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Page: 1/14

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UNITED STATES – ANTI-DUMPING AND COUNTERVAILING DUTIES ON CERTAIN PRODUCTS AND THE USE OF FACTS AVAILABLE

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY THE REPUBLIC OF KOREA

The following communication, dated 16 April 2018, from the delegation of the Republic of Korea to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

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1. On 14 February 2018, the Government of the Republic of Korea ("Korea") requested consultations with the Government of the United States of America ("United States") pursuant to Articles 1 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXII:1 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), Articles 17.2 and 17.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Anti-Dumping Agreement"), and Article 30 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), regarding (a) certain anti-dumping and countervailing duty measures imposed on products from Korea; (b) certain provisions of United States' legislation regarding the use of facts available; and (c) the United States' ongoing conduct as well as its practice of using adverse facts available as a rule or norm of general and prospective application in anti-dumping and countervailing duty investigations and reviews. These measures appear to be inconsistent with the United States' obligations under certain provisions of the GATT 1994, the Anti-Dumping Agreement, the SCM Agreement, and the Marrakesh Agreement establishing the WTO.

2. Consultations were held on 22 March 2018 with a view to reaching a mutually satisfactory solution. However, these consultations failed to resolve the dispute.

3. Therefore, Korea respectfully requests, pursuant to Article 6 of the DSU, Article XXIII of the GATT 1994, Article 17.4 of the Anti-Dumping Agreement, and Article 30 of the SCM Agreement, that the Dispute Settlement Body establish a panel to examine this matter, with the standard terms of reference as set out in Article 7.1 of the DSU.

4. Pursuant to Article 6.2 of the DSU, Korea proceeds below to identify the specific measures at issue and to provide a brief summary of the legal basis of the complaint.

I. IDENTIFICATION OF THE MEASURES

A. Certain Definitive Anti-Dumping and Countervailing Duty Measures

5. This request concerns the definitive anti-dumping and countervailing duty measures imposed by the United States pursuant to the preliminary and final anti-dumping and countervailing duty determinations and orders issued by the U.S. Department of Commerce ("USDOC") in the investigations and administrative reviews listed below.

6. The measures include the conduct of those investigations and administrative reviews, any preliminary or final anti-dumping and countervailing duty determinations issued in those investigations and administrative reviews, any definitive anti-dumping and countervailing duties imposed as a result of those investigations and administrative reviews, as well as any notices,

annexes, decision memoranda, orders, amendments, or other instruments issued by the United States in connection with these anti-dumping and countervailing duty measures:

- ***Anti-Dumping Duties on Certain Corrosion-Resistant Steel Products From the Republic of Korea*** **(USDOC investigation number A-580-878) ("Corrosion-Resistant Steel AD Measure") as set forth, among others, in:**
    - Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, 81 Fed. Reg. 35303 (2 June 2016);
    - Issues and Decision Memorandum for the Final Affirmative Determination in the Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products from the Republic of Korea (24 May 2016);
    - Antidumping Duty Order, 81 Fed. Reg. 48390 (25 July 2016).
- ***Anti-Dumping Duties on Certain Cold-Rolled Steel Flat Products From the Republic of Korea*** **(USDOC investigation number A-580-881) ("Cold-Rolled Steel AD Measure") as set forth, among others, in:**
    - Final Determination of Sales at Less Than Fair Value, 81 Fed. Reg. 49953 (29 July 2016);
    - Issues and Decision Memorandum for the Final Affirmative Determination in the Antidumping Duty Investigation of Certain Cold-Rolled Steel Products from the Republic of Korea (20 July 2016);
    - Antidumping Duty Order, 81 Fed. Reg. 64432 (20 September 2016).
- ***Countervailing Duties on Certain Cold-Rolled Steel Flat Products From the Republic of Korea*** **(USDOC investigation number C-580-882) ("Cold-Rolled Steel CVD Measure") as set forth, among others, in:**
    - Final Affirmative Determination, 81 Fed. Reg. 49943 (29 July 2016);
    - Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Republic of Korea (20 July 2016);
    - Countervailing Duty Order, 81 Fed. Reg. 64436 (20 September 2016).
- ***Anti-Dumping Duties on Certain Hot-Rolled Steel Flat Products From the Republic of Korea*** **(USDOC investigation number A-580-883) ("Hot-Rolled Steel AD Measure") as set forth, among others, in:**
    - Final Determination of Sales at Less Than Fair Value, 81 Fed. Reg. 53419 (12 August 2016);
    - Issues and Decision Memorandum for the Final Affirmative Determination in the Antidumping Duty Investigation of Certain Hot-Rolled Steel Flat Products from the Republic of Korea (4 August 2016);
    - Antidumping Duty Order, 81 Fed. Reg. 67962 (3 October 2016).
- ***Countervailing Duties on Certain Hot-Rolled Steel Flat Products From the Republic of Korea*** **(USDOC investigation number C-580-884) ("Hot-Rolled Steel CVD Measure") as set forth, among others, in:**
    - Final Affirmative Determination, 81 Fed. Reg. 53439 (12 August 2016);
    - Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products from the Republic of Korea (4 August 2016);
    - Countervailing Duty Order, 81 Fed. Reg. 67960 (3 October 2016).

- ***Anti-Dumping Duties on Large Power Transformers From the Republic of Korea*** **(USDOC investigation number A-580-867) ("Large Power Transformers AD Measure") as set forth, among others, in:**
    - Final Determination of Sales at Less Than Fair Value, 77 Fed. Reg. 40857 (11 July 2012);
    - Antidumping Duty Order, 77 Fed. Reg. 53177 (31 August 2012);
    - Review determinations and related measures, including:
        - Final Results of Redetermination Pursuant to Court Remand, ABB INC. v. United States, Consol. Court No. 16-00054, Slip Op. 17-138 (7 February 2018, remand of second administrative review).
        - Final Results of Antidumping Duty Administrative Review; 2014-2015 (82 Fed. Reg. 13432, 13 March 2017, third administrative review)
            - the Issues and Decision Memorandum for the Final Results of the Administrative Review of the Antidumping Duty Order on Large Power Transformers from the Republic of Korea; 2014-2015 (6 March 2017)
        - Final Results of Antidumping Duty Administrative Review; 2015-2016 (83 Fed. Reg. 11679, 16 March 2018, fourth administrative review)
            - the Issues and Decision Memorandum for the Final Results of the Administrative Review of the Antidumping Duty Order on Large Power Transformers from the Republic of Korea; 2015-2016 (9 March 2018)
        - Final Results of the Expedited First Sunset Review of the Antidumping Duty Order, 82 Fed. Reg. 51604 (7 November 2017):
            - Issues and Decision Memorandum for the Expedited First Sunset Review of the Antidumping Duty Order on Large Power Transformers from the Republic of Korea (31 October 2017).

7. This request also concerns any modification, review, replacement or amendment to the definitive anti-dumping and countervailing duty measures listed above and any closely connected, subsequent measures to determine a dumping margin or subsidy amount, or related anti-dumping duty or countervailing duty rates.

B. Section 776 of the Tariff Act of 1930 (19 U.S.C. § 1677e) as amended by Section 502 of the Trade Preferences Extension Act of 2015, and its implementing regulations

8. This request also concerns a number of provisions of U.S. law relating to the use of facts available and the drawing of adverse inferences in certain situations by the USDOC under national legislation including:

- Section 502 of the Trade Preferences Extension Act of 2015, Pub. L. No. 114-27;
- Section 776 of the Tariff Act of 1930, codified at 19 U.S.C. § 1677e;
- The implementing regulations of the USDOC in 19 C.F.R. § 351, including in particular section 351.308; and
- Any other related, subsequent measures that enable or implement the use of facts available in anti-dumping and countervailing duty investigations, administrative reviews and other parts of such proceedings.

C. Use of Adverse Facts Available As Ongoing Conduct, or a Rule or Norm of General and Prospective Application

9. This request also concerns the ongoing conduct or the practice of the USDOC of using "adverse facts available" as a rule or norm of general and prospective application when a producer

or exporter is found to have failed to cooperate by not acting to the best of its ability. 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.[1]

II. LEGAL BASIS

10. Korea is concerned that the measures identified above are inconsistent with the WTO obligations of the United States, including, among others, under Article 6.8 and Annex II of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement.

11. The failure of the United States to comply with its obligations relating to the use of facts available when making preliminary and/or final determinations of dumping and/or subsidization has a direct consequential effect on other aspects of the investigation or review that relate to the determination of dumping or subsidization, the determination of injury by dumped or subsidized imports, the imposition and maintenance of anti-dumping or countervailing duties, and the level of such duties.

12. In addition, Korea is concerned that when resorting to the use of adverse facts available in the specific investigations and reviews leading to the adoption and maintenance of the above-listed anti-dumping and countervailing duty measures, the United States failed to comply with a number of related procedural and substantive obligations under the Anti-Dumping Agreement and the SCM Agreement, as identified below.

A. As Applied Challenge to Certain Definitive Anti-Dumping and Countervailing Duty Measures

13. With respect to the anti-dumping and countervailing duty measures listed in Section I.A of this request, Korea considers that the USDOC resorted to the use of facts available and drew adverse inferences in disregard of the obligations set forth in Article 6.8 and Annex II of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement.

14. In the anti-dumping and countervailing duty measures identified above, the USDOC did not assess the facts properly and objectively in finding that the affected Korean producers and exporters failed to cooperate by not acting to the best of their abilities when allegedly failing to provide information necessary to determine a margin of dumping or an amount of subsidization. In addition, the USDOC failed to respect the specific steps to be followed when resorting to the use of facts available and selected from the facts available those facts that were sufficiently adverse to the interests of the Korean producers/exporters. In so doing, the USDOC failed to use the best information available in order to arrive at an accurate determination where necessary information was allegedly missing and rather applied facts available in a punitive manner, in violation of Article 6.8 and Annex II of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement.

15. The above-described violations affect all of the anti-dumping and countervailing duty measures that are referred to in Section I.A of this request.[2]

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[1] The use of adverse facts available has been consistently applied by the USDOC and is undertaken pursuant to: (i) Section 502 of the Trade Preferences Extension Act of 2015, Pub. L. No. 114-27; (ii) Section 776 of the Tariff Act of 1930, codified at 19 U.S.C. § 1677e; and (iii) the implementing regulations of the USDOC in 19 C.F.R. § 351, including in particular section 308.

It is also evidenced, for example, by the manner in which facts available was used in the measures identified in Section I.A of this Request. A preliminary and non-exhaustive list of measures confirming the existence of this ongoing conduct or rule or norm of applying adverse facts available whenever a finding is made that a producer or exporter has failed to act to the best of its ability is attached as Annex I to illustrate the practice.

[2] The relevant findings for the use of partial or total AFA made by the USDOC can be found in the Issues and Decision Memorandum of each measure, as follows: ***Corrosion-Resistant Steel AD Measure*** – Issues and Decision Memorandum for the Final Affirmative Determination in the Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products from the Republic of Korea (24 May 2016), including section VII,

16. In particular, first, the USDOC failed to make a reasoned and adequate finding that the affected Korean producers and exporters "refused access to" or otherwise did not provide "necessary" information or "significantly impeded" the investigation. Given that Article 6.8 of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement limit the possibility of making preliminary or final determinations on the basis of facts available to such circumstances only, there appears not to have been a valid basis for resorting to the use of facts available in the way the USDOC did in any of the identified investigations and reviews leading to the imposition of anti-dumping or countervailing duty measures.

17. In addition, when resorting to the use of facts available, the USDOC in each case (i) failed to specify in detail the information required from the producers/exporters; (ii) failed to take into account all verifiable information submitted by the producers/exporters; (iii) disregarded information simply because it was not ideal in all respects; (iv) failed to provide the producers/exporters opportunity to provide further explanations when information was rejected; and (v) failed to respect the steps to be followed with respect to the use of information from secondary sources, such as the need to use such information with special circumspection and the need to check the information from other independent sources at their disposal. In so doing, the USDOC failed to respect the express obligations set forth in paragraphs 1, 3, 5, 6 and 7 of Annex II of the Anti-Dumping Agreement as well as the obligation set forth in Article 12.7 of the SCM Agreement.

18. Finally, when selecting from the facts otherwise available, the USDOC resorted to the drawing of "adverse" inferences and failed to take into account all substantiated facts on the record and all evidence that was verifiable and appropriately submitted in a timely manner. In each of these measures, the USDOC based the determination of dumping or subsidization for the relevant producers or exporters on certain information, including secondary source information from the petitioners, as well as assumptions or speculation with a view to arriving at a result that was sufficiently adverse to the interests of these producers or exporters. The USDOC did not seek to replace the allegedly missing information with the best information available and did not seek to corroborate the information in order to arrive at an accurate determination of dumping or subsidization. It unduly disregarded verifiable information that was submitted by the Korean producers or exporters to the best of their ability. The USDOC's determinations in the investigations and reviews that led to the adoption or continuation of these measures did not reflect a valid process of reasoning and evaluation that would support the selection of the facts in the circumstances of each case. In sum, Korea is concerned that when determining dumping and subsidization on the basis of facts available in the context of the above-listed measures, the USDOC used facts available in a punitive manner rather than to seek to arrive at an accurate determination, in violation of Article 6.8 and paragraph 7 of Annex II of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement.

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and comments 4 and 5; ***Cold-Rolled Steel AD Measure*** – Issues and Decision Memorandum for the Final Affirmative Determination in the Antidumping Duty Investigation of Certain Cold-Rolled Steel Products from the Republic of Korea (20 July 2016), including comments 12, 15, and 19; ***Cold-Rolled Steel CVD Measure*** – Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Republic of Korea (20 July 2016), including section VI, and comments 5, 6, 7; ***Hot-Rolled Steel AD Measure*** - Issues and Decision Memorandum for the Final Affirmative Determination in the Antidumping Duty Investigation of Certain Hot-Rolled Steel Flat Products from the Republic of Korea (4 August 2016), including comment 8; ***Hot-Rolled Steel CVD Measure*** – Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products from the Republic of Korea (4 August 2016), including section VI, and comments 5, 6, 7; ***Large Power Transformers AD Measure***: for the third administrative review – Issues and Decision Memorandum for the Final Results of the Administrative Review of the Antidumping Duty Order on Large Power Transformers from the Republic of Korea; 2014-2015 (6 March 2017), including sections VI and VII, and comments 1, 4 and 5; for the fourth administrative review – Issues and Decision Memorandum for the Final Results of the Administrative Review of the Antidumping Duty Order on Large Power Transformers from the Republic of Korea; 2015-2016 (9 March 2018), including section V, and comments 1, 2, 3, 4, and 5; and for the sunset review – Issues and Decision Memorandum for the Expedited First Sunset Review of the Antidumping Duty Order on Large Power Transformers from the Republic of Korea (31 October 2017), including sections IV, VI, VII, and VIII; for the remand of the second administrative review – Final Results of Redetermination Pursuant to Court Remand, ABB INC. v. United States, Consol. Court No. 16-00054, Slip Op. 17-138 (7 February 2018), including sections B, C, and D.

For the sake of clarity, in Annex II Korea briefly summarizes in a non-exhaustive manner some of the most relevant findings of each of these measures before linking them to the obligations contained in the relevant legal provisions of the Anti-Dumping Agreement and the SCM Agreement.

19. In sum, the USDOC appears to have acted in violation of the United States' obligations under Article 6.8 and Annex II of the Anti-Dumping Agreement, in particular paragraphs 1, 3, 5, 6 and 7 of Annex II and Article 12.7 of the SCM Agreement relating to the use of facts available and drawing adverse inferences in selecting from the facts otherwise available in each of the anti-dumping and countervailing duty measures identified in Section I.A.

20. Furthermore, Korea is concerned that when resorting to the use of facts available in the context of the above-identified anti-dumping and countervailing duty measures, the United States failed to comply with the following provisions:

a. Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement because the USDOC failed to give notice of the information which it required and to give ample opportunity for interested parties to present in writing all evidence which they considered relevant in the investigation;

b. Article 6.2 of the Anti-Dumping Agreement and Article 12.2 of the SCM Agreement because the USDOC failed to provide interested parties with the full opportunity to defend their interests;

c. Article 6.6 of the Anti-Dumping Agreement and Article 12.5 of the SCM Agreement because the USDOC failed to satisfy itself as to the accuracy of the information supplied by interested parties upon which its findings were based;

d. Article 6.7 and Annex I of the Anti-Dumping Agreement and Article 12.6 and Annex VI of the SCM Agreement when the USDOC failed to carry out investigations, including on the premises of a firm in the territory of other Members, "as required" to verify information provided or to obtain further details and because it failed to make available the results of verifications to the firms to which they pertain or provide disclosure thereof;

e. Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement because the USDOC failed to inform all interested parties of the essential facts under consideration which formed the basis for the decision to apply definitive measures such as, among others, the "necessary" nature of the information that was allegedly not provided, the factual basis for the finding of failure to act to the best of one's ability, and the selection of the facts available;

f. Article 9.4 of the Anti-Dumping Agreement because in situations where sampling was used[3] the USDOC determined an all others rate that did not disregard margins established under the circumstances of Article 6.8;

g. Articles 11.2, 11.3 and 11.6 of the SCM Agreement because the USDOC requested information to be provided on "any other forms of assistance" that was not included in the application on which the investigation was based, and applied facts available whenever it discovered information that was not provided in response to this request, without examining whether the information obtained or discovered sufficed to initiate the investigation; and

h. Article 11.4 of the Anti-Dumping Agreement and Article 21.4 of the SCM Agreement because the USDOC failed to act in accordance with the provisions on evidence and procedure as outlined above in the relevant reviews.

21. Moreover, as a consequence of the undue use of adverse facts available when determining dumping and/or subsidization, these measures appear to be inconsistent with several provisions of the Anti-Dumping Agreement and the SCM Agreement relating to the determination of dumping or subsidization, the determination of injury and causation, the determination of the amount of the duty to be imposed, and the maintenance of the duty, such as Articles 1, 2.1, 2.2, 2.3, 2.4, 3.1, 3.2, 3.4, 3.5, 5.8, 9.2, 9.3, 9.4, 9.5, 11.1, 11.3, 11.4, and 18.1 of the Anti-Dumping Agreement as well as Articles 1, 10, 11.2, 11.3, 11.9, 14, 15.1, 15.2, 15.4, 15.5, 19.1, 19.3, 19.4, 21.1, 21.3,

[3] This was the case, for example, in the fourth administrative review in the Large Power Transformers AD Measure.

and 32.1 of the SCM Agreement, and Articles VI:1, VI:2 and VI:3 of the GATT 1994. These consequential violations are further summarized below.

22. In particular, Korea considers that the undue use of adverse facts available in each of these measures automatically vitiates the determination of dumping or subsidization under Articles 2.1, 2.2, 2.3 and 2.4 of the Anti-Dumping Agreement and Article 1 and 10 of the SCM Agreement. Where normal value, export price and the comparison between the two are affected by the undue use of adverse facts available, the dumping determination is necessarily also flawed. Similarly, where subsidy programs are presumed to be benefiting certain producers based on the undue use of adverse facts available, the subsidy determination is necessarily inconsistent with Article 1 and any countervailing duty measure is thus inconsistent with Article 10 of the SCM Agreement.

23. In addition, any injury and causation analysis under Article 3 of the Anti-Dumping Agreement and Article 15 of the SCM Agreement that seeks to identify the effects of such unduly determined "dumped" or "subsidized" imports, is necessarily also flawed since there is no certainty that imports would have been found to be dumped or subsidized if the relevant WTO obligations were abided by. In addition, the magnitude of the margin of dumping is a specific injury factor that must be examined under Article 3.4 of the Anti-Dumping Agreement. Given that the improper use of adverse facts available inflates the margin of dumping, this automatically vitiates the injury analysis under Article 3.4 of the Anti-Dumping Agreement. Similarly, Article 14 of the SCM Agreement sets forth obligations on the calculation of the amount of the subsidy which are necessarily violated if, as was the case in the two countervailing duty measure identified above, subsidies are assumed to be provided to exporters or producers based on the undue use of adverse facts available.

24. Furthermore, the amount of the duties is limited by the margin of dumping or subsidization under Articles 9.1 and 9.3 of the Anti-Dumping Agreement and Articles 19.2 and 19.4 of the SCM Agreement. In all of the investigations and reviews in question, USDOC determined the amount of the duties to be equal to the margin of dumping or subsidization. Duties that have been calculated based on margins of dumping or subsidization that were inflated as a result of the undue use of adverse facts available will necessarily violate these obligations.

25. In addition, any anti-dumping and countervailing duty investigation should have been terminated promptly under Article 5.8 of the Anti-Dumping Agreement and Article 11.9 of the SCM Agreement where, absent the undue use of adverse facts available, no dumping or subsidization above *de minimis* was found. In particular, in the context of the above-identified Cold-Rolled Steel CVD Measure and Hot-Rolled Steel CVD Measure, the investigations should have been terminated promptly since the preliminary determinations concluded that the amount of subsidization were *de minimis*. Only as a result of the undue use of adverse facts available did the USDOC make findings of subsidization above *de minimis* in both investigations. In addition, the sunset review determination in Large Power Transformers AD Measure is based on an examination of the likelihood of recurrence or continuation of dumping that relies on dumping margins established through the improper use of adverse facts available. Such a sunset review examination is automatically flawed as it is not supported by a sufficient factual basis and is not based on a determination of dumping that is consistent with Article 2 of the Anti-Dumping Agreement, thus violating Articles 11.1 and 11.3 of the Anti-Dumping Agreement.

26. Finally, the undue application of adverse facts available vitiates key aspects of the challenged anti-dumping and countervailing duty measures, which thus constitute specific actions against dumping or against a subsidy that are inconsistent with the provisions of the GATT 1994, as interpreted by the Anti-Dumping Agreement and the SCM Agreement respectively. As a result, the listed anti-dumping measures in Section I.A. violate Article 18.1 of the Anti-Dumping Agreement and the listed countervailing duty measures in the same section violate Article 32.1 of the SCM Agreement.

B. As Such Challenge to Section 776 of the Tariff Act of 1930 (19 U.S.C. § 1677e) as amended by Section 502 of the Trade Preferences Extension Act of 2015, and its implementing regulations

27. With regard to Section 776 of the Tariff Act of 1930, codified at 19 U.S.C. § 1677e, as amended by Section 502 of the Trade Preferences Extension Act of 2015, and the above-listed related legal provisions of the United States' national legislation governing the use of facts

available, Korea is concerned that these provisions are inconsistent with the United States' obligations under Article 6.8 and Annex II of the Anti-Dumping Agreement, and Article 12.7 of the SCM Agreement.

28. Section 776 of the Tariff Act of 1930 (19 U.S.C. § 1677e), as amended by Section 502 of the Trade Preferences Extension Act of 2015, provides that if the authorities find that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information, the authorities may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.[4] In particular, it provides that the authorities are not required to determine, or make any adjustments to, a countervailable subsidy rate or weighted average dumping margin based on any assumptions about information the interested party would have provided if the interested party had complied with the request for information.[5] It gives full discretion to the authorities to apply the highest rate or margin available from among the available dumping margins or countervailable subsidy rates, without the need to corroborate such margins.[6] It further clarifies that the authorities are not required to estimate what the countervailable subsidy rate or dumping margin would have been if the interested party found to have failed to cooperate had cooperated or to demonstrate that the countervailable subsidy rate or dumping margin used by the administering authority reflects an alleged commercial reality of the interested party.[7]

29. Korea considers that these legal provisions unduly permit the United States' investigating authorities, and in particular the USDOC, not only to replace the missing necessary information but to disregard verifiable and relevant information that was appropriately submitted by the producers or exporters. They expressly relieve the authorities from the requirement to use "best" information available as they permit the USDOC to select from the facts otherwise available those that are adverse to the interest of the party concerned. They relieve the authorities from the requirement to use secondary source information with special circumspection in certain circumstances and give full discretion to the authorities to deliberately apply the highest rate or margin, without the need to even consider whether this rate has a basis in the commercial reality of the producer or exporter in question, or is supported by available other information that relates to the producer or exporter in question.

30. These provisions thus provide that there is no obligation on the authorities to abide by the obligations on the use of facts available imposed by Article 6.8 and, among others, paragraphs 1, 3, 5, 6 and 7 of Annex II of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement. These provisions unduly relieve the obligation on the investigating authorities to use facts available to reasonably replace missing "necessary information" with a view to arriving at an accurate determination and permit the use of facts available in a punitive manner.[8] Section 776 of the Tariff Act of 1930 (19 U.S.C. § 1677e), as amended by Section 502 of the Trade Preferences Extension Act of 2015, permits the use of facts available in a manner that is not permitted by Articles 6.8 and Annex II of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement and thus violate these provisions. The Anti-Dumping Agreement and the SCM Agreement do not permit resorting to facts available in a punitive manner but require that the authorities take into account all substantiated facts on the record and all evidence that was verifiable and appropriately submitted in a timely manner and that facts available be used only to replace the "necessary" information that is allegedly missing with the best information otherwise available in order to arrive at an accurate determination of dumping or subsidization.

31. In addition, Korea considers that the unfettered discretion granted to the authorities to act in this manner is inconsistent with the United States' obligation under Article 18.4 of the Anti-Dumping Agreement and Article 32.5 of the SCM Agreement, as well as Article XVI:4 of the Marrakesh Agreement establishing the WTO to ensure conformity of its laws regulations and administrative procedures with the provisions of, in particular, Article 6.8 and Annex II of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement.

[4] 19 U.S.C. § 1677e(b)(1)(A).
[5] 19 U.S.C. § 1677e(b)(1)(B).
[6] 19 U.S.C. § 1677e(c)(2), § 1677e(d)(1),(2).
[7] 19 U.S.C. § 1677e(d)(3).
[8] As confirmed by the practice of the USDOC referred to in Section I.C, the selection of facts that are sufficiently adverse to the interests of the party in question rather than seeking to arrive at an accurate determination, is in fact the rule under these legal provisions.

C. As Such Challenge to the USDOC's Use of Adverse Facts Available As an Ongoing Conduct, or Rule or Norm of General and Prospective Application

32. Finally, with regard to the USDOC's use of adverse facts available, Korea is concerned that, under this ongoing conduct, or rule or norm, whenever the USDOC determines that a producer or exporter has failed to cooperate by not acting to the best of its ability, the USDOC selects facts from the record that are adverse to the interests of the foreign producers or exporters without (i) establishing that the adverse inferences can reasonably be drawn in light of the degree of cooperation received, and (ii) ensuring that such facts are the "best information available" in the particular circumstances.

33. Korea considers that the USDOC's ongoing conduct, or rule or norm of general and prospective application appears to be inconsistent with the United States' obligations relating to the use of facts available, because, among other things, the United States disregards verifiable and relevant information that was appropriately submitted by the producers or exporters acting to the best of their abilities and fails to act with special circumspection when basing its findings on information from secondary sources, thus failing to use the "best information available". The USDOC draws conclusions on whether an interested party fails to act to the best of its ability without evidence that "necessary" information is actively being withheld or that the investigation is being impeded in a significant and deliberate manner. Furthermore, and in line with the permission granted by Section 776 of the Tariff Act of 1930 (19 U.S.C. § 1677e), as amended by Section 502 of the Trade Preferences Extension Act of 2015, the USDOC practice is not to determine, or make any adjustments to, a countervailable subsidy rate or weighted average dumping margin based on any assumptions about information the interested party would have provided if the interested party had complied with the request for information. It does not estimate what the countervailable subsidy rate or dumping margin would have been if the interested party found to have failed to cooperate had cooperated or seek to determine that the countervailable subsidy rate or dumping margin used by the administering authority reflects an alleged commercial reality of the interested party. Whenever it relies on a rate reflected in the petition or a margin of dumping or subsidization established in a previous segment of the proceeding, it does not seek to corroborate or check such information based on the available information in the record. The USDOC's ongoing conduct, or rule or norm is to select a rate that is sufficiently adverse to ensure that the allegedly uncooperative party does not obtain a more favorable result by failing to cooperate than if it had fully cooperated, and thus effectively applies facts available in a punitive manner rather than with a view to arriving at an accurate determination.

34. Korea considers that the USDOC's ongoing conduct, or rule or norm of using adverse facts available whenever it makes a finding of a failure to cooperate by not acting to the best of its ability is inconsistent with the obligation that investigating authorities undertake a process of reasoning and evaluation when selecting the facts available that reasonably replace the missing "necessary information" to arrive at an accurate determination and thus appears to violate Article 6.8 and Annex II of the Anti-Dumping Agreement, in particular paragraphs 1, 3, 5, 6 and 7 of Annex II, and Article 12.7 of the SCM Agreement.

III. CONCLUSION

35. The US anti-dumping and countervailing measures identified in Section I.A, the relevant legal provisions under US law identified in Section I.B, and the U.S. ongoing conduct, or rule or norm of general and prospective application of applying adverse facts available as identified in Section I.C of this request, nullifies or impairs benefits accruing to Korea, directly or indirectly, under the cited agreements.

36. Therefore, Korea respectfully requests, pursuant to Article 6 of the DSU, Article XXIII of the GATT 1994, Article 17.4 of the Anti-Dumping Agreement, and Article 30 of the SCM Agreement, that the Dispute Settlement Body establish a panel to examine this matter, with the standard terms of reference as set out in Article 7.1 of the DSU.

37. Korea further asks that this request for the establishment of a panel be placed on the agenda of the next meeting of the Dispute Settlement Body to be held on 27 April 2018.

ANNEX I

1. *Certain Uncoated Paper From Portugal: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 80 Fed. Reg. 51777 (26 August 2015)

2. *Low-Enriched Uranium From France: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 80 Fed. Reg. 55089 (14 September 2015)

3. *Certain Hot-Rolled Steel Flat Products From the Netherlands: Affirmative Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination and Extension of Provisional Measures*, 81 Fed. Reg. 15225 (22 March 2016)

4. *Circular Welded Carbon-Quality Steel Pipe From Pakistan: Affirmative Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination and Extension of Provisional Measures*, 81 Fed .Reg. 36867 (8 June 2016)

5. *Certain Stilbenic Optical Brightening Agents From Taiwan: Final Results of Antidumping Duty Administrative Review; 2014*-2015, 81 Fed. Reg. 43991 (6 July 2016)

6. *Certain Cold-Rolled Steel Flat Products From the United Kingdom: Final Determination of Sales at Less Than Fair Value*, 81 Fed. Reg. 49929 (29 July 2016)

7. *Certain Carbon and Alloy Steel Cut-to-Length Plate From the Federal Republic of Germany: Final Determination of Sales at Less Than Fair Value*, 82 Fed. Reg. 16360 (4 April 2017)

8. *Certain Carbon and Alloy Steel Cut-to-Length Plate From France: Final Determination of Sales at Less Than Fair Value*, 82 Fed. Reg. 16363 (4 April 2017)

9. *Certain Carbon and Alloy Steel Cut-To-Length Plate From Belgium: Final Determination of Sales at Less Than Fair Value and Final Determination of Critical Circumstances, in Part*, 82 Fed. Reg. 16378 (4 April 2017)

10. *Carbon and Certain Alloy Steel Wire Rod From Mexico: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2014-2015*, 82 Fed. Reg. 23190 (22 May 2017)

11. *Certain Uncoated Groundwood Paper From Canada: Preliminary Affirmative Countervailing Duty Determination, and Alignment of Final Determination With Final Antidumping Duty Determination*, 83 Fed. Reg. 2133 (16 January 2018)

12. *Certain Steel Nails From Taiwan: Final Results of Antidumping Duty Administrative Review and Partial Rescission of Administrative Review; 2015-2016*, 83 Fed. Reg. 6163 (13 February 2018)

13. *Biodiesel From Argentina: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, in Part*, 83 Fed. Reg. 8837 (1 March 2018)

14. *Silicon Metal From Brazil: Final Affirmative Countervailing Duty Determination*, 83 Fed. Reg. 9838 (8 March 2018)

15. *Polytetrafluoroethylene Resin From India: Preliminary Affirmative Countervailing Duty Determination*, 83 Fed. Reg. 9842 (8 March 2018)

16. *Large Power Transformers From the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2015-2016*, 83 Fed. Reg. 11679 (16 March 2018)

17. *Carbon and Alloy Steel Wire Rod From the Republic of Turkey: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination, in Part*, 83 Fed. Reg. 13239 (28 March 2018)

18. *Stainless Steel Flanges From India: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Preliminary Affirmative Determination of Critical Circumstances, Postponement of Final Determination, and Extension of Provisional Measures*, 83 Fed. Reg. 132436 (28 March 2018)

ANNEX II

19. In the **Corrosion-Resistant Steel AD Measure**, the USDOC used partial Adverse Facts Available ("AFA") for Hyundai's further manufactured sales of sheet, skelp, blanks, TWBs, and auto parts allegedly because Hyundai failed to submit information by the established deadlines and significantly impeded the proceeding. Moreover, the USDOC considered that an adverse inference was warranted under section 776(b) of the Tariff Act of 1930 because Hyundai allegedly did not cooperate to the best of its ability in providing information on these further manufactured sales. As a result, the USDOC selected from the facts otherwise available with respect to Hyundai the highest rate as calculated in the petition (i.e. a rate of 86.34%).

20. Korea considers that, among others, the USDOC failed to specify in sufficient detail the information that was required to be submitted, failed to provide an adequate and reasoned explanation that the information was "necessary" or that the failure to provide this information "significantly impeded" the investigation. The USDOC failed to substantiate its finding that Hyundai failed to act to the best of its abilities. In addition, the USDOC disregarded verifiable information, did not provide a meaningful opportunity to Hyundai to provide further explanations and did not use special circumspection when resorting to the use of secondary information. The USDOC did not check such information from other independent sources at its disposal. More in general, the USDOC selected the highest rate as calculated in the petition as the basis for the facts available because such rate was sufficiently adverse to the interests of Hyundai, and not because it was the best information available to arrive at an accurate determination. In so doing, it appears to have acted in violation of Article 6.8 and Annex II of the Anti-Dumping Agreement, as well as Articles 6.1, 6.2, 6.6, 6.7 and Annex I, and 6.9 of the Anti-Dumping Agreement.

21. In the **Cold-Rolled Steel AD Measure**, the USDOC used partial AFA for Hyundai (i) with respect to the reported sales and cost data, including the control numbers that were reported by Hyundai; (ii) with respect to the reporting of freight and warehousing services provided by an affiliated company; and (iii) with respect to the alleged failure to report warehousing expenses. The USDOC found that Hyundai did not cooperate to the best of its ability with regard to these three sets of information, and thus drew adverse inferences selecting from among the facts available those that were sufficiently adverse to the interests of the Korean exporter. In particular, it selected as AFA the highest calculated margin for any other reported U.S. sale of Hyundai and assigned the highest reported total cost of manufacturing for the CONNUMs in question as AFA. Similarly, with respect to the use of AFA for affiliated company services, the USDOC applied Hyundai's lowest reported value for its home inland freight and warehousing fields, the highest reported values by destination for Hyundai's international freight and U.S. inland freight and, for home market inland freight for U.S. sales, the USDOC selected the second-highest transaction-specific value as AFA. Similarly, with respect to the alleged failure to report warehousing information, the USDOC appears to have applied as AFA for Hyundai's home-market warehousing expenses, its lowest reported value for its warehousing fields for the final determination.

22. Korea considers that, among others, the USDOC failed to specify in sufficient detail the information that was required to be submitted, failed to provide an adequate and reasoned explanation that the information was "necessary" or that the failure to provide this information "significantly impeded" the investigation. The USDOC failed to substantiate its finding that Hyundai failed to act to the best of its abilities. In addition, the USDOC disregarded verifiable information, did not provide a meaningful opportunity to Hyundai to provide further explanations and did not use special circumspection when resorting to the use of secondary information. The USDOC did not check such information from other independent sources at its disposal. More in general, the USDOC selected the information to be used as the basis for the facts available because it was sufficiently adverse to the interests of Hyundai, and not because it was the best information available to arrive at an accurate determination. In so doing, it appears to have acted in violation of Article 6.8 and Annex II of the Anti-Dumping Agreement, as well as Articles 6.1, 6.2, 6.6, 6.7 and Annex I, and 6.9 of the Anti-Dumping Agreement.

23. In the **Cold-Rolled Steel CVD Measure**, the USDOC used partial AFA in relation to Korean producer, POSCO. In particular USDOC applied AFA to POSCO for (1) its failure to report certain cross-owned input suppliers; (2) the discovery at verification of facilities allegedly located in a foreign economic zone ("FEZ"); and (3) for the failure of its affiliated trading company, Daewoo International Corporation, to report certain loans. As AFA, the USDOC determined that POSCO

benefitted from the majority of the programs in the investigation and instead of a *de minimis* rate of 0.18% as determined preliminarily, determined that the AFA subsidy rate for POSCO was 58.36%. The USDOC requested information to be provided on "any other forms of assistance" that was not included in the application on which the investigation was based, and applied facts available whenever it discovered information that was not provided in response to this request, without examining whether the information obtained or discovered sufficed to initiate the investigation.

24. Korea considers that, among others, the USDOC failed to specify in sufficient detail the information that was required to be submitted, failed to provide an adequate and reasoned explanation that the information was "necessary" or that the failure to provide this information "significantly impeded" the investigation. In particular, a reasonable explanation was provided by POSCO of why certain information was not provided. The USDOC failed to substantiate its finding that POSCO failed to act to the best of its abilities. In addition, the USDOC disregarded verifiable information, did not provide a meaningful opportunity to POSCO and Daewoo International Corporation to provide further explanations and did not use special circumspection when resorting to the use of secondary information. The USDOC did not check such information from other independent sources at its disposal. More in general, the USDOC used as facts available certain assumptions that were sufficiently adverse to the interests of POSCO and Daewoo International Corporation, and did not seek to apply the best information available to arrive at an accurate determination. In so doing, it appears to have acted in violation of Article 12.7 of the SCM Agreement, as well as Articles 12.1, 12.2, 12.5, 12.6 and Annex VI, and 12.8 of the SCM Agreement. In addition, USDOC's failure to examine whether there was sufficient information to initiate the investigation with respect to "other forms of assistance" not included in the application appears to violate Articles 11.2, 11.3, and 11.6 of the SCM Agreement.

25. In the **Hot-Rolled Steel AD Measure**, the USDOC applied partial AFA to Hyundai's home market inland freight, home market warehousing expenses, international freight, marine insurance, and domestic inland freight for U.S. sales because of the alleged failure to report such information that was in the possession of affiliated companies. In particular, the USDOC applied AFA to Hyundai because it was unable to supply information regarding its affiliates' transactions with unaffiliated parties, requested for the first time at verification, that the agency claimed was necessary to benchmark its affiliates' services provided to Hyundai. For home market inland freight and warehousing, the USDOC applied Hyundai's lowest reported values for home inland freight and warehousing fields for the final determination. For marine insurance and international freight (including wharfage), it applied the highest reported values for the final determination. For domestic inland freight for U.S. sales, it selected the highest value as AFA.

26. Korea considers that, among others, the USDOC failed to specify in sufficient detail the information that was required to be submitted, failed to provide an adequate and reasoned explanation that the information was "necessary" or that the failure to provide this information "significantly impeded" the investigation. The USDOC failed to substantiate its finding that Hyundai failed to act to the best of its abilities. In addition, the USDOC disregarded verifiable information, did not provide a meaningful opportunity to Hyundai to provide further explanations and did not use special circumspection when resorting to the use of secondary information. The USDOC did not check such information from other independent sources at its disposal. More in general, the USDOC selected the information to be used as the basis for the facts available because it was sufficiently adverse to the interests of Hyundai, and not because it was the best information available to arrive at an accurate determination. In so doing, USDOC appears to have acted in violation of Article 6.8 and Annex II of the Anti-Dumping Agreement, as well as Articles 6.1, 6.2, 6.6, 6.7 and Annex I, and 6.9 of the Anti-Dumping Agreement.

27. In the **Hot-Rolled Steel CVD Measure**, the USDOC used partial AFA with respect to (1) POSCO's alleged failure to report certain cross-owned input suppliers; (2) the discovery at verification of facilities allegedly located in a foreign economic zone ("FEZ"); and (3) for the failure of its affiliated trading company, Daewoo International Corporation, to report certain loans. As adverse facts available, the USDOC determined that POSCO benefitted from the majority of the programs in the investigation and instead of a *de minimis* rate of 0.17% as determined preliminarily, it determined that the AFA subsidy rate for POSCO was 57.04%. The USDOC requested information to be provided on "any other forms of assistance" that was not included in the application on which the investigation was based, and applied facts available whenever it

discovered information that was not provided in response to this request, without examining whether the information obtained or discovered sufficed to initiate the investigation.

28. Korea considers that, among others, the USDOC failed to specify in sufficient detail the information that was required to be submitted, failed to provide an adequate and reasoned explanation that the information was "necessary" or that the failure to provide this information "significantly impeded" the investigation. In particular, a reasonable explanation was provided by POSCO of why certain information was not provided and was not necessary. The USDOC failed to substantiate its finding that POSCO failed to act to the best of its abilities. In addition, the USDOC disregarded verifiable information, did not provide a meaningful opportunity to POSCO and Daewoo International Corporation to provide further explanations and did not use special circumspection when resorting to the use of secondary information. The USDOC did not check such information from other independent sources at its disposal. More in general, the USDOC used as facts available certain assumptions that were sufficiently adverse to the interests of POSCO and Daewoo International Corporation, and did not seek to apply the best information available to arrive at an accurate determination. In so doing, it appears to have acted in violation of Article 12.7 of the SCM Agreement, as well as Articles 12.1, 12.2, 12.5, 12.6 and Annex VI, and 12.8 of the SCM Agreement. In addition, USDOC's failure to examine whether there was sufficient information to initiate the investigation with respect to "other forms of assistance" not included in the application appears to violate Articles 11.2, 11.3, and 11.6 of the SCM Agreement.

29. In the **Large Power Transformers AD Measure**, in the third administrative review, the USDOC used total AFA with regard to Hyundai. The USDOC considered that Hyundai failed to provide complete and accurate information in particular concerning service-related revenues, the exclusion of certain parts, the failure to report the price and costs for accessories separately, a number of other concerns relating to the alleged "selective reporting" by Hyundai. The USDOC found that an adverse inference was warranted, as the company significantly impeded the review and failed to cooperate to the best of its ability and as a result, the USDOC used the highest petition margin to determine the 60.81% anti-dumping duty.

30. A similar set of findings was made in the fourth administrative review. For the fourth administrative review, the USDOC continued to find that Hyundai withheld requested information and impeded the review by failing to provide the prices and costs for "accessories", thus allegedly preventing the USDOC from analyzing and determining whether: (1) product matches were based on accurate physical characteristics; (2) the difference in costs between similar products could be attributed to factors other than the physical characteristics; and (3) there was potential for manipulation of the dumping margin by inconsistent treatment of accessories between home market and U.S. sales. In addition, Hyundai was found to have inconsistently reported an identical component in different sales as foreign like and non-foreign like product which allegedly called into question the reliability of its reporting of home market sales.

31. As AFA, the USDOC assigned Hyundai a dumping margin of 60.81%, the petition rate as used also in the third administrative review. USDOC relied on the same arguments for corroboration as in the third administrative review. Similar findings were made with respect to Hyosung. For the fourth administrative review, the USDOC found that Hyosung failed to report information essential to the calculation of the average U.S. price, in particular that Hyosung: (1) failed to report service-related revenues accurately and completely; (2) failed to explain how a single invoice could cover multiple sales that entered into the United States over multiple periods of review; and (3) failed to report all relevant discounts and price adjustments. Furthermore, the USDOC calculated an all others rate based on the margins determined by using AFA. The USDOC explained that it averaged the two AFA margins in order to determine the margin for non-selected respondents, and that, in its view, this was a reasonable method to determine the all others rate.

32. In the redetermination of the second administrative review, the USDOC also resorted to the use of AFA with respect to Hyundai. Specifically, it found that Hyundai failed to report service-related revenue, despite its agreement with Hyundai's reporting in the final results of the second administrative review. The USDOC did not notify Hyundai of any deficiency in its reporting during the remand proceeding, nor did it offer Hyundai an opportunity to remedy any deficiency.

33. In the sunset review, the USDOC found that revocation of the antidumping duty order on Large Power Transformers from Korea would likely lead to continuation or recurrence of dumping, and that the magnitude of the dumping margins likely to prevail would be weighted-average

dumping margins up to 29.04% for Hyosung and 14.95% for Hyundai. The decision that dumping was likely to continue or recur was based on dumping margins calculated by USDOC using AFA in subsequent reviews (e.g., the final results of the third administrative review and the preliminary results of the fourth administrative review). The USDOC considered that the dumping margins calculated on the basis of AFA provided the best evidence of dumping behavior of these Korean companies and there was no evidence that indicated that dumping had ceased.

34. In respective of the above reviews, Korea considers that, among others, the USDOC failed to specify in sufficient detail the information that was required to be submitted, failed to provide an adequate and reasoned explanation that the information was "necessary" or that the failure to provide this information "significantly impeded" the investigation. The USDOC failed to substantiate its finding that Hyundai and Hyosung failed to act to the best of their abilities. In addition, the USDOC disregarded verifiable information, did not provide a meaningful opportunity to Hyundai to provide further explanations and did not use special circumspection when resorting to the use of secondary information from the petition. The USDOC did not check such information from other independent sources at its disposal. More in general, the USDOC selected the information to be used as the basis for the facts available because it was sufficiently adverse to the interests of Hyundai and Hyosung, and not because it was the best information available to arrive at an accurate determination. In so doing, USDOC appears to have acted in violation of Article 6.8 and Annex II of the Anti-Dumping Agreement, as well as Articles 6.1, 6.2, 6.6, 6.7 and Annex I, and 6.9 of the Anti-Dumping Agreement. The USDOC determination of an all others rate that included margins determined on the basis of the facts available appears to be inconsistent with Article 9.4 of the Anti-Dumping Agreement.

35. In addition, in the sunset review, the USDOC relied on dumping margins that were not determined in accordance with Article 2 of the Anti-Dumping Agreement as a result of their undue reliance on AFA. The USDOC did not identify the necessary information that was missing that would have allowed it to effectively apply AFA also in the context of this sunset review and applied AFA in a manner that does not only violate Article 6.8 and Annex II of the Anti-Dumping Agreement but also Articles 11.1, 11.3, and 11.4 of the Anti-Dumping Agreement, as the USDOC did not comply with the provisions of Article 6, did not base its determination of a likelihood of recurrence or continuation of dumping and injury on a sufficient factual basis, and thus maintained the measure beyond what was necessary to counteract dumping causing injury.