴ Thus, USDOC determined the Severstal Companies’ use of the program, but it needed to determine the relevant benefit. USDOC did not accept deduction amounts discovered at verification because this would have constituted untimely new factual information.²⁸⁵

171. According to Korea, an unwritten measure required USDOC at that point to cease all reasoning and instead focus solely on selecting a “sufficiently adverse” rate. However, because no such unwritten measure exists, this is not what occurred.

172. The petitioners in the case urged USDOC to use the values in line 040 of the tax return and multiply them by Russia’s corporate tax rate of 20 percent, which presumably would have resulted in a large number.²⁸⁶ However, USDOC reasoned that such an approach would

²⁸⁰ Cf. Korea FWS, para. 1007.

²⁸¹ *Certain Cold-Rolled Steel Flat Products from the Russian Federation*, Issues and Decision Memorandum (July 20, 2016), p. 122 (Exhibit USA-85).

²⁸² *Certain Cold-Rolled Steel Flat Products from the Russian Federation*, Issues and Decision Memorandum (July 20, 2016), p. 124 (Exhibit USA-85).

²⁸³ *Certain Cold-Rolled Steel Flat Products from the Russian Federation*, Issues and Decision Memorandum (July 20, 2016), pp. 123-124 (Exhibit USA-85).

²⁸⁴ *Certain Cold-Rolled Steel Flat Products from the Russian Federation*, Issues and Decision Memorandum (July 20, 2016), pp. 124 (Exhibit USA-85).

²⁸⁵ *Certain Cold-Rolled Steel Flat Products from the Russian Federation*, Issues and Decision Memorandum (July 20, 2016), p. 123 (Exhibit USA-85).

²⁸⁶ *Certain Cold-Rolled Steel Flat Products from the Russian Federation*, Issues and Decision Memorandum (July 20, 2016), pp. 120, 125 (Exhibit USA-85).

overstate the benefit under this program because the amount in line item 040 reflects a variety of expense categories of which exploration expenses is only a part.²⁸⁷

173. Instead, USDOC observed that a benefit had been calculated for a cooperating respondent, NLMK Companies, for the identical program in the instant review.²⁸⁸ USDOC determined that the rate calculated for the cooperating company should be assigned to the Severstal Companies.²⁸⁹ Accordingly, USDOC assigned to the Severstal Companies NLMK Companies' rate of 0.03 percent.²⁹⁰

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

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

²⁸⁷ *Certain Cold-Rolled Steel Flat Products from the Russian Federation*, Issues and Decision Memorandum (July 20, 2016), pp. 125-126 (Exhibit USA-85).

²⁸⁸ *Certain Cold-Rolled Steel Flat Products from the Russian Federation*, Issues and Decision Memorandum (July 20, 2016), p. 126 (Exhibit USA-85).

²⁸⁹ *Certain Cold-Rolled Steel Flat Products from the Russian Federation*, Issues and Decision Memorandum (July 20, 2016), p. 126 (Exhibit USA-85).

²⁹⁰ *Certain Cold-Rolled Steel Flat Products from the Russian Federation*, Issues and Decision Memorandum (July 20, 2016), p. 126 (Exhibit USA-85).

customer and that affiliate’s customer, is the most appropriate methodology for estimating NEXTEEL’s warranty expenses for the POI.²⁹¹

175. In *Certain Uncoated Paper from China*, USDOC made non-cooperation findings warranting adverse inferences regarding, *inter alia*, Provision of Calcium Carbonate for LTAR (less than adequate remuneration) and Provision of Caustic Soda for LTAR.²⁹² According to Korea, an unwritten measure required USDOC at that point to cease all reasoning and instead focus solely on selecting a “sufficiently adverse” rate. The rate for each program would be identical if the adverse inference were the sole basis for selection of the facts, as Korea contends. However, because Korea’s case is incorrect, this is not what occurred. Instead, USDOC engaged in extensive reasoning, ultimately arriving at a subsidy rate of 0.74 percent for Provision of Calcium Carbonate for LTAR and 0.37 percent for Provision of Caustic Soda for LTAR.²⁹³

176. In the 2012-2013 administrative review in *Large Residential Washers from Korea*, Samsung and Daewoo both opted not to participate in the review.²⁹⁴ The government of Korea also refused to respond to certain questionnaires.²⁹⁵ Accordingly, USDOC had no information as to the benefit to the respondents from the Tax Reduction for Research and Manpower Development: RSTA 10(1)(3) program.²⁹⁶ According to Korea, an unwritten measure required USDOC at that point to cease all reasoning and instead focus solely on selecting a “sufficiently adverse” rate. However, because Korea’s case is incorrect, this is not what occurred.

177. Instead, USDOC selected a rate of 0.72 percent that had been calculated for Samsung for the identical program in the original investigation. On this basis, and unlike the varied rates applied for other programs, USDOC assigned Samsung and Daewoo the rate of 0.72 percent. This again disproves Korea’s claim by showing that USDOC did not cease all reasoning and pursuit of an accurate result and instead focus solely on selecting a “sufficiently adverse” rate.

²⁹¹ See *Certain Oil Country Tubular Goods from the Republic of Korea*, Issues & Decision Memorandum, p. 81 (Exhibit USA- 65).

²⁹² *Certain Uncoated Paper from China*, Issues and Decision Memorandum (January 8, 2016), pp. 19-20, 24-30 (Exhibit USA-93).

²⁹³ *Certain Uncoated Paper from China*, Issues and Decision Memorandum (January 8, 2016), pp. 19-20, 24-30 (Exhibit USA-93).

²⁹⁴ *Large Residential Washers from Korea*, Issues and Decision Memorandum (September 8, 2015), p. 4 (Exhibit USA-94).

²⁹⁵ *Large Residential Washers from Korea*, Issues and Decision Memorandum (September 8, 2015), p. 4 (Exhibit USA-94).

²⁹⁶ See *Large Residential Washers from Korea*, Issues and Decision Memorandum (September 8, 2015), p. 8 (Exhibit USA-94).

178. In *Certain Uncoated Paper from Indonesia*,²⁹⁷ USDOC resorted to adverse inferences for two respondents that failed to respond to USDOC’s questionnaire. It considered adopting the highest petition margin of 66.82 percent, which the petitioners advocated.²⁹⁸ However, it determined that this rate lacked probative value.²⁹⁹ This was because, USDOC reasoned, the petition rate was much higher than the highest calculated transaction-specific rate calculated for the cooperating respondent.³⁰⁰ Accordingly, USDOC instead adopted a significantly lower rate of 17.39 percent, which was the highest calculated transaction-specific rate of a cooperating respondent.³⁰¹

179. As these cases and those in the preceding section show, Korea is simply wrong that, whenever USDOC finds a failure to cooperate, it abandons all reasoning and pursuit of an accurate result in favor of selecting facts solely on the basis of an adverse inference. Thus, this provides yet another independent basis for finding that Korea has failed to establish the existence of the unwritten measure alleged in its panel request (as identified in the Panel’s preliminary ruling). Accordingly, Korea’s as such claim must fail.

B. Korea Fails to Establish that the Alleged Unwritten Measure Has General and Prospective Application.

180. Korea alleges that the purported unwritten measure “has general and prospective application.”³⁰² Yet, Korea has offered no rebuttal in the wake of the United States’ demonstration that Korea failed to establish this element of its claim.

181. As the United States pointed out, Korea’s first written submission bounced around wildly, with various statements addressing different supposed unwritten measures. For example, in attempting to establish that the alleged unwritten measure has general application, Korea argued that “{n}othing in the U.S. statute limits the application of AFA to certain producers only.”³⁰³ But Korea is not challenging the U.S. statute! As the United States observed, whether the statute has general application is completely irrelevant to the issue whether the alleged

²⁹⁷ *Certain Uncoated Paper from Indonesia*, Issues and Decision Memorandum (January 8, 2016), pp. 4-5 (Exhibit USA-95).

²⁹⁸ *Certain Uncoated Paper from Indonesia*, Issues and Decision Memorandum (January 8, 2016), pp. 4-8 (Exhibit USA-95).

²⁹⁹ *Certain Uncoated Paper from Indonesia*, Issues and Decision Memorandum (January 8, 2016), pp. 4-8 (Exhibit USA-95).

³⁰⁰ *Certain Uncoated Paper from Indonesia*, Issues and Decision Memorandum (January 8, 2016), pp. 7-8 (Exhibit USA-95).

³⁰¹ *Certain Uncoated Paper from Indonesia*, Issues and Decision Memorandum (January 8, 2016), pp. 7-8 (Exhibit USA-95).

³⁰² See Korea FWS, paras. 926-928.

³⁰³ Korea FWS, para. 930.

unwritten measure has general application. In the ensuing paragraph, Korea included an argument directed at the use of adverse effects broadly, which also is not the subject of Korea’s panel request.³⁰⁴

182. The United States also demonstrated that Korea’s argument regarding prospective application suffered from the same flaws. To wit, Korea argued 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.”³⁰⁵ Again, as the United States observed, Korea does not challenge the statute. Therefore, even if Korea could establish that the statute has prospective application, it would not resolve the relevant issue, namely whether the alleged unwritten measure has prospective application. The United States also pointed to additional arguments that failed to focus on the alleged unwritten measure included in Korea’s panel request.³⁰⁶

183. In addition, Korea even asserted that the alleged unwritten measure has general and prospective application because the alleged unwritten measure has “identical content” with the measure at issue in *US – Antidumping Methodologies*.³⁰⁷ The United States noted that this is obviously incorrect, because 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 Korea’s claim.³⁰⁸

184. Thus, in its first written submission, Korea failed to make out a *prima facie* case that the alleged unwritten measure that is within the Panel’s terms of reference has general and prospective application. In its oral statement at the first substantive meeting, Korea included only a cursory, conclusory statement on this point, with no reasoning or evidence.³⁰⁹ Accordingly, Korea has failed to establish the general and prospective nature of the alleged unwritten measure alleged in its panel request. This provides yet another independent reason why Korea’s as such claim must fail.

³⁰⁴ See U.S. FWS, para. 449.

³⁰⁵ Korea FWS, para. 933.

³⁰⁶ See U.S. FWS, paras. 452-455.

³⁰⁷ Korea First Written Submission, para. 995.

³⁰⁸ See U.S. FWS, para. 456.

³⁰⁹ Korea Oral Statement, para. 142.

C. Korea Fails to Establish that the Alleged Unwritten Measure Breaches Article 6.8 and Annex II of the Anti-Dumping Agreement or Article 12.7 of the SCM Agreement.

1. Korea’s “Statistical Analysis” is Fatally Flawed in Its Conception and Further Flawed in Its Execution.

185. As the United States pointed out in its first written submission, Korea’s “statistical analysis” is logically incapable of demonstrating what Korea purports to show. Korea has offered no rebuttal to explain this fatal flaw.

186. Specifically, Korea argues that “statistics confirm that whenever the USDOC reaches the conclusion that there is a lack of cooperation, it will draw an adverse inference and select particularly adverse facts to replace the allegedly missing information.”³¹⁰ Thus, the so-called “trigger” in Korea’s contention is non-cooperation, which leads to two alleged consequences: (1) the drawing of adverse inferences, and (2) the selection of particularly adverse facts. Yet Korea’s purported statistical analysis does not start with a subset of cases in which non-cooperation exists. Instead, Korea starts with 319 cases in which USDOC allegedly drew adverse inferences.³¹¹ Therefore, any conclusion drawn from this analysis is logically incapable of demonstrating the consequences of non-cooperation.

187. An analogy would be if Korea maintained that whenever an animal has legs (trigger), it is a spider (consequence). Obviously, the correct way to test that would be start to with a set of animals that have legs (*i.e.*, the trigger). If every animal is indeed a spider, then one may conclude that whenever an animal has legs, it is a spider.

188. But, applying Korea’s approach to this analogy, Korea instead starts with a set of spiders (consequence). It then observes that all of these spiders have legs (trigger). Korea then concludes that all animals that have legs are spiders—which obviously is logically unwarranted (and it also turns out, false). Because the original set in the analogy was not selected based on the trigger (*i.e.*, whenever an animal has legs), there is no valid conclusion that can be drawn in relation to that trigger.

189. Likewise, because Korea’s statistical analysis does not start with cases selected based on the trigger (*i.e.*, whenever USDOC reaches the conclusion that there is a lack of cooperation), as a logical matter, there is no basis to draw any conclusions in relation to that trigger. Therefore, Korea’s statistical analysis unequivocally fails from its conception.

190. Moreover, Korea’s argument includes a second consequence allegedly associated with the trigger—that USDOC “will select particularly adverse facts to replace the allegedly missing

³¹⁰ Korea FWS, para. 1008.

³¹¹ Korea FWS, para. 916 (“Korea compiled a list of all proceedings in which AFA was used....”).

information.”³¹² “Particularly adverse” is inherently relative and fact-specific. It is difficult to imagine how such a contention would lend itself to a statistical analysis.

191. And Korea does not offer any such analysis. Instead, Korea begins by paring down the list of 319 cases because 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.”³¹³ Putting aside the veracity of Korea’s characterization, “focusing on the most egregious situation” is antithetical to an as such claim. For an as such claim to succeed, an inconsistency must result from all situations, not just the “most egregious” situation.

192. Moreover, after ignoring 229 of the 319 cases, Korea asserts that, “{i}n all of these 90 cases, the USDOC applied AFA in a mechanistic manner solely based on the finding that the party failed to cooperate to the best of its ability and without engaging in the required comparative process of reasoning and evaluation and an assessment of the available facts on the record to identify the facts that lead to an accurate determination.”³¹⁴ This is nothing more than a conclusory statement based on Korea’s legal characterizations; it does not even purport to be a statistical analysis.³¹⁵ Therefore, with respect to this second consequence, Korea’s statistical analysis also is fatally flawed from its conception.

193. In addition to Korea’s statistical analysis being incapable of proving what Korea argues for the reasons described above, Korea further errs in its execution. Of the 319 cases listed in Exhibit KOR-216, Korea double counts 59 cases.³¹⁶ Specifically, Korea repeatedly counts the same case once as a preliminary determination, and a second time as a final determination. Moreover, despite not discussing the facts or reasoning of the individual cases, Korea fails even to place the vast majority of these cases on the record of this dispute. Therefore, Korea presented no evidence about the vast majority of the cases supposedly included in its “statistical analysis.” For these reasons, Korea’s “statistical analysis” provides no support for the as such breach Korea alleges.

³¹² Korea FWS, para. 1007.

³¹³ Korea FWS, para. 1016.

³¹⁴ Korea FWS, para. 1017.

³¹⁵ In response to a question from the Panel, Korea maintains that it found 200 references to the term “practice” in these cases. Korea RPQ 45. Korea provides no evidence to support this assertion. It does not indicate how it reached this view. It does not even explain whether these references were specific to drawing of adverse inferences. Accordingly, no weight should be given to this assertion or any arguments that rely on it.

³¹⁶ See List of Duplicative Cases in KOR-216 (Exhibit USA-96).

2. Korea’s “Substantive Analysis” is Equally Flawed.

194. Korea’s “substantive analysis” essentially continues Korea’s effort to demonstrate the existence of an unwritten measure.³¹⁷ Because the alleged unwritten measure is vaguely defined, Korea appears to have collapsed elements of the measure with the rationale for the alleged breach. This further underscores the incoherence of Korea’s argumentation in support of its as such claim.

195. Moreover, in both its first written submission and oral statement at the first meeting of the Panel with the parties, the United States discussed a multitude of error’s in Korea’s “substantive analysis.”³¹⁸ Korea has failed to even attempt a rebuttal of any of the U.S. points.³¹⁹ Thus, it remains unrebutted that, *inter alia*:

- 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.³²⁰
- Contrary to Korea’s arguments, U.S. courts have stated unambiguously that, under U.S. law, application of adverse inferences in resorting to facts available cannot be punitive.³²¹
- Korea has never established that the Anti-Dumping Agreement or the SCM Agreement requires USDOC, in adopting adverse inferences, to consider whether necessary information is missing due to fraud, withholding of information, or some other manner of failing to cooperate to the best of a party’s ability. 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, and Korea has not even argued that USDOC lacks the discretion to do so if it considered that the facts of a particular case warranted such consideration.³²²
- Korea argument 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’” contradicts its own case because these selected types of facts are all *different* from one another. Moreover, Korea has explicitly stated that its challenge is not that USDOC will always select the worst information

³¹⁷ See Korea FWS, paras. 1019-1032.

³¹⁸ See U.S. FWS, paras. 483-490; U.S Oral Statement, paras. 92-108.

³¹⁹ See Korea Oral Statement, paras. 140-144; Korea RPQ 40, 43-45, 47.

³²⁰ See U.S. FWS, para. 483.

³²¹ See U.S. FWS, para. 485.

³²² See U.S. FWS, para. 484; U.S. Oral Statement, paras. 92-93.

possible.³²³ Therefore, to the extent Korea insinuates that the “highest” version of some data point is the worst and was selected in all 12 cases, then on the terms of its own arguments (which the United States does not concede as being accurate), Korea would be establishing that these 12 cases are *not* representative.

- Korea’s allegation about USDOC’s “unsatisfactory” analysis is a conclusory characterization supported by no evidence and no analysis of the details of any of the determinations.³²⁴
- 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. It still would be manifestly insufficient to establish an as such breach.³²⁵
- Korea offers nothing more than conclusory statements about three alleged “practices,” which it labels “the ‘Total AFA – Highest Dumping Margin’ practice, the ‘Expenses AFA – Highest / Lowest Expenses’ practice, and the ‘Subsidy Program – Highest Rates AFA’ practice.”³²⁶ And in any event, the differences between these three alleged practices underscore Korea’s failure to identify a single unwritten measure with any coherence, which is further reinforced by the fact that *none* of these three alleged practices was included in Korea’s panel request.³²⁷
- Korea’s reliance on certain TPEA amendments—which Korea does not challenge and are not problematic as a substantive matter—fails to make a *prima facie* case because, even if accurate (and they are not), Korea’s arguments would be insufficient to establish a breach as such.³²⁸

196. Furthermore, the United States previously demonstrated that, 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.³²⁹ Korea has now

³²³ Korea FWS, para. 974.

³²⁴ See U.S. FWS, para. 488.

³²⁵ See U.S. FWS, para. 489.

³²⁶ See Korea First Written Submission, paras. 1029-1031.

³²⁷ See U.S. FWS, para. 490.

³²⁸ See U.S. Oral Statement, paras. 103-106.

³²⁹ See U.S. Oral Statement, para. 100 (discussing paragraph 1 of Annex II and citing *US – Carbon Steel (AB)*, para. 4.426). See also U.S. Oral Statement, para. 101 (demonstrating that paragraph 5 of Annex II also underscores that the AD Agreement supports the validity of considering the fact of non-cooperation in resorting to facts otherwise available).

expressed its agreement that an investigating authority is permitted to consider a party’s non-cooperation and draw adverse inferences therefrom.³³⁰

197. For these reasons, it is clear that Korea fails to establish any as such breach of Article 6.8 and Annex II of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement, including through its “substantive analysis.”

CONCLUSION

198. Based on the foregoing, the United States respectfully requests that the Panel reject Korea’s claims in this dispute.

³³⁰ See Korea RPQ 44 (“An authority is entitled to draw inferences from the degree of cooperation of interested parties.... Thus, a reasonable degree of inference is warranted in order to prevent the party from benefitting from its non-cooperation.”).