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UNITED STATES – ANTI-DUMPING MEASURES ON CERTAIN OIL COUNTRY TUBULAR GOODS FROM KOREA

REPORT OF THE PANEL

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CASES CITED IN THIS REPORT

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Argentina – Import Measures	Appellate Body Reports, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015
Argentina – Poultry Anti-Dumping Duties	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003, DSR 2003:V, p. 1727
Australia – Apples	Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/AB/R, adopted 17 December 2010, DSR 2010:V, p. 2175
Canada – Welded Pipe	Panel Report, *Canada – Anti-Dumping Measures on Imports of Certain Carbon Steel Welded Pipe from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu*, WT/DS482/R and Add.1, adopted 25 January 2017
Chile – Price Band System	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3045 (Corr.1, DSR 2006:XII, p. 5473)
China – Broiler Products	Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R and Add.1, adopted 25 September 2013, DSR 2013:IV, p. 1041
China – GOES	Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012, DSR 2012:XII, p. 6251
China – GOES	Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/R and Add.1, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R, DSR 2012:XII, p. 6369
China – HP-SSST (Japan) / China – HP-SSST (EU)	Appellate Body Reports, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*, WT/DS454/AB/R and Add.1 / WT/DS460/AB/R and Add.1, adopted 28 October 2015
China – HP-SSST (Japan) / China – HP-SSST (EU)	Panel Reports, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*, WT/DS454/R and Add.1 / WT/DS460/R, Add.1 and Corr.1, adopted 28 October 2015, as modified by Appellate Body Reports WT/DS454/AB/R / WT/DS460/AB/R
China – Raw Materials	Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, p. 3295
China – Raw Materials	Panel Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R, Add.1 and Corr.1 / WT/DS395/R, Add.1 and Corr.1 / WT/DS398/R, Add.1 and Corr.1, adopted 22 February 2012, as modified by Appellate Body Reports WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, DSR 2012:VII, p. 3501
China – X-Ray Equipment	Panel Report, *China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union*, WT/DS425/R and Add.1, adopted 24 April 2013, DSR 2013:III, p. 659
EC – Bed Linen	Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted 12 March 2001, as modified by Appellate Body Report WT/DS141/AB/R, DSR 2001:VI, p. 2077
EC – Chicken Cuts	Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, p. 9157
EC – Fasteners (China)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011, DSR 2011:VII, p. 3995

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EC – Fasteners (China) (Article 21.5 – China)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China – Recourse to Article 21.5 of the DSU by China*, WT/DS397/AB/RW and Add.1, adopted 12 February 2016
EC – Fasteners (China) (Article 21.5 – China)	Panel Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China – Recourse to Article 21.5 of the DSU by China*, WT/DS397/RW and Add.1, adopted 12 February 2016, as modified by Appellate Body Report WT/DS397/AB/RW
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
EC – IT Products	Panel Reports, *European Communities and its member States – Tariff Treatment of Certain Information Technology Products*, WT/DS375/R / WT/DS376/R / WT/DS377/R, adopted 21 September 2010, DSR 2010:III, p. 933
EC – Salmon (Norway)	Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, p. 3
EC – Selected Customs Matters	Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, p. 3791
EC – Tube or Pipe Fittings	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, p. 2613
EC – Tube or Pipe Fittings	Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted 18 August 2003, as modified by Appellate Body Report WT/DS219/AB/R, DSR 2003:VII, p. 2701
EC and certain member States – Large Civil Aircraft	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
Egypt – Steel Rebar	Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted 1 October 2002, DSR 2002:VII, p. 2667
EU – Biodiesel (Argentina)	Appellate Body Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/AB/R and Add.1, adopted 26 October 2016
EU – Biodiesel (Argentina)	Panel Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/R and Add.1, adopted 26 October 2016, as modified by Appellate Body Report WT/DS473/AB/R
EU – Footwear (China)	Panel Report, *European Union – Anti-Dumping Measures on Certain Footwear from China*, WT/DS405/R, adopted 22 February 2012, DSR 2012:IX, p. 4585
Guatemala – Cement I	Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, p. 3767
Guatemala – Cement II	Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, DSR 2000:XI, p. 5295
India – Patents (US)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, p. 9
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, p. 3
Mexico – Anti-Dumping Measures on Rice	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, p. 10853
Mexico – Anti-Dumping Measures on Rice	Panel Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/R, adopted 20 December 2005, as modified by Appellate Body Report WT/DS295/AB/R, DSR 2005:XXIII, p. 11007
Mexico – Corn Syrup (Article 21.5 – US)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, p. 6675

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Mexico – Olive Oil	Panel Report, *Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities*, WT/DS341/R, adopted 21 October 2008, DSR 2008:IX, p. 3179
Thailand – H-Beams	Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, adopted 5 April 2001, as modified by Appellate Body Report WT/DS122/AB/R, DSR 2001:VII, p. 2741
US – Anti-Dumping and Countervailing Duties (China)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011, DSR 2011:V, p. 2869
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
US – Carbon Steel (India)	Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 19 December 2014, DSR 2014:V, p. 1727
US – Carbon Steel (India)	Panel Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/R and Add.1, adopted 19 December 2014, as modified by Appellate Body Report WT/DS436/AB/R, DSR 2014:VI, p. 2189
US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
US – Countervailing Duty Investigation on DRAMS	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, p. 8131
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697
US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, p. 4051
US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, p. 3257
US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)	Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5* of the DSU by Argentina, WT/DS268/RW, adopted 11 May 2007, as modified by Appellate Body Report WT/DS268/AB/RW, DSR 2007:IX, p. 3609
US – Softwood Lumber VI (Article 21.5 – Canada)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865
US – Upland Cotton	Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, Add.1 to Add.3 and Corr.1, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, p. 299
US – Washing Machines	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/R and Add.1, adopted 26 September 2016, as modified by Appellate Body Report WT/DS464/AB/R
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
US – Zeroing (Japan) (Article 21.5 – Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/AB/RW, adopted 31 August 2009, DSR 2009:VIII, p. 3441

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the GATT 1994
BCI	Business Confidential Information
CV	Constructed value
CV profit	The amount for profit used in constructed normal value
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
OCTG	Oil country tubular goods
POI	Period of investigation
SG&A	Sales, general, and administrative expenses
USCIT	United States Court of International Trade
USDOC	United States Department of Commerce
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

1 INTRODUCTION

1.1 Complaint by Korea

1.1. On 22 December 2014, Korea requested consultations with the United States pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Article 17 of the Agreement on Implementation of Article VI of the GATT 1994 (Anti-Dumping Agreement) with respect to the measures and claims set out below.[1]

1.2. Consultations were held on 21 January 2015, but failed to resolve the dispute.

1.2 Panel establishment and composition

1.3. On 23 February 2015, Korea requested the establishment of a panel pursuant to Articles 4.7 and 6 of the DSU, Article XXIII of the GATT 1994, and Article 17.4 of the Anti-Dumping Agreement with standard terms of reference.[2] At its meeting on 25 March 2015, the Dispute Settlement Body (DSB) established a panel pursuant to the request of Korea, in accordance with Article 6 of the DSU.[3]

1.4. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Korea in document WT/DS488/5 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[4]

1.5. Following the agreement of the parties, the Panel was composed on 13 July 2015 as follows[5]:

Chairperson:	Mr John Adank
Members:	Mr Abd El Rahman Ezz El Din Fawzy Mr Gustav Brink

1.6. On 5 September 2016, the Chairperson informed the Chairman of the DSB that, in light of his appointment as Director of the Legal Affairs Division of the WTO Secretariat, he had decided to resign forthwith from the Panel. Following the resignation of the Chairperson, the parties on 15 September 2016 agreed on the appointment of a new Chairperson. Accordingly, the composition of the Panel is as follows[6]:

Chairperson:	Mr Crawford Falconer
Members:	Mr Abd El Rahman Ezz El Din Fawzy Mr Gustav Brink

1.7. Canada, China, the European Union, India, Mexico, the Russian Federation, and Turkey notified their interest in participating in the Panel proceedings as third parties.[7]

[1] Korea's request for consultations, WT/DS488/1 (Korea's consultations request).
[2] Korea's request for the establishment of a panel, WT/DS488/5 (Korea's panel request).
[3] DSB, Minutes of meeting held on 25 March 2015, circulated on 1 May 2015, WT/DSB/M/359.
[4] Constitution note of the Panel, WT/DS488/6.
[5] Constitution note of the Panel, WT/DS488/6.
[6] Note by the Secretariat, WT/DS488/8.
[7] Constitution note of the Panel, WT/DS488/6.

1.3 Panel proceedings

1.3.1 General

1.8. After consultation with the parties, the Panel adopted its Working Procedures[8] and timetable on 30 October 2015. The timetable was revised during the course of the panel proceeding in light of subsequent developments.[9]

1.9. The Panel began its work on this dispute later than it would have wished due to staff constraints in the WTO Secretariat. The Panel held a first substantive meeting with the parties on 20-21 July 2016. A session with the third parties took place on 21 July 2016. Following a delay as a result of the need to appoint a new Chairperson, the Panel held a second substantive meeting with the parties on 2-3 November 2016. On 16 December 2016, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 5 April 2017. The Panel issued its Final Report to the parties on 10 May 2017.

1.3.2 Additional working procedures on Business Confidential Information (BCI)

1.10. After consultation with the parties, the Panel adopted, on 30 October 2015, additional working procedures for the protection of BCI.[10]

2 FACTUAL ASPECTS

2.1 The measures at issue

2.1. Korea challenges the "laws, regulations, administrative procedures and other measures"[11] through which the United States maintains a "viability test" in anti-dumping investigations, administrative reviews, and other segments of anti-dumping proceedings as such, and as applied in the investigation initiated on 29 July 2013 which is at issue in this dispute (underlying investigation).[12]

2.2. Further, Korea challenges certain aspects of the final anti-dumping measure imposed by the United States on imports of oil country tubular goods (OCTG) from Korea following a final determination of dumping by the United States Department of Commerce (USDOC) in the underlying investigation.[13] Korea also challenges certain conduct of the USDOC during the course of the underlying investigation.

2.3. In addition, Korea challenges the USDOC's determination dated 22 February 2016 in a remand proceeding (remand determination), which was issued while this dispute was pending before the Panel.[14] The remand proceeding was undertaken by the USDOC following a decision by

[8] Working Procedures, Annex A-1.
[9] The timetable was revised on 12 November 2015, 8 April 2016, 16 September 2016, 13 October 2016, and 15 December 2016.
[10] Additional Working Procedures Concerning Business Confidential Information, Annex A-2.
[11] Korea asserts that these "other measures" include any other related or subsequent measures that enable or implement the so-called "viability test" in anti-dumping investigations, administrative reviews, and other segments of anti-dumping proceedings. (Korea's first written submission, para. 33 and fn 58).
[12] Korea's first written submission, paras. 33-40.
[13] Korea's first written submission, para. 42. In particular, Korea challenges the imposition of anti-dumping duties on OCTG pursuant to the following instruments: (a) USDOC, Certain oil country tubular goods from the Republic of Korea, Final Determination of sales at less than fair value and negative final determination of critical circumstances, *United States Federal Register*, Vol. 79, No. 138 (18 July 2014), p. 41983 (Final Determination), (Exhibit KOR-24); (b) USDOC, Issues and Final Decision Memorandum for the Final Affirmative Determination in the less than fair value investigation of certain oil country tubular goods from the Republic of Korea, 10 July 2014 (Final Decision Memorandum), (Exhibit KOR-21); and (c) USDOC, Certain Oil Country Tubular Goods from certain countries: Antidumping Duty Orders; and Certain Oil Country Tubular Goods From the Socialist Republic of Vietnam: Amended Final Determination of sales at less than fair value, *United States Federal Register*, Vol. 79, No. 175 (10 September 2014), p. 53691 (Anti-Dumping Duty Order), (Exhibit KOR-59).
[14] Korea's second written submission, para. 357; opening statement at the second meeting of the Panel, para. 89.

the United States Court of International Trade (USCIT) on review of the same USDOC final determination of dumping challenged by Korea in this dispute. The USCIT found certain aspects of that determination to be contrary to US laws and regulations, and remanded that determination to the USDOC, directing it to reconsider those aspects of the determination that were found to be contrary to US laws and regulations.

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. Korea requests the Panel to find as follows[15]:

a. With respect to the "viability test":

i. the "viability test" is inconsistent with Article 2.2 of the Anti-Dumping Agreement as such because it imposes a rigid quantitative test under which a third-country market is automatically disqualified as a comparison market for determining normal value if the respondents' sales to that market are less than 5% of its export sales volume to the United States; and

ii. the USDOC acted inconsistently with Article 2.2 of the Anti-Dumping Agreement by applying the "viability test" in the underlying investigation and disqualifying the respondents' sales to third-country markets in determining the normal value only because the volume of these sales constituted less than 5% of the volume of respondents' export sales to the United States.

b. With respect to the USDOC's determination of dumping in the underlying investigation:

i. the USDOC acted inconsistently with the *chapeau* of Article 2.2.2 of the Anti-Dumping Agreement because it did not use actual data of the respondents to calculate the respondents' constructed value (CV) profit rate[16], although the respondents' actual home market and third-country market profit data was available on the record of the investigation;

ii. the USDOC acted inconsistently with Articles 2.2.2(i) and (iii) of the Anti-Dumping Agreement because it interpreted and applied "same general category of products" in an impermissibly narrow manner such that it was not broader than its definition of "like products";

iii. the USDOC acted inconsistently with Article 2.2.2(iii) of the Anti-Dumping Agreement because it failed to calculate a "profit cap" as required by that Article. By failing to calculate a profit cap, the USDOC also failed to ensure that the CV profit was "reasonable" as required under Article 2.2;

iv. the USDOC acted inconsistently with Article 2.2.2(iii) of the Anti-Dumping Agreement because the use of Tenaris as a source of CV profit data did not constitute a "reasonable method" and did not reflect the profit normally realized by other exporters or producers on sales of products in the domestic market of the country of origin;

v. the USDOC acted inconsistently with Article 2.4 of the Anti-Dumping Agreement because it did not make a fair comparison between the export price and the normal value as a result of the failure to make due allowances for significant differences between the Korean respondents and Tenaris that affected price comparability;

vi. the USDOC acted inconsistently with Article 2.3 of the Anti-Dumping Agreement by improperly disregarding NEXTEEL's export prices to the Customer[17] without a proper

[15] Korea's first written submission, paras. 277-280; response to Panel question No. 40, para. 13.
[16] Article 2.2.2 refers to the methodologies that an investigating authority shall use in determining the amount for profit in constructed normal value. We refer to this profit amount as "CV profit" in this Report.
[17] The parties refer to **[[***]]** and/or **[[***]]** as the "Customer". As indicated in paragraph 7.135 we refer to them as Company A and Company B.

finding of "association" or "compensatory agreement", and without conducting any assessment of whether those prices were "unreliable";

vii. the USDOC acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement because it did not calculate NEXTEEL's costs on the basis of the records kept by NEXTEEL, based on an erroneous determination that NEXTEEL was associated with its supplier, when NEXTEEL's cost records satisfied the requirements of this provision; and

viii. the USDOC acted inconsistently with Article 12.2.2 of the Anti-Dumping Agreement because the final determination in the underlying investigation did not contain all relevant information on the reasons that led to the imposition of anti-dumping duties. In particular, the final determination did not provide sufficient or reasoned explanations regarding the USDOC's improperly narrow definition of "same general category", its selection of the Tenaris financial statements as a CV profit data source, and its finding of affiliation between NEXTEEL and its supplier and customer, especially in light of opposing evidence presented by the Korean respondents.

c. With respect to the proceedings in the underlying investigation:

i. the USDOC acted inconsistently with Articles 6.2, 6.4, and 6.9 of the Anti-Dumping Agreement by failing to make a determination regarding the placement of the Tenaris financial data on the record until its final determination, when it was too late for the Korean respondents to prepare presentations based on that data and to defend their interests regarding an issue that was relevant to the USDOC's dumping margin determinations for the Korean respondents;

ii. the USDOC acted inconsistently with Articles 6.4 and 6.9 of the Anti-Dumping Agreement by failing to disclose several letters that it had received from various government and industry representatives until immediately before the deadline for interested parties to submit their final presentations to the USDOC, depriving the Korean respondents of sufficient opportunity to defend their interests; and

iii. the USDOC acted inconsistently with Articles 6.10 and 6.10.2 of the Anti-Dumping Agreement because the USDOC provided no reasonable basis to conclude that it only had resources to examine two mandatory respondents and provided no reasoned explanation for why it was unable to examine any voluntary respondents.

d. In addition, Korea requests the Panel to find that the United States failed to comply with its obligations under Article I of the GATT 1994 because the USDOC's treatment of Korean respondents *vis-à-vis* respondents in other parallel OCTG investigations resulted in an advantage to OCTG products from other countries that was not extended immediately and unconditionally to OCTG produced in Korea. Furthermore, Korea requests the Panel to find that the USDOC's conduct was inconsistent with Article X:3(a) of the GATT 1994 because the USDOC's administration of laws, regulations, decisions, and rulings was not uniform, impartial, or reasonable.

e. Korea requests that, as a consequence of the findings requested above, the Panel find that the United States has acted inconsistently with Articles 1, 9.3, and 18.4 of the Anti-Dumping Agreement, Article VI of the GATT 1994, and Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement).

f. With respect to the USDOC's remand determination, Korea requests the Panel to find that:

i. the USDOC acted inconsistently with the *chapeau* of Article 2.2.2 of the Anti-Dumping Agreement because it did not use actual data pertaining to the sales of the like product in the ordinary course of trade;

ii. the USDOC acted inconsistently with Article 2.2.2(i) and (iii) of the Anti-Dumping Agreement because it relied on an impermissibly narrow definition of the "same general category of products";

iii. the USDOC acted inconsistently with Article 2.2.2(iii) of the Anti-Dumping Agreement because by determining the profit rates of the Korean respondents on the basis of the profits earned by Tenaris and OAO TMK, which had no production or sales of OCTG in Korea, it failed to use a "reasonable" method to calculate the profit rates of the Korean respondents;

iv. the USDOC acted inconsistently with Article 2.2.2(iii) of the Anti-Dumping Agreement because it calculated a profit cap based on the average of the profit rates in the 2012 financial statement of Tenaris and the profit rates of OAO TMK; and

v. the USDOC acted inconsistently with Article 2.4 of the Anti-Dumping Agreement because instead of rejecting the Tenaris financial data or accounting for the differences between Tenaris and the Korean respondents, the USDOC averaged the Tenaris profit rate with that of another foreign producer that suffered from the same flaws as Tenaris.

3.2. Korea further requests, pursuant to Article 19.1 of the DSU that the Panel recommend that the United States bring its measures into conformity with the Anti-Dumping Agreement, the GATT 1994, and the WTO Agreement.

3.3. The United States asserts that the USDOC remand determination challenged by Korea is outside the Panel's terms of reference. The United States requests the Panel to reject Korea's claims in this dispute in their entirety.

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 19 of the Working Procedures adopted by the Panel (see Annexes B-1 to B-4 and C-1 to C-4).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of China, the European Union, and Turkey are reflected in their executive summaries, provided in accordance with paragraph 20 of the Working Procedures adopted by the Panel (see Annexes D-1 to D-3). Canada, India, Mexico, and the Russian Federation did not submit written or oral arguments to the Panel.

6 INTERIM REVIEW

6.1. On 5 April 2017, the Panel issued its Interim Report to the parties. On 19 April 2017, Korea and the United States each submitted written requests for the Panel to review precise aspects of the Interim Report. Neither party requested an interim review meeting. On 27 April 2017, both parties submitted comments on the other party's requests for review.

6.2. The parties' requests made at the interim review stage as well as the Panel's discussion and disposition of those requests are set out in Annex F-1.

7 FINDINGS

7.1 General principles regarding treaty interpretation, the standard of review, and burden of proof

7.1.1 Treaty interpretation

7.1. Article 3.2 of the DSU provides that the WTO dispute settlement system serves to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". Article 17.6(ii) of the Anti-Dumping Agreement similarly

requires panels to interpret that Agreement's provisions in accordance with the customary rules of interpretation of public international law.[18] It is generally accepted that the principles codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties are such customary rules.

7.1.2 Standard of review

7.2. Article 11 of the DSU provides, in relevant part, that:

> [A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.

In addition, Article 17.6 of the Anti-Dumping Agreement sets forth the special standard of review applicable to disputes under the Anti-Dumping Agreement:

> (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
>
> (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

Thus, Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement together establish the standard of review we will apply with respect to both the factual and the legal aspects of the present dispute.

7.3. The Appellate Body has explained that where a panel is reviewing an investigating authority's determination, the "objective assessment" standard in Article 11 of the DSU requires a panel to review whether the authority has provided a reasoned and adequate explanation as to: (a) how the evidence on the record supported their factual findings; and (b) how those factual findings support the overall determination.[19] In the context of Article 17.6(i) of the Anti-Dumping Agreement, the Appellate Body has explained that while the text of this provision is couched in terms of an obligation on a panel, in effect it defines when an investigating authority can be considered to have acted inconsistently with the Anti-Dumping Agreement in the course of its "establishment" and "evaluation" of the relevant facts.[20] Therefore, a panel must assess if the establishment of the facts by the investigating authority was proper and if the evaluation of those facts by that authority was unbiased and objective.[21] If these broad standards have not been met, a panel must hold the investigating authority's establishment or evaluation of the facts to be inconsistent with the Anti-Dumping Agreement.[22]

7.4. In reviewing an investigating authority's determination, a panel should not conduct a *de novo* review of the evidence, nor substitute its judgment for that of the investigating authority. A panel must limit its examination to the evidence that was before the investigating authority during the course of the investigation[23] and must take into account all such evidence submitted by the parties to the dispute.[24] At the same time, a panel must not simply defer to the conclusions of the

[18] Article 17.6(ii) of the Anti-Dumping Agreement also provides that if a panel finds that a provision of the Anti-Dumping Agreement admits of more than one permissible interpretation, it shall uphold a measure that rests upon one of those interpretations.

[19] Appellate Body Reports, *US – Countervailing Duty Investigation on DRAMS*, para. 186; and *US – Lamb*, para. 103.

[20] Appellate Body Report, *US – Hot-Rolled Steel*, para. 56.

[21] Appellate Body Report, *US – Hot-Rolled Steel*, para. 56.

[22] Appellate Body Report, *US – Hot-Rolled Steel*, para. 56.

[23] Article 17.5(ii) requires a panel to examine the matter based on the facts made available to the authorities.

[24] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 187 and 188.

investigating authority; a panel's examination of those conclusions must be "in-depth" and "critical and searching".[25]

7.5. The Appellate Body has clarified a panel's standard of review of the facts pursuant to the above provisions in the following terms:

> It is well established that a panel must neither conduct a *de novo* review nor simply defer to the conclusions of the national authority. A panel's examination of those conclusions must be critical and searching, and be based on the information contained in the record and the explanations given by the authority in its published report. A panel must examine whether, in the light of the evidence on the record, the conclusions reached by the investigating authority are reasoned and adequate. What is "adequate" will inevitably depend on the facts and circumstances of the case and the particular claims made, but several general lines of inquiry are likely to be relevant. The panel's scrutiny should test whether the reasoning of the authority is coherent and internally consistent. The panel must undertake an in-depth examination of whether the explanations given disclose how the investigating authority treated the facts and evidence in the record and whether there was positive evidence before it to support the inferences made and conclusions reached by it. The panel must examine whether the explanations provided demonstrate that the investigating authority took proper account of the complexities of the data before it, and that it explained why it rejected or discounted alternative explanations and interpretations of the record evidence. A panel must be open to the possibility that the explanations given by the authority are not reasoned or adequate in the light of other plausible alternative explanations, and must take care not to assume itself the role of initial trier of facts, nor to be passive by "simply *accept[ing]* the conclusions of the competent authorities".[26]

7.1.3 Burden of proof

7.6. The general principles applicable to the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO Agreement must assert and prove its claim.[27] Therefore, as the complaining party in this proceeding, Korea bears the burden of demonstrating that the challenged aspects of the measures at issue are inconsistent with the Anti-Dumping Agreement. The Appellate Body has stated that a complaining party will satisfy its burden when it establishes a *prima facie* case, namely a case which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party.[28] Finally, it is generally for each party asserting a fact to provide proof thereof.[29]

7.2 Whether the "viability test" is inconsistent with Article 2.2 of the Anti-Dumping Agreement

7.7. US law provides that where domestic market sales cannot be used to determine normal value, third-country export sales of the foreign like product can be used for this purpose, subject to certain conditions.[30] One of these conditions, which we refer to as the "viability test", is set out in 19 U.S.C. §1677b(a)(1)(B)(ii), and provides that third-country export sales of the foreign like product can be used for determining normal value if such sales are 5% or more of the quantity or

[25] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.
[26] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93 (quoting Appellate Body Report, *US – Lamb*, para. 106). (emphasis from the original quote; fn omitted)
[27] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16.
[28] Appellate Body Report, *EC – Hormones*, paras. 98 and 104.
[29] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16.
[30] Under 19 U.S.C. § 1677b(a)(1)(B)(ii), the USDOC is permitted to use third-country sales for normal value determination where three conditions are fulfilled: (a) the third-country sales price is representative; (b) the aggregate quantity (or, if quantity is not appropriate, value) of the foreign like product sold by the exporter or producer in such third country is 5% or more of the aggregate quantity (or value) of the subject merchandise sold in the United States or for export to the United States; and (c) the USDOC does not determine that the particular market situation in such other third country prevents a proper comparison with the export price or constructed export price.

value of sales of the subject merchandise to or in the United States.[31] Korea refers to this requirement under the "viability test" as the "minimum quantitative threshold".

7.8. Korea brings two claims regarding the "viability test" under Article 2.2 of the Anti-Dumping Agreement. First, it contends that Article 2.2 of the Anti-Dumping Agreement, unlike the "viability test" provided for under US law, does not stipulate that an investigating authority may use third-country export sales to determine the normal value only when such a minimum quantitative threshold is met. Korea claims that the existence of such a threshold in US law under the "viability test", which is not found in the Anti-Dumping Agreement, renders the "viability test" "as such" inconsistent with Article 2.2. Second, Korea claims that the "viability test" was inconsistent with Article 2.2 "as applied" in the underlying investigation.

7.9. In the underlying investigation, the USDOC, after concluding that neither HYSCO nor NEXTEEL had a viable home market[32], found in its final determination, on the basis of application of the "viability test", that neither HYSCO nor NEXTEEL had a viable third-country market during the period of investigation (POI), and therefore proceeded to determine normal value on the basis of constructed normal value.[33]

7.2.1 Provision at issue

7.10. Article 2.2 reads:

> When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country[*], such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.
>
> [*fn original] Sales of the like product destined for consumption in the domestic market of the exporting country shall normally be considered a sufficient quantity for the determination of the normal value if such sales constitute 5 per cent or more of the sales of the product under consideration to the importing Member, provided that a lower ratio should be acceptable where the evidence demonstrates that domestic sales at such lower ratio are nonetheless of sufficient magnitude to provide for a proper comparison.

7.2.2 Whether the "viability test" is as such inconsistent with Article 2.2 of the Anti-Dumping Agreement

7.2.2.1 Main arguments of the parties

7.11. Korea argues that the minimum quantitative threshold for use of third-country sales in determining normal value in US law is an additional requirement not contemplated in the Anti-Dumping Agreement and is therefore inconsistent with Article 2.2.[34] According to Korea, the existence of a choice between the use of constructed normal value and third-country sales to

[31] The USDOC regulations implementing the statute provide that:

> *In general*. The Secretary [of the USDOC] will consider the exporting country or a third country as constituting a viable market if the Secretary is satisfied that the sales of the foreign like product in that country are of sufficient quantity to form the basis of normal value.

(19 C.F.R. § 351.404(b)(1) (emphasis original))

The regulations further explain that sufficient quantity "normally" means that the aggregate quantity (or if quantity is not appropriate, value) of the foreign like product sold by an exporter or producer in a country is 5% or more of the aggregate quantity (or value) of its sales of the subject merchandise to the United States. (19 C.F.R. § 351.404(b)(2)).

[32] This conclusion is not at issue in this dispute.

[33] Final Decision Memorandum, (Exhibit KOR-21), p. 14.

[34] Korea's first written submission, paras. 57-59 (referring to Appellate Body Reports, *India – Patents (US)*, para. 45; and *Mexico – Anti-Dumping Measures on Rice*, para. 315).

determine normal value does not absolve the United States of its obligation to ensure that its laws, regulations, and administrative procedures relating to each of these methods are consistent with Article 2.2.[35]

7.12. The United States contends that because the use of third-country sales as a method to determine normal value is itself optional, Article 2.2 permits Members to use their own internal criteria to decide whether to use that method or not.[36] The United States submits that even if Article 2.2 did not permit an investigating authority to set its own criteria, the term "appropriate third country" in the provision allows the authority to select a suitable third country for purposes of normal value determination by reference to indices such as volume of sales.[37]

7.2.2.2 Main arguments of third parties

7.13. The European Union submits that an investigating authority's discretion to opt for either third-country sales prices or constructed normal value in determining normal value under Article 2.2 is contextually informed by footnote 2. Further, the absence of a sufficient volume of exports of the like product to an appropriate third country could justify a finding that the price of those exports was not "representative".[38]

7.2.2.3 Evaluation by the Panel

7.14. The main issue before us is whether the fulfilment of a minimum quantitative threshold as a condition for use of third-country sales to determine normal value is inconsistent with Article 2.2 of the Anti-Dumping Agreement.

7.15. We begin our analysis by considering the requirements of Article 2.2. The text of Article 2.2 makes it clear that a choice exists between the use of third-country sales and constructed normal value for the determination of normal value. Article 2.2 provides that where certain circumstances set out in the provision preclude the use of home market sales in determining normal value, "the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative *or* with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits".[39] The use of the word "or", in the relevant part of Article 2.2, implies that Members have a choice between third-country export prices and the constructed normal value for purposes of normal value determination. The dictionary meaning of "or" is "introducing the second of two, or all but the first or only the last of several, alternatives".[40] Article 2.2 is therefore clearly intended to provide Members with alternatives to home market sales prices for normal value determination to ensure that an anti-dumping investigation can be completed. In this regard, the Appellate Body has stated that where normal value cannot be determined on the basis of home market sales, Article 2.2 specifies two "alternative bases" for calculation of normal value.[41]

7.16. That there is a free choice between the two methods is confirmed by the language of Article VI:1(b) of the GATT 1994, which provides an option between "either" the highest comparable price for the like product for export to any third country in the ordinary course of trade "or" the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit. We note that the parties agree that Article 2.2 allows Members a choice between the two alternate methods and that there is no hierarchy between the two options.[42]

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[35] Korea's opening statement at the first meeting of the Panel, paras. 25-27.
[36] United States' first written submission, para. 45.
[37] United States' second written submission, para. 9 (referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 552).
[38] European Union's third-party submission, para. 9.
[39] Emphasis added.
[40] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 2016.
[41] Appellate Body Report, *EC – Tube or Pipe Fittings*, paras. 93-95.
[42] Korea's first written submission, para. 54; response to Panel question No. 42, para. 21; and United States' first written submission, paras. 44 and 45.

7.17. While Korea agrees that Members have a choice between the two methods and that no hierarchy exists between them, it contends that the criteria for making that choice are already set out in Article 2.2 and cannot be altered or added to.[43] The United States argues, on the other hand, that even if Article 2.2 did not permit a Member to set its own criteria, the term "appropriate third country" in the provision allows it to select a suitable third country for purposes of normal value determination.[44]

7.18. We disagree with Korea that the criteria for choosing between the two methods are set out in Article 2.2. Article 2.2 sets out the criteria for *use* of either of the two methods. However, criteria for the *use* of the two methods are not the same as criteria for *choosing between* those two methods. In the process of arriving at a *choice between* the two methods, an investigating authority will assess the criteria for use of the methods to see if they can be satisfied. That will show whether either or both of the two methods can be used, but will not necessarily determine which to use. In providing for a choice, Article 2.2 neither expressly limits nor directs how the authority should reach that choice. Thus, the authority is free to choose which method to use based on its own criteria, should it choose to have them. Therefore, we consider that Article 2.2 does not preclude an investigating authority from establishing its own criteria for choosing which method to use.

7.19. Should a Member decide to use third-country export prices as normal value, the *criteria for use* of third-country sales in Article 2.2, requiring use of a "comparable" price of the like product exported to an "appropriate" third country, which price must be "representative", must be satisfied. However, this does not affect an investigating authority's freedom to choose *whether or not* to use third-country sales as a basis for determining normal value. Moreover, Article 2.2 does not require that Members explain the basis of their choice between the two methods.

7.20. We therefore find that Article 2.2 does not impose any limitation on criteria that a Member may establish for deciding whether to use one or the other of the alternative methods and that the imposition of the 5% threshold as a criterion for use of third-country sales in US law is thus not inconsistent "as such" with Article 2.2 of the Anti-Dumping Agreement.[45]

7.2.3 Whether the "viability test" as applied in the underlying investigation is inconsistent with Article 2.2 of the Anti-Dumping Agreement

7.2.3.1 Main arguments of the parties

7.21. Korea's principal arguments are set out below:

a. The USDOC automatically excluded from consideration the Korean respondents' third-country market sales that did not meet the 5% threshold without any regard to whether the prices of these sales were representative in accordance with Article 2.2 of the Anti-Dumping Agreement.[46]

b. Moreover, the USDOC's questionnaire deprived Korean respondents of the opportunity to submit third-country sales data or describe its third-country market sales based on a rigid application of the "viability test".[47]

7.22. The United States contends that Article 2.2 does not require the use of third-country sales where the conditions for use of constructed normal value as a method for determining normal value are satisfied. It further argues that Article 2.2 does not require that an investigating authority use or seek third-country sales data. In any event, the USDOC did not prohibit

[43] Korea's response to Panel question No. 1, paras. 2 and 3.
[44] United States' second written submission, para. 9 (referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 552).
[45] We do not consider it necessary to assess whether there are grounds to maintain an "as such" claim because the measure at issue does not appear, in any instance, to be inconsistent with Article 2.2.
[46] Korea's first written submission, para. 66.
[47] Korea's first written submission, para. 66.

respondents from submitting data and no evidence exists that the USDOC would have refused third-country sales data had it been submitted.[48]

7.2.3.2 Evaluation by the Panel

7.23. Article 2.2 does not impose any obligation on a Member to examine whether a respondent's third-country export prices are representative if it has opted to use constructed normal value to determine normal value. If a Member has decided not to use third-country exports to determine normal value for a particular reason, including because it does not consider that market to be viable, nothing in Article 2.2 requires it to nonetheless assess whether all the conditions for use of that method set out in the provision are fulfilled.

7.24. As discussed under paragraphs 7.15-7.19 above, the use of third-country sales as a method to determine normal value is optional and a Member may choose, for its own reasons, to not use it. We have found that the "viability test" is not, as such, inconsistent with Article 2.2. Therefore, we find that the USDOC in applying that test in the underlying investigation and concluding on the basis of that application that it would not use third-country sales for determining normal value, did not act inconsistently with Article 2.2.

7.2.4 Conclusion

7.25. For the foregoing reasons, we find that Korea has not established that the "viability test" is inconsistent with Article 2.2 of the Anti-Dumping Agreement, either as such, or as applied in the underlying investigation.

7.3 Whether the USDOC's determination of profit rates for the Korean respondents in the final and remand determinations is inconsistent with Articles 2.2.2 and 2.4 of the Anti-Dumping Agreement

7.26. In its first written submission, Korea claimed that the USDOC's profit rate determination in the final determination in the underlying investigation was inconsistent with the *chapeau* of Articles 2.2.2, 2.2.2(i), and 2.2.2(iii) of the Anti-Dumping Agreement. Korea also claimed that the USDOC's failure to make adjustments to the profit rates of the Korean respondents in this determination resulted in a violation of Article 2.4 of the Anti-Dumping Agreement.

7.27. This final determination was challenged before the US Court of International Trade (USCIT), which issued a remand order directing the USDOC to, *inter alia*, reconsider certain aspects of its profit rate determination in the underlying investigation.[49] The USDOC initiated a remand investigation pursuant to this order, and on 22 February 2016 (that is, after Korea had already filed its panel request and its first written submission in these proceedings) issued its remand determination.[50] This determination was affirmed by the USCIT in August 2016. The profit rate for the Korean respondents was reduced from 26.11% in the final determination to 16.24% in the remand determination due to revisions in the methodology used to determine this profit rate.[51]

7.28. Korea considers this remand determination to be within our terms of reference, and the USDOC's profit rate determination therein to be inconsistent with the *chapeau* of Articles 2.2.2, 2.2.2(i), 2.2.2(iii), and 2.4 of the Anti-Dumping Agreement. The United States argues, for the reasons set out below, that the remand determination is outside our terms of reference, and asks us to make no rulings in this regard.

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[48] United States' first written submission, para. 61.

[49] US Court of International Trade, Husteel Co. Ltd., Nexteel Co. Ltd., and Hyundai Hysco v. United States, Commerce's final determination in antidumping investigation sustained in part and remanded in part to reconsider selection of mandatory respondents and constructed value profit margin, Slip Op. 15-100, (Exhibit KOR-25), p. 84.

[50] USDOC, Final Determination pursuant to court remand, Husteel Co. Ltd., et al., v. United States, Ct. No. 14-215, Slip Op. 15-100 (USDOC's Remand Determination), (Exhibit KOR-69), p. 85.

[51] USDOC's Remand Determination, (Exhibit KOR-69), p. 85. The United States confirmed during the second substantive meeting that a new anti-dumping order specifying new anti-dumping duty rates, which had changed as result of the remand determination, has been published in the US Federal Register.

7.29. In our evaluation of Korea's claims regarding the USDOC's final and remand determinations of profit rates, we will first address Korea's claims with respect to the final determination. Then, we will examine whether the remand determination falls within our terms of reference. Only if we find that it does will we proceed to address Korea's claims regarding this determination.

7.3.1 Provisions at issue

7.30. Article 2.2.2 of the Anti-Dumping Agreement provides:

> For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:
>
> > (i) the actual amounts incurred and realized by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products;
> >
> > (ii) the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;
> >
> > (iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.

7.31. Article 2.4 of the Anti-Dumping Agreement provides:

> A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.[*] In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.
>
> [*fn original] It is understood that some of the above factors may overlap, and authorities shall ensure that they do not duplicate adjustments that have been already made under this provision.

7.3.2 USDOC's profit rate determination in the underlying investigation

7.32. In the underlying investigation, the USDOC constructed the normal value of the Korean respondents based on their cost of production. In doing so, it determined the profit rate for these respondents using the profit data of a surrogate company, Tenaris, rather than the profit data of the Korean respondents whose normal value was being constructed. Korea claims that the USDOC's rejection of the profit data of the Korean respondents and its use of the profit data of Tenaris were inconsistent with Article 2.2.2 of the Anti-Dumping Agreement, and specifically that the USDOC acted inconsistently with the following requirements set out in that provision:

a. The *chapeau* of Article 2.2.2 because:

   i. the USDOC had actual data on record pertaining to profits realized by the Korean respondents on home market sales of the like product but failed to use it; and

   ii. the USDOC had actual data on record pertaining to profits realized by the Korean respondents on third-country sales of the like product but again failed to use it.

b. Articles 2.2.2(i) and 2.2.2(iii) because the USDOC applied an impermissibly narrow interpretation of the term "same general category of products" which affected its ability to determine profits on the basis of these provisions.

c. Article 2.2.2(iii) because the USDOC failed to calculate a profit cap and also because its use of the Tenaris profit data to determine the profit for the Korean respondents was not a "reasonable method" within the meaning of that provision.

d. Article 2.2 because as a consequence of its failure to determine profits consistently with Article 2.2.2(iii), the USDOC failed to ensure that the profit amount used in constructing normal value was a "reasonable amount".

e. Article 2.4 because the USDOC, having decided to use the Tenaris profit rate for constructing the Korean respondents' normal value, failed to make due allowance for the difference between that constructed normal value, which reflected the Tenaris profit rate, and the export price, which reflected the Korean respondents' own profit rates, and make appropriate adjustment.

7.33. The United States rejects Korea's claims.

7.3.2.1 Whether the USDOC's failure to use "actual data" as a CV profit source is inconsistent with Article 2.2.2

7.3.2.1.1 Main arguments of the parties

7.34. Korea's main arguments are set out below:

a. Low volume of sales is not a valid reason under the *chapeau* of Article 2.2.2 for an investigating authority to refuse to use the respondents' actual data to determine CV profit.[52] Therefore, the USDOC applied an improper basis for disregarding the Korean respondents' actual data.

b. Moreover, the USDOC had access to actual profit data pertaining to the like product from both the respondents' home market and third-country market sales. Only when this actual data is not available would the USDOC be able to use one of the alternative methods provided under the subparagraphs of Article 2.2.2 to determine the CV profit.[53]

7.35. The main arguments of the United States are as follows:

a. Neither of the two Korean respondents had a viable home or third-country market during the period of investigation, as a result of which their home and third-country market

[52] Korea's first written submission, para. 76 (referring to Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 101).

[53] Korea's first written submission, para. 77 (referring to Response of Hyundai HYSCO to Section A of the Department's 27 August 2013 Questionnaire, 17 September 2013, (Exhibit KOR-60) (BCI), p. A-2, Response of NEXTEEL to the Department's 27 August 2013 Questionnaire, 17 September 2013, (Exhibit KOR-61) (BCI), p. A-2; HYSCO Cost Verification Exhibit, CVE 15 March 2014, (Exhibit KOR-27) (BCI); and NEXTEEL Cost Verification Exhibit, CVE 8 March 2014, (Exhibit KOR-28) (BCI)).

sales could not serve as a basis for normal value determination, including with respect to the CV profit.[54]

b. In addition, actual profit data pertaining to sales in the ordinary course of trade of the like product in the domestic market required to determine the CV profit did not exist in the record of the investigation at issue.[55]

c. The *chapeau* of Article 2.2.2 does not obligate an investigating authority to consider third-country sales for purposes of determining CV profit.[56]

7.3.2.1.2 Main arguments of third parties

7.36. The European Union submits that the USDOC was entitled to use one of the three alternative methods provided in subparagraphs (i)-(iii) of Article 2.2.2 to the extent that it first ascertained that actual sales, general, and administrative expenses (SG&A) and profit data for sales in the ordinary course of trade did not exist for the exporters and the like products under investigation.[57]

7.3.2.1.3 Evaluation by the Panel

7.37. The *chapeau* of Article 2.2.2 of the Anti-Dumping Agreement requires that, in constructing normal value, the amounts for profits determined for an exporter or producer be based on "actual data pertaining to production and sales in the ordinary course of trade of the like product". Only when the profit amounts "cannot be determined on this basis" is an investigating authority permitted to determine profit amounts on the basis of the alternative methods set out in Articles 2.2.2(i)-(iii) of the Agreement. In the underlying investigation, the USDOC concluded that it could not establish the CV profit amounts for the Korean respondents on the basis of their "actual data pertaining to production and sales in the ordinary course of trade of the like product", i.e. OCTG. The USDOC reached this conclusion based on its determination that the Korean respondents had no viable home market sales of the like product. Korea claims that the USDOC's failure to use the Korean respondents' "actual data" as the basis for determining CV profit is inconsistent with the *chapeau* of Article 2.2.2. The United States disagrees with Korea, and contends that the USDOC had a proper basis for not using the respondents' actual data for determining CV profit amounts. The issue before us is whether the USDOC acted inconsistently with the *chapeau* of Article 2.2.2 because it did not use the Korean respondents' "actual data" pertaining to production and sales of the like product in the ordinary course of trade in either their domestic or third-country markets, as the basis for determining their CV profit.

7.38. In addressing this issue, we will consider the following:

a. whether the USDOC was permitted to reject the actual data pertaining to the Korean respondents' domestic market sales of the like product during the period of investigation, because these sales were made in "low volumes";

b. whether there was, in the USDOC's record in the underlying investigation, actual profit data pertaining to the respondents' domestic market sales of the *like product*; and

c. whether the use of the word "profits" in the *chapeau* of Article 2.2.2 suggests that when an exporter makes a *loss* rather than a *profit* on domestic sales of the like product, the data pertaining to such losses, even if "actual", need not be considered by the investigating authority.

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[54] United States' first written submission, para. 73 (referring to Final Decision Memorandum, (Exhibit KOR-21), p. 14).

[55] United States' first written submission, para. 89 (referring to USDOC, NEXTEEL Sales Verification Report, 29 May 2014, (Exhibit USA-9) pp. 16 and 17; USDOC HYSCO Sales Verification Report, 5 June 2014, (Exhibit USA-8) pp. 22 and 23; HYSCO's section A questionnaire responses, 17 September 2013, (Exhibit USA-6) (BCI), p. A-2 and exhibit A-1; and NEXTEEL's section A questionnaire responses, 17 September 2013, (Exhibit USA-7) (BCI), p. A-2 and exhibit A-1).

[56] United States' response to Panel question No. 7, para. 11.

[57] European Union's third-party submission, para. 15.

7.3.2.1.3.1 The USDOC's rejection of actual data pertaining to the Korean respondents' domestic market sales of the like product during the period of investigation because these sales were made in "low volumes"

7.39. The *chapeau* of Article 2.2.2 does not contain any explicit textual limitation on the use of actual data pertaining to sales made in low volumes as a basis for CV profit determination. The *chapeau* reads as follows:

> For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation.

It is clear from the use of the word "shall" that the investigating authority is required to base the CV profit on actual data pertaining to production and sales in the ordinary course of trade of the like product, assuming such data exists. There is nothing in the text to the effect that if those sales were made in low volumes, an investigating authority is permitted to disregard them as a basis for CV profit, provided such sales were made in the ordinary course of trade.

7.40. The Appellate Body in *EC – Tube or Pipe Fittings* reached a similar conclusion. The issue before the Appellate Body in that case was whether an investigating authority *must* exclude data from low-volume sales when determining the amounts for SG&A and profits under the *chapeau* of Article 2.2.2, having disregarded such low-volume sales for normal value determination under Article 2.2. The Appellate Body found that:

> [I]t is meaningful for the interpretation of Article 2.2.2 that Article 2.2 specifically identifies low-volume sales *in addition to* sales outside the ordinary course of trade. In contrast to Article 2.2, the chapeau of Article 2.2.2 explicitly excludes only sales outside the ordinary course of trade. The absence of any qualifying language related to low volumes in Article 2.2.2 implies that an exception for low-volume sales should not be read into Article 2.2.2.[58]

Thus, the Appellate Body concluded that a requirement that low-volume sales be disregarded as a basis for determining SG&A and profits cannot be read into the text of Article 2.2.2.[59]

7.41. The United States contends that the findings in *EC – Tube or Pipe Fittings* are inapplicable to this dispute because the issue before the Appellate Body in that case was whether an investigating authority *must exclude* data pertaining to low-volume sales when determining the amounts for SG&A and profits under the *chapeau* of Article 2.2.2. We understand the United States to argue that the issue in this dispute, in contrast, is whether an investigating authority *must include*, or perhaps *may exclude*, data pertaining to low-volume sales when determining the amounts for profit under the *chapeau* of Article 2.2.2. However, the United States' argument in this regard is contrary to the Appellate Body's clear statement in *EC – Tube or Pipe Fittings* that if actual profit data for sales in the ordinary course of trade exist for the exporter and the like product under investigation, an investigating authority *must* use that data in constructing normal value, and it *may not* construct normal value by reference to different data or by using an alternative method.[60] We therefore disagree with the United States, and consider the Appellate Body's findings in *EC – Tube or Pipe Fittings* clearly relevant to the issue before us.

7.42. We note that the panel in *EC – Salmon (Norway)* also addressed the question of whether an investigating authority *must include* data pertaining to low-volume sales when determining the amounts for profit under the *chapeau* of Article 2.2.2. The facts in *EC – Salmon (Norway)* are similar to those in the instant dispute. In that case, the European Community had excluded data pertaining to domestic sales made in low volumes when determining the profit for constructed normal value. The issue before the panel was whether that exclusion was consistent with the

[58] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 98. (emphasis original; fn omitted)
[59] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 98.
[60] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 97.

chapeau of Article 2.2.2.[61] The panel in that case, agreeing with the views of the Appellate Body in *EC – Tube or Pipe Fittings*, concluded that it was not.[62]

7.43. The United States also argues that the Appellate Body in *EC – Tube or Pipe Fittings* did not explain why low-volume sales in the domestic market are rejected as a basis for normal value determination because they do not permit proper comparison, but data derived from the same sales should be accepted for purposes of CV profit determination under Article 2.2.2.[63] It further argues that the Appellate Body did not address why data from low-volume sales, found not to permit a proper comparison in the context of Article 2.2, could nonetheless achieve the objective of permitting a proper comparison in the context of Article 2.2.2.[64]

7.44. We recognize the logic behind the United States' argument. We understand the United States to argue that the price pertaining to sales made in low-volumes in the domestic market is discarded for purposes of normal value determination under Article 2.2 because it is considered to not permit a proper comparison with the export price. To require that data from the same sales be used to determine CV profit and SG&A under Article 2.2.2 for purposes of constructing normal value would seem to reintroduce the same improper comparison through the constructed normal value. This is, in terms of overall coherence of Article 2, somewhat perplexing. But this does not allow an interpretation that does not fully comport with the express language of Article 2.2.2.

7.45. Under Article 2.2, upon the identification of low-volume sales, an investigating authority is required to either construct normal value or use third-country export prices as normal value. Therefore, the identification of low-volume sales serves as a trigger for an investigating authority to use an alternative to the *price* of those sales for normal value determination but not necessarily to exclude the *components of the price* pertaining to those sales from that determination. If an investigating authority opts to construct normal value, nothing in Article 2.2 suggests that it is required to, or may, exclude data derived from the rejected low-volume sales from that construction. Further, Article 2.2.2 requires that only *sales that are in the ordinary course of trade* be used as a basis for CV profit determination. Thus, only data from such sales, even if in low volumes, can be used in constructing normal value. Therefore, what is discarded for normal value determination under Article 2.2 is the price of *low-volume sales* but what is accepted for purposes of normal value construction under Article 2.2.2 is the amount for profit and SG&A on those *low-volume sales that are in the ordinary course of trade*.

7.46. To the extent that low-volume sales might be considered to generate a normal value that will not permit proper comparison with the export price, excluding data from such sales that are not in the ordinary course of trade as a basis for CV profit and SG&A determination under the *chapeau* of Article 2.2.2 addresses, at least in part, the overall coherence issue referred to above.

7.47. Thus, while we see the general logic behind the United States' argument, we cannot, in light of prior Appellate Body and panel findings read out of the text of the *chapeau* that the CV profit has to be based on the respondents' actual data for sales of the like product in the ordinary course of trade, even if those sales were made in low volumes. We thus conclude that the *chapeau* of Article 2.2.2 did not permit the USDOC to reject the actual data pertaining to the Korean respondents' domestic market sales of the like product in the period of investigation because these sales were made in low volumes.

7.3.2.1.3.2 Alleged lack of actual profit data pertaining to the respondents' domestic market sales of the like product, in the USDOC's record in the underlying investigation

7.48. The United States argues that the USDOC was unable to use the preferred method set out in the *chapeau* of Article 2.2.2 to determine CV profit, as actual data pertaining to the Korean respondents' sales in the ordinary course of trade of the like product was not in the record of the investigation at issue. In particular, the United States maintains that the actual profit data

[61] Panel Report, *EC – Salmon (Norway)*, para. 7.297.
[62] Panel Report, *EC – Salmon (Norway)*, para. 7.304 (referring to Appellate Body Report, *EC – Tube or Pipe Fittings*, paras. 93-102 and fn 99).
[63] United States' first written submission, para. 80.
[64] United States' first written submission, para. 85.

pertaining to the respondents' domestic market sales that was on the record did not relate to the like product, OCTG.[65]

7.49. As a threshold matter, we note that neither in the USDOC's final determination nor in its preliminary determination is there any reference to this alleged lack of relevant data as a reason for its inability to use the preferred method for CV profit determination. The USDOC attributed its inability to determine CV profit using the preferred method exclusively to the absence of a "viable home or third-country market".[66]

7.50. The USDOC's findings on the absence of a viable domestic or third-country market in its final determination cite the Korean respondents' questionnaire responses.[67] In these questionnaire responses, the respondents, HYSCO and NEXTEEL, acknowledge that they do not have viable markets, but also clearly state that they have made "some sales of the foreign like product in the home market during the POI".[68]

7.51. In support of its assertion regarding the unavailability of actual profit data for the like product, the United States refers to certain sales verification reports in which the respondents are reported to have stated that the products they sold in the home market were not sold as OCTG.[69] However, neither the preliminary nor final determinations contain any conclusions drawn by the USDOC regarding availability of data for the like product on the basis of those reported statements. On the contrary, in its preliminary determination, the USDOC states that:

> In order to determine whether there was a sufficient volume of sales in the home market to serve as a viable basis for calculating NV, we compared *HYSCO's and NEXTEEL's volume of home market sales of the foreign like product* to the volume of U.S. sales of the subject merchandise, in accordance with section 773(a)(1)(B) of the Act. For both HYSCO and NEXTEEL, we found that the aggregate volume of U.S. sales, and, thus, HYSCO's and NEXTEEL's sales in the home market were not viable.[70]

7.52. This finding also formed the basis of the USDOC's decision, in its final determination, to not use the preferred method to determine CV profit.[71] The United States has not identified any finding in the USDOC's preliminary or final determinations that HYSCO and NEXTEEL made *no* sales of the like product in the home market, and further that it was because of the absence of data pertaining to sales of the like product in the home market that the USDOC had rejected the preferred method as a basis for determining CV profit.[72] We therefore dismiss, as *ex post rationalization*, the United States' argument that the USDOC could not use the preferred method to determine CV profit because the record did not contain any data pertaining to sales of the like product in the home market.[73]

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[65] United States' first written submission, para. 89 (referring to USDOC, NEXTEEL Sales Verification Report, 29 May 2014, (Exhibit USA-9) pp. 16 and 17; USDOC, HYSCO Sales Verification Report, 5 June 2014, (Exhibit USA-8) pp. 22 and 23; HYSCO's section A questionnaire responses, 17 September 2013, (Exhibit USA-6) (BCI), p. A-2 and exhibit A-1; and NEXTEEL's section A questionnaire responses, 17 September 2013, (Exhibit USA-7) (BCI), p. A-2 and exhibit A-1).

[66] Final Decision Memorandum, (Exhibit KOR-21), p. 14.

[67] Final Decision Memorandum, (Exhibit KOR-21), pp. 20 and 21 and fns 68 and 72 (referring to HYSCO's section A questionnaire responses, 17 September 2013, (Exhibit USA-6) (BCI), p. A-2; and NEXTEEL's section A questionnaire responses, 17 September 2013, (Exhibit USA-7) (BCI), p. A-2, among others).

[68] HYSCO's section A questionnaire responses, 17 September 2013, (Exhibit USA-6) (BCI), p. A-2; and NEXTEEL's section A questionnaire responses, 17 September 2013, (Exhibit USA-7) (BCI), p. A-2.

[69] United States' first written submission, para. 89 (referring to USDOC, NEXTEEL Sales Verification Report, 29 May 2014, (Exhibit USA-9) pp. 16 and 17; and USDOC, HYSCO Sales Verification Report, 5 June 2014, (Exhibit USA-8) pp. 22 and 23);

[70] USDOC, Decision Memorandum for the Negative Preliminary Determination of sales at less than fair value, negative Preliminary Determination of critical circumstances, and postponement of Final Determination in the less-than-fair-value investigation of certain oil country tubular goods from the Republic of Korea, 14 February 2014 (Preliminary Decision Memorandum), (Exhibit KOR-5), p. 20. (emphasis added)

[71] Final Decision Memorandum, (Exhibit KOR-21), p. 14.

[72] United States' response to Panel question No. 43, paras. 8-10.

[73] In this regard, the Appellate Body has clarified that a Member is precluded from providing an *ex post* rationale during the panel proceedings to justify the investigating authority's determination, and that an investigating authority's determinations must be evaluated in light of the rationale provided

7.53. In light of this and given the mandatory nature of the obligation in the *chapeau* of Article 2.2.2 to use actual data as a basis for CV profit, we conclude that if unavailability of the data for the like product was a reason for the USDOC's inability to use that method, it should have set out that reason in its determination.

7.3.2.1.3.3 Rejection of data showing [[***]] in determining the amounts for "profits" for constructed normal value

7.54. The United States argues that the USDOC was unable to use the respondents' actual data as a basis for CV profit because their sales of "non-prime OCTG" in the domestic market were made at a **[[***]]** and **[[***]]** cannot form the basis for CV profit under the *chapeau* of Article 2.2.2.[74]

7.55. As noted in paragraph 7.49, in its final determination the USDOC attributed its inability to determine CV profit using the preferred method exclusively to the absence of a "viable home or third-country market".[75] We find no mention in the USDOC's findings of the **[[***]]**-making nature of the respondents' domestic sales as a reason for its inability to use the preferred method. The record also does not reflect a determination by the USDOC that the Korean respondents' sales of "non-prime OCTG" in the domestic market were made at a **[[***]]**. We understand the United States to argue, in response to our specific question[76] in this regard, that having already rejected the Korean respondents' actual data pertaining to their home market sales as a basis for CV profit determination because those sales were not viable, the USDOC was not required to determine whether that data could not be used for CV profit determination on other grounds.[77] However, as noted above, the United States has argued in these proceedings that it did not determine CV profit based on the Korean respondents' actual data pertaining to home market sales because these sales were made at a **[[***]]**. We therefore must determine if this reasoning was used by the USDOC in the underlying investigation or is *ex post rationalization* by the United States in these proceedings. The United States has not identified where in its determination the USDOC relied on this conclusion as a reason for not using the preferred method to calculate CV profit. We therefore reject this justification offered by the United States as *ex post* rationalization.

7.56. Based on the foregoing reasons, we find that the United States has not offered any valid justification for the USDOC's failure to use the respondents' actual data pertaining to the respondents' domestic market sales as a basis for CV profit. We therefore conclude that in failing to use the preferred method as basis for CV profit calculation, the United States acted inconsistently with its obligations under the *chapeau* of Article 2.2.2.

7.57. Having already concluded that the USDOC had no basis to reject the "actual data" pertaining to domestic sales of the like product in the ordinary course of trade, we do not find it necessary to resolve the question whether the USDOC should have determined CV profit on the basis of the profit derived by the Korean respondents from third-country markets in order to comply with the *chapeau* of Article 2.2.2. We, therefore, exercise judicial economy on this claim.

7.3.2.1.4 Conclusion

7.58. For the foregoing reasons, we find that the United States acted inconsistently with its obligations under the *chapeau* of Article 2.2.2 because:

a. The lack of viable home market sales is not a permissible ground for rejecting the Korean respondents' actual data as a basis for determination of CV profit;

b. Nothing in the USDOC's determinations indicates that it rejected the Korean respondents' actual data because there were no domestic sales of the like product; and

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contemporaneously by that investigating authority. (Appellate Body Report, *US – Carbon Steel (India)*, para. 4.273 (referring to Panel Report, *US – Carbon Steel (India)*, para. 7.154)).

[74] United States' response to Panel question No. 12, paras. 37-39.

[75] Final Decision Memorandum, (Exhibit KOR-21), p. 14.

[76] United States' response to Panel question No. 45, paras. 13 and 14.

[77] United States' response to Panel question No. 45, paras. 13 and 14.

c. Nothing in the USDOC's determinations indicates that it rejected the Korean respondents' actual data because the respondents made a **[[***]]** rather than a profit.

7.59. We exercise judicial economy of Korea's claim that the USDOC acted inconsistently with the *chapeau* of Article 2.2.2 because it did not use actual data of the respondents to determine its CV profit rate although the respondents' third-country market profit data was available on the record of the underlying investigation.

7.3.2.2 Whether the USDOC's interpretation and application of "same general category of products" was inconsistent with Articles 2.2.2(i) and 2.2.2(iii)

7.3.2.2.1 Main arguments of the parties

7.60. Korea argues that the USDOC erroneously interpreted and applied the term "same general category of products" so narrowly that it did not consider non-OCTG products, such as line pipe and standard pipe, as falling within the "same general category" as OCTG.[78] Based on this narrow interpretation, the USDOC rejected Article 2.2.2(i) as a basis to calculate CV profit and also determined that it could not calculate a profit cap under Article 2.2.2(iii).[79]

7.61. In response, the United States contends that the USDOC defined "same general category of products" more broadly than "like product" so as to include drill pipe and OCTG that fell outside the scope of the investigation such as stainless steel tubular products.[80]

7.3.2.2.2 Main arguments of third parties

7.62. The European Union submits that while Article 2.2.2 does not provide any elaboration as to the definition of "the same general category of products", its *chapeau* and overall structure provide guidance in this regard.[81] It notes that the panel in *Thailand – H-Beams* found that where the preferred method in the *chapeau* cannot be used for purposes of determining an amount for profit in the constructed normal value on the basis of actual data of the exporter or producer under investigation for the like product, subparagraphs (i) and (ii) respectively provide for the database to be broadened, either as to the product (i.e. the same general category of products produced by the producer or exporter in question) or as to the producer (i.e. other producers or exporters subject to investigation in respect of the like product), but not both. The European Union maintains that the *Thailand – H-Beams* panel confirmed that the intention of these provisions is to obtain results that approximate, as closely as possible, the price of the like product in the ordinary course of trade in the domestic market of the exporting country.

7.3.2.2.3 Evaluation by the Panel

7.63. Article 2.2.2(i) of the Anti-Dumping Agreement provides for profit rate determination on the basis of the actual amounts incurred and realized by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the "*same general category of products*". Article 2.2.2(iii) provides for profit rate determination on the basis of any other reasonable method, provided that the amount for profit so established shall not exceed the "profit cap", which is the profit normally realized by other exporters or producers on sales of "*products of the same general category*" in the domestic market of the country of origin. Therefore, in order to make a profit determination under Article 2.2.2(i) or to calculate a profit cap under Article 2.2.2(iii), an investigating authority must determine which products fall within the same general category of products.

7.64. In the underlying investigation, the USDOC found that non-OCTG pipe products manufactured by the Korean producers, such as line pipe and standard pipe, were not in the same general category of products as the product under consideration, OCTG. The USDOC stated that it could therefore not determine the CV profit rate for the Korean respondent HYSCO using actual

[78] Korea's first written submission, para. 79.
[79] Korea's first written submission, para. 88.
[80] United States' first written submission, para. 91.
[81] European Union's third-party submission, para. 18 (referring to Panel Report, *Thailand – H-Beams*, para. 7.112).

amounts incurred by that producer in respect of production and sales in the domestic market of the country of origin of the same general category of products, as provided for in Article 2.2.2(i).[82] In addition, the USDOC determined that it could not calculate the profit cap called for in Article 2.2.2(iii) because it did not have domestic market profit data for other exporters and producers of products of the same general category in Korea.[83]

7.65. Korea challenges the USDOC's definition of the same general category of products in the underlying investigation, asserting that the USDOC's focus on down hole applications as the defining factor of products constituting the same general category of products as OCTG resulted in a definition that is narrower than the USDOC's definition of the foreign like product.[84] Therefore, a product that is a like product, based on the USDOC's definition of the foreign like product, could be excluded from the same general category of products. The United States disagrees with Korea, and asserts that the USDOC defined the same general category of products more broadly, rather than more narrowly, than the like product. The issue before us therefore is whether the USDOC properly determined the scope of the relevant "same general category of products", and thus whether its conclusions were consistent with its obligations under Articles 2.2.2(i) and (iii).

7.66. We note that there is no definition of the term "same general category of products" in Article 2.2.2(i) or (iii) of the Anti-Dumping Agreement. However, as previous panels have noted, and as both parties agree, the scope of the same general category of products must be understood to be broader, not narrower than that of the like product, as defined by the investigating authority.[85] We agree with this conclusion, which is consistent with our own views in this regard.

7.67. Bearing in mind this understanding, we turn to examine how the USDOC defined the same general category of products in the underlying investigation. We note that the USDOC defined the same general category of products by reference to the functionality of the foreign like product. In particular, in its final determination, the USDOC stated that:

> While we do not consider line pipe and standard pipe to be in the same general category of products as OCTG, we do find that the general category of products that encompass the subject casing and tubing would not be limited to just the *foreign like product*. Rather it would include other tubular products that go into the exploration and production of oil and gas. *These would be products that would exhibit the same fundamental characteristics for down hole applications*, and they would include subject OCTG, non-scope OCTG such as stainless steel tubular products, and drill pipes.[86]

7.68. The USDOC thus defined products in the same general category as the like product as those exhibiting "the same fundamental characteristics for down hole applications" as the foreign like product i.e. tubular products that are used in the exploration and production of oil and gas. However, as the United States has confirmed in these proceedings, the USDOC's definition of the foreign like product is co-extensive with the definition of the product under consideration in the underlying investigation, and the product under consideration definition itself is not limited to pipe products that can be used for down hole applications.[87] The USDOC defined the product under consideration as follows:

> The merchandise covered by the investigations is certain oil country tubular goods ("OCTG"), which are hollow steel products of circular cross-section, including oil well casing and tubing, of iron (other than cast iron) or steel (both carbon and alloy), whether seamless or welded, regardless of end finish (e.g., whether or not plain end, threaded, or threaded and coupled) whether or not conforming to American Petroleum Institute ("API") or non-API specifications, whether finished (including limited service OCTG products) or unfinished (including green tubes and limited service OCTG

[82] Final Decision Memorandum, (Exhibit KOR-21), p. 19.
[83] Final Decision Memorandum, (Exhibit KOR-21), p. 21.
[84] Korea's second written submission, paragraph 158.
[85] Panel Reports, *EC – Bed Linen*, para. 6.60; and *Thailand – H-Beams*, para. 7.112. See also United States' first written submission, para. 95; and Korea's first written submission, para. 83.
[86] Final Decision Memorandum, (Exhibit KOR-21), p. 19. (emphasis added)
[87] United States' second written submission, para. 28 and fn 55.

> products), whether or not thread protectors are attached. The scope of the investigations also covers OCTG coupling stock.
>
> Excluded from the scope of the investigations are: casing or tubing containing 10.5 percent or more by weight of chromium; drill pipe; unattached couplings; and unattached thread protectors.[88]

7.69. Thus, the product under consideration as defined by the USDOC, and by implication, the foreign like product which is co-extensive with that definition, do not incorporate any express limitation based on whether the pipe products in question can be used for down hole applications. Based on the foregoing, we conclude that the USDOC's record shows that the foreign like product was not limited to pipe products that could be used for down hole applications. However, the same general category of products, as defined by the USDOC, does incorporate such a limitation.[89]

7.70. Our conclusion is confirmed by the clarification provided by the USDOC itself in a parallel investigation of OCTG from Ukraine, which was initiated based on the same petition as the underlying investigation.[90] The definition of the product under consideration in that investigation was identical to that in the underlying investigation, and included "reject" products that cannot be used in oil and gas well applications. The USDOC clarified the scope of the product under consideration in the Ukraine investigation as follows:

> [T]he plain language of the scope of the investigation indicates that a *failure to meet the requirements for OCTG applications* does not render merchandise outside the scope, provided that merchandise meets the physical characteristics described in the scope. The scope specifically states that certain OCTG is included "whether or not conforming to…API or non-API specifications …". We also note that the scope of the investigation includes unfinished OCTG (including green tubes) which is "prime" merchandise which cannot be used in OCTG applications until it undergoes additional processing. Taken together, the *scope language clearly covers a variety of goods produced as OCTG which may not currently meet established OCTG specifications for use in OCTG-specific applications.* On this basis, we find that, whether or not Interpipe's merchandise failed inspection and therefore did not meet API specifications, it was still produced as OCTG, entered the United States as OCTG and is still OCTG, even if identified as damaged or otherwise unusable as prime merchandise.[91]

The USDOC further stated that:

> While it is reasonable to assume that use of OCTG in oil and gas well applications is the primary intended purpose of OCTG, *the scope does not limit or otherwise require*

[88] USDOC, Notice of Initiation in OCTG Investigation, *United States Federal Register*, Vol. 78, No. 145 (29 July 2013), p. 45505 (Initiation Notice), (Exhibit KOR-2), p. 45512.

[89] According to the United States, the USDOC determined that "[the foreign like product as well as] the same general category of products in the investigation should exhibit characteristics for [down hole] applications". (United States' response to Panel question no. 49, para. 22).

[90] We consider that the clarification provided by the USDOC in the context of the Ukraine investigation can properly be considered in understanding the scope of the product under consideration, and consequently the like product, in the underlying investigation. Both investigations were initiated based on the same petition and covered the same scope of imported products. (Petitions for the imposition of anti-dumping and countervailing duties on OCTG from certain countries, 2 July 2013, (Exhibit KOR-1)). Further, the Initiation Notification sets out the scope language for both the underlying investigation and the Ukraine investigation, among others, under a single heading entitled "Scope of the Investigations", which also supports this understanding. (Initiation Notice, (Exhibit KOR-2), p. 45506).

[91] USDOC, Certain oil country tubular goods from Ukraine, Final Determination of sales at less than fair value and negative final determination of critical circumstances, *United States Federal Register*, Vol. 79, No. 138 (18 July 2014), p. 41969, (Exhibit KOR-75), p. 9 (emphasis added). In US practice, the "scope of the investigation" refers to the product under consideration.

> *that goods manufactured as OCTG be used in that capacity* in order to be considered subject merchandise.[92]

There is no dispute between the parties that pipe products that fail to meet the "requirements for OCTG applications" or products which do not "currently meet established OCTG specifications for use in OCTG-specific applications" cannot be used for down hole applications.

7.71. As noted, in our view, the foreign like product was not limited to pipe products that could be used for down hole applications, which understanding is confirmed by the clarification from the Ukraine investigation which shows that pipe products that *could not be used* for down hole applications were within the definition of the product under consideration, and by implication, the foreign like product.

7.72. We recall our view that the same general category of products includes the like product, and, as both parties also agree, is broader than the like product.[93] Therefore, if the like product is not limited to pipe products used for down hole applications, the same general category of products, which is broader than and includes the like product, cannot be limited to pipe products used for down hole applications. In other words, the same general category of products cannot exclude pipe products that do not exhibit the same fundamental characteristics for down hole applications and are not used for down hole applications. Yet, the USDOC excluded such products from the same general category of products in the underlying investigation. We therefore conclude that the USDOC defined the same general category of products more narrowly than it defined the like product by excluding from the definition of the same general category those pipe products not used for down hole applications that fell within the definition of the like product.

7.73. The United States attempts to distinguish the USDOC's clarification in the Ukraine OCTG investigation by noting that the pipe products that were the subject of that clarification were sold to the US market as OCTG and therefore came within the scope of the investigation. In contrast, the pipe products sold by the Korean respondents in Korea were "not sold as OCTG" and for that reason were not within the scope of the investigation. Therefore, the USDOC did not define the same general category of products more narrowly than the like product.[94] We consider it irrelevant that the pipe products sold by the Korean respondents in Korea were not sold as OCTG, given that the USDOC's definition of the product under consideration (which we recall was the same for both investigations) is not limited to products that are "sold as OCTG". We therefore reject this argument from the United States.

7.74. Based on the definition of the product under consideration in the underlying investigation, as well as the USDOC's clarification of that same definition in the parallel investigation of OCTG from Ukraine, and the fact that the United States has acknowledged that the product under consideration is co-extensive with the like product, we find that the USDOC defined the same general category of products more narrowly than the like product.

7.75. For the foregoing reasons, we conclude that having relied on an impermissibly narrow definition of the "same general category of products" as the basis for not calculating CV profit under Article 2.2.2(i) and for not calculating the profit cap under Article 2.2.2(iii), the USDOC acted inconsistently with its obligations under those provisions. In particular, we find that the United States acted inconsistently with its obligations under Articles 2.2.2(i) and (iii) because the USDOC defined the same general category of products more narrowly than the like product by excluding OCTG not used for down hole applications, which was part of the like product as defined by the USDOC. Thus, the USDOC had no proper basis for its conclusions that the methods under Article 2.2.2(i) could not be used, and that the profit cap called for in Article 2.2.2(iii) could not be calculated.

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[92] USDOC, Certain oil country tubular goods from Ukraine, Final Determination of sales at less than fair value and negative final determination of critical circumstances, *United States Federal Register*, Vol. 79, No. 138 (18 July 2014), p. 41969, (Exhibit KOR-75), pp. 9 and 10. (emphasis added)

[93] Panel Reports, *EC – Bed Linen*, para. 6.60; and *Thailand – H-Beams*, para. 7.112. See also United States' first written submission, para. 95; and Korea's first written submission, para. 83.

[94] United States' second written submission, para. 29.

7.3.2.3 Whether the USDOC's use of profit data from the Tenaris financial statements in constructing normal value was a "reasonable method" within the meaning of Article 2.2.2(iii)

7.3.2.3.1 Main arguments of the parties

7.76. Korea maintains that:

a. It is impermissible to calculate a dumping margin by comparing an export price to a normal value which predominantly represents the profit of enterprises, such as Tenaris, that do not operate in the exporting country.[95]

b. Further, subparagraphs (i)-(iii) of Article 2.2.2 are intended to approximate the price of the like product in the ordinary course of trade in the domestic market of the exporting country.[96]

c. The USDOC relied on the profit rate of Tenaris despite the existence on the record of various CV profit sources that originated from the exporting country, Korea.[97]

d. The profit of Tenaris is fundamentally not comparable with profits realized by the Korean respondents.[98]

7.77. The United States contends that:

a. The USDOC's use of the Tenaris financial statements to calculate CV profit resulted from a reasoned consideration of the evidence before it. The CV profit it calculated was "rationally directed at approximating what the profit of a producer of the like product would have been if the like product had been sold in the ordinary course of trade in the domestic market of the exporting country".[99]

b. The average profit experience of Tenaris is representative of OCTG sales across a broad range of different geographic markets as it sells OCTG in significant quantities and in virtually every market in which OCTG is sold.[100]

c. In any case, Article 2.2 expressly permits the use of sales that are destined for consumption in markets other than the exporting country in determining normal value. In addition, Article 2.2.2(iii) does not limit the use of "any reasonable method" to a particular country or market.[101]

d. Moreover, Article 2.2.2 recognizes that where data specific to the product under consideration and the exporting country is unavailable, an investigating authority needs to find a reasonable proxy from data available in the record.[102]

e. Korea's request for establishment of a panel does not include a claim that the USDOC's use of the Tenaris profit data as a basis for CV profit determination does not constitute a reasonable method within the meaning of Article 2.2.2(iii).[103]

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[95] Korea's first written submission, para. 130.
[96] Korea's first written submission, para. 131 (referring to Panel Report, *Thailand – H-Beams*, para. 7.113).
[97] Korea's first written submission, para. 135 (referring to Final Decision Memorandum, (Exhibit KOR-21), p. 20).
[98] Korea's second written submission, paras. 185-192.
[99] United States' first written submission, para. 123 (referring to Panel Report, *EU – Biodiesel (Argentina)*, para.7.337).
[100] United States' first written submission, para. 126 (referring to Final Decision Memorandum, (Exhibit KOR-21), p. 20).
[101] United States' first written submission, para. 130.
[102] United States' first written submission, para. 131.
[103] United States' comments on Korea's response to Panel question No. 53, paras. 41-48.

7.3.2.3.2 Main arguments of third parties

7.78. The European Union submits that while the Anti-Dumping Agreement does not define the exact scope of what constitutes a "reasonable method" under Article 2.2.2, the intention of the subparagraphs under Article 2.2.2 is to obtain results that approximate as closely as possible the price of the like product in the ordinary course of trade in the domestic market of the exporting country.[104]

7.79. Turkey doubts whether the use of the profit data of a non-Korean corporation, that had neither production nor sales in the Korean market, is consistent with Article 2.2.2(iii).[105] Further, it considers that the profit cap is a means to test the reasonability of the method employed under Article 2.2.2(iii).[106]

7.3.2.3.3 Evaluation by the Panel

7.80. Before we can examine the merits of Korea's claim that the USDOC's determination of CV profit based on the Tenaris profit data does not constitute a "reasonable method" under Article 2.2.2(iii), we will ascertain whether Korea's panel request includes that claim, and that it therefore falls within our terms of reference and the scope of this dispute.[107] On its face, Korea's panel request does not set out any *express* reference to a claim that the USDOC's determination of CV profit based on the Tenaris profit data does not constitute a "reasonable method" under Article 2.2.2(iii). Korea's considers that this claim nevertheless falls within our terms of reference.

7.81. Article 6.2 of the DSU requires, in relevant part, that the panel request "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". The panel request must therefore identify, by way of a brief summary, the "legal basis of the complaint" and that summary must be "sufficient to present the problem clearly".

7.82. The question before us is whether Korea's panel request sets out the requisite "legal basis of the complaint" with respect to the claim at issue. We consider it clearly established that a panel request contains "a brief summary of the legal basis of the complaint" if it: (a) identifies the legal provision which allegedly has been violated; and (b) clearly specifies how or why that provision has been violated in terms of the obligations set out in therein.[108] If the provision allegedly violated contains multiple obligations, the specific obligation that has allegedly been violated must be clear on the face of the panel request.[109] Further, the compliance of a panel request with

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[104] European Union's third-party submission, paras. 21 and 22 (referring to Panel Report, *Thailand – H-Beams*, para. 7.114).

[105] Turkey's third-party submission, para. 12.

[106] Turkey's third-party submission, para. 9.

[107] Panels are not permitted to address legal claims falling outside their terms of reference. The terms of reference of a panel define the scope of the dispute. (Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 152). Pursuant to Article 7.1 of the DSU, a panel's terms of reference are governed by the request for the establishment of a panel. Article 6.2 of the DSU sets forth the requirements applicable to such requests.

[108] The Appellate Body in *EC – Selected Customs Matters* found that:

> [T]he legal basis of the complaint, namely, the "claim" pertains to the specific provision of the covered agreement that contains the obligation alleged to be violated. A brief summary of the legal basis of the complaint required by Article 6.2 of the DSU aims to explain succinctly *how* or *why* the measure at issue is considered by the complaining Member to be violating the WTO obligation in question.

(Appellate Body Report, *EC – Selected Customs Matters*, para. 130 (emphasis original))

[109] In *Korea – Dairy*, the Appellate Body observed that while the identification of treaty provisions claimed to have been violated by the respondent is a minimum prerequisite for the presentation of the legal basis of the complaint, such identification may not always be enough. In certain circumstances, such as, where the treaty provisions identified establish not one single, distinct obligation but rather multiple obligations, the listing of articles of an agreement, in and of itself, may fall short of the standard of clarity in Article 6.2. (Appellate Body Report, *Korea – Dairy*, para. 124). In *China – Raw Materials*, the Appellate Body found that "to the extent that a provision contains not one single, distinct obligation, but rather multiple obligations, a panel request might need to specify which of the obligations contained in the provision is being challenged". (Appellate Body Report, *China – Raw Materials*, para. 220).

Article 6.2 must be determined on the merits of each case, considering the panel request as a whole, and in the light of attendant circumstances.[110]

7.83. Bearing these principles in mind, we turn to examine whether Korea's panel request satisfies the requirements of Article 6.2 with respect to the claim at issue. The panel request states, in relevant part:

> II. USDOC'S CALCULATION OF CONSTRUCTED VALUE ("CV") PROFIT
>
> Korea considers the USDOC's calculation of constructed value ("CV") profit in its anti-dumping investigation of Oil Country Tubular Goods from Korea, which was based on information contained in the financial statements of Tenaris SA (a global producer incorporated under the laws of Luxembourg with no record of sales or production in the Korean home market), to be inconsistent with the following provisions of the Anti-Dumping Agreement:
>
> > 3. Articles 2.2.2(i) and 2.2.2(iii) because the USDOC applied an impermissibly narrow interpretation of the term "same general category of products." The USDOC's application of the term "same general category of products" resulted in a scope of products that was essentially identical to the scope of the term "like product."
> >
> > 4. Article 2.2.2(iii) because the USDOC declined to examine whether the profit rate that it calculated exceeded "the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin," and it did not provide any legal basis for disregarding this requirement.
> >
> > 5. Article 2.2 because the USDOC did not take any steps to ensure that its calculated CV profit was "reasonable." In fact, the CV profit that the USDOC calculated far exceeded all other potential CV profit rates on the record, including the profit margins that U.S. producers earned on their sales of OCTG in the United States.[111]

7.84. We find that Korea's request for establishment of a panel does not set out a claim that the USDOC's determination of CV profit based on the Tenaris profit data does not constitute a "reasonable method" under Article 2.2.2(iii). We reach this conclusion based on the following considerations:

a. Korea's panel request does not expressly state that the USDOC acted inconsistently with Article 2.2.2(iii) because it did not determine the CV profit on the basis of any other "reasonable method", within the meaning of that provision. The requirements of due process and orderly procedure dictate that claims must be stated explicitly and clearly in WTO dispute settlement. This is the only way that the panel, other parties, and third parties will understand that a specific claim has been made, be aware of its dimensions, and have an adequate opportunity to address and respond to it.[112]

b. Korea's panel request does expressly state claims on the violation of the profit cap requirement in Article 2.2.2(iii) and the "reasonable amount for profit" requirement in Article 2.2, but does not refer to the "reasonable method" obligation in Article 2.2.2(iii). We consider that, as previous panels have found, the requirement that the CV profit be determined on the basis of a "reasonable method" is a separate and distinct obligation in

[110] Appellate Body Report, *US – Carbon Steel*, para. 127.
[111] Emphasis original.
[112] Appellate Body Reports, *Chile – Price Band System*, para. 164; and *India – Patents (US)*, para. 94.

> Article 2.2.2(iii).[113] We are of the view that a claim alleging violation of that independent obligation should therefore have been separately set out in Korea's panel request.[114]

7.85. Korea maintains that the panel request contains the claim at issue, and makes two main arguments in this regard. First, Korea contends that paragraphs II.3 and II.4 of its panel request, read together with the *chapeau* of paragraph II, set out that claim consistent with the requirements of Article 6.2 of the DSU. Korea asserts that paragraphs II.3 and II.4 identify Article 2.2.2(iii) as the relevant provision against which it alleges a violation. In particular, it contends that paragraph II.4 explains that the USDOC's manner of determining profit is inconsistent with Article 2.2.2(iii), while the *chapeau* of paragraph II further indicates that the profit so determined is inconsistent with Article 2.2.2(iii) because it was based on information in the Tenaris financial statements.[115] Korea cites findings by the Appellate Body and prior panels, in support of its argument that a panel request must be construed "as a whole" and not in isolation.[116] It notes, in particular, that the panel in *Mexico – Anti-Dumping Measures on Rice* found that the "accompanying narrative" and the provisions of the Anti-Dumping Agreement identified in the panel request made it clear what the claim being raised was.[117]

7.86. We disagree with Korea that the claim at issue can be inferred from its panel request, even when read as a whole. We do not agree that it can be inferred from paragraphs II.3 and II.4 of Korea's panel request read together with the *chapeau* of paragraph II that it is the "reasonable method" obligation under Article 2.2.2(iii) that has allegedly been violated.

7.87. Korea argues that paragraph II.3 of its panel request, read together with the chapeau of section II, sets forth a claim that the USDOC's calculation of CV profit, based on the Tenaris financial statements, was inconsistent with Articles 2.2.2(i) and (iii) *because the USDOC interpreted and applied an impermissibly narrow definition of the same general category of products*. Korea also argues that paragraph II.4, read together with the *chapeau* of Section II, sets forth a claim that the USDOC's calculation of CV profit, based on the Tenaris financial statements, was inconsistent with Article 2.2.2(iii) *because the USDOC did not examine whether the profit rate it had calculated exceeded "the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin"*.

7.88. The legal basis for the alleged inconsistency of the USDOC's CV profit determination with Article 2.2.2(iii), set out in the panel request, is two-fold. In paragraph II.3, Korea identifies the USDOC's narrow interpretation and application of the definition of the "same general category of products", and in paragraph II.4, it identifies the USDOC's failure to examine whether the profit calculated exceeded the profit cap. Nowhere in its panel request does Korea identify the legal basis for an alleged inconsistency with Article 2.2.2(iii) as the USDOC's failure to determine the CV profit on the basis of a "reasonable method" within the meaning of that provision. As noted above[118], the obligation that the CV profit be determined using a "reasonable method" is a separate obligation under Article 2.2.2(iii). Thus, if an inconsistency with that obligation is alleged, it must be clearly, if not expressly, set out in the panel request.[119] As Korea failed to clearly or expressly set out the alleged violation in its panel request, we conclude that Korea's panel request does not set out a claim alleging that the USDOC acted inconsistently with the "reasonable method" obligation in Article 2.2.2(iii).

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[113] Panel Reports, *EU – Footwear (China)*, para. 6.52; and *Thailand – H-Beams*, para. 7.125.

[114] This consideration is consistent with the Appellate Body's findings that a mere identification of the legal provision in the panel request where that provision sets out multiple obligations, is not sufficient to meet the standard of Article 6.2 and in such a case a panel request might need to specify which of the obligations contained in the provision is being challenged. (Appellate Body Reports, *China – Raw Materials*, para. 220; and *Korea – Dairy*, para. 124).

[115] Korea's response to Panel question No. 53, paras. 41 and 42.

[116] Korea's response to Panel question No. 53, para. 43 (referring to Appellate Body Report, *EC – Selected Customs Matters*, para. 168; and Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.31).

[117] Korea's response to Panel question No. 53, para. 43 (referring to Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.31).

[118] See para. 7.84b above.

[119] We recall in this regard that paragraph II.5 of the panel request, which is the only appearance of the word "reasonable" refers to whether the calculated profit rate was, itself, reasonable, and not to whether the method by which that profit rate was calculated was reasonable.

7.89. Second, Korea argues that its claim under the "reasonable method" obligation of Article 2.2.2(iii) is covered by the claim under Article 2.2 set out in paragraph II.5 of its panel request.[120] In paragraph II.5, Korea contends that the USDOC's determination of CV profit was inconsistent with Article 2.2 because the USDOC did not take any steps to ensure that the CV profit it determined was "reasonable". We understand Korea to argue that this claim under Article 2.2 covers its asserted claim under the "reasonable method" obligation of Article 2.2.2(iii), because use of a "reasonable method" is one of the "steps" under Article 2.2.2 to ensure the reasonableness of the CV profit determined for purposes of Article 2.2.[121]

7.90. We are not persuaded that Korea's claim under Article 2.2 can be understood to cover a claim alleging inconsistency with the "reasonable method" obligation of Article 2.2.2(iii). In our view, a failure to comply with the "reasonable method" obligation is not the only error that could lead to the determination of an amount of profit that is not "reasonable" under Article 2.2. For instance, failure to act consistently with the *chapeau* of Article 2.2.2, Articles 2.2.2(i) and 2.2.2(ii), as well as with the profit cap obligation in Article 2.2.2(iii), could equally have led to the same result. Thus, a claim under Article 2.2 does not imply a claim under the "reasonable method" obligation of Article 2.2.2(iii), and nothing in Korea's panel request gives rise to such an implication. Korea's panel request does not state, in connection with the claim under Article 2.2, that the CV profit determined by the USDOC was not "reasonable" because the method used by the USDOC to determine that profit did not constitute a "reasonable method".[122] Indeed, it does not mention the method by which that profit was determined at all.

7.91. Korea's panel request also does not suggest that the claim under Article 2.2 covered claims pertaining to inappropriate application of *all* methods for CV profit determination set out under Article 2.2.2, such that a claim pertaining to the "reasonable method" under Article 2.2.2(iii) was necessarily covered as one among those methods. Indeed, the fact that Korea's panel request enumerated claims pertaining to the inappropriate application of certain methods for CV profit determination under Article 2.2.2, separately from its claim under Article 2.2, but omitted any reference to the "reasonable method" obligation of Article 2.2.2(iii), supports our view that its claim under Article 2.2 does not cover claims pertaining to inappropriate application of *all* methods for CV profit determination set out under Article 2.2.2 and, in particular, does not cover a claim pertaining to the "reasonable method" obligation of Article 2.2.2(iii).[123]

7.92. We therefore conclude that the reference to "reasonable amount of profit" in Article 2.2 does not suffice to persuade us that a claim challenging the reasonableness of the amount of profit determined covers a purported claim concerning the *reasonable method* requirement in Article 2.2.2(iii). We find that this claim is simply not specified in Korea's panel request, and therefore, Korea's allegation of inconsistency with the "reasonable method" obligation under Article 2.2.2(iii) is not properly before us.

7.93. Korea further argues that the United States has not demonstrated any prejudice arising from Korea's panel request and would likely not have objected to the claim at issue had the Panel not raised a question in this regard during the second substantive meeting.[124]

7.94. We recall that we have an obligation to decide on issues concerning our jurisdiction, even if the parties to the dispute remain silent on those issues and if necessary, on our own motion, in order to satisfy ourselves that we have authority to proceed.[125] We consider that even if the

[120] Korea's response to Panel question No. 53, paras. 50-53.
[121] Korea's response to Panel question No. 53, para. 52 (referring to Panel Report, *EC – Bed Linen*, para. 6.96).
[122] Indeed, in its written submissions, Korea argues that it was the USDOC's failure to comply with the profit cap obligation in Article 2.2.2(iii) that led to the determination of a CV profit which was not "reasonable" under Article 2.2. (Korea's first written submission, paras. 119 and 277(b)(iii)).
[123] In particular, in paragraphs II.I and II.2, Korea makes claims pertaining to inappropriate application of the method provided for in the *chapeau* of Article 2.2.2. In paragraph II.3, it brings a claim under Articles 2.2.2(i) and 2.2.2(iii) regarding the erroneous interpretation and application of the term "same general category of products", and in paragraph II.4, it raises a claim regarding failure to comply with the profit cap obligation in Article 2.2.2(iii). Korea does not bring any separate and distinct claim under the "reasonable method" obligation of Article 2.2.2(iii). Korea has also not brought any claim under Article 2.2.2(ii).
[124] Korea's response to Panel question No. 53, paras. 54-56.
[125] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36.

United States had not objected to Korea's claim, it would still have been appropriate for us to determine whether we had jurisdiction to address and dispose of the claim at issue, regardless of whether or not there was any evidence of prejudice to the United States. We therefore reject Korea's argument in this regard.

7.95. Considering that the "reasonable method" obligation in Article 2.2.2(iii) is a separate and distinct obligation in that provision and that Korea has failed to properly allege a violation of that obligation in its panel request, we find that Korea's panel request does not include a claim that the USDOC acted inconsistently with that obligation. We therefore, reject as falling outside our jurisdiction, Korea's claim that the USDOC's use of profit data from the Tenaris financial statements in constructing normal value is not a "reasonable method" within the meaning of Article 2.2.2(iii).

7.3.2.4 Whether the USDOC acted inconsistently with Article 2.2.2(iii) and Article 2.2 by failing to calculate and apply a profit cap

7.3.2.4.1 Main arguments of the parties

7.96. Korea's principal arguments are set out below:

a. The USDOC's failure to calculate and apply a profit cap constitutes a *per se* violation of Article 2.2.2(iii).[126] That failure also contravenes Article 2.2 of the Anti-Dumping Agreement as that provision imposes an obligation to calculate a "reasonable amount for profits".[127]

b. Assuming that unavailability of data constitutes a valid justification for failing to calculate and apply a profit cap, the USDOC's determination that it was unable to calculate a profit cap would still be inconsistent with Article 2.2.2(iii) because it is premised on an impermissibly narrow definition of the "same general category of products".[128]

7.97. The United States contends that:

a. The data required for calculation of the profit cap under Article 2.2.2(iii) was not available as there were no sales of products of the same general category in Korea.[129]

b. Further, Article 2.2.2(iii) does not always require the calculation of a profit cap.[130]

7.3.2.4.2 Main arguments of third parties

7.98. The European Union submits that the application of a "profit cap" is a mandatory requirement whenever an investigating authority determines to use "any other reasonable method" under Article 2.2.2(iii). The presence of the profit cap in subparagraph (iii) and the absence of any cap in subparagraphs (i) and (ii) demonstrate that there is an additional element in subparagraph (iii) that needs to be satisfied.[131]

7.99. Turkey submits that an investigating authority is expected under Article 2.2.2 to determine the "reasonable amount" for profit as required under Article 2.2.[132]

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[126] Korea's first written submission, paras. 110 and 114.
[127] Korea's first written submission, paras. 111, 112, and 119 (referring to Panel Reports, *EC – Bed Linen*, paras. 6.96-6.98 and *Thailand – H-Beams*, para. 7.125).
[128] Korea's first written submission, para. 120.
[129] United States' first written submission, para. 88.
[130] United States' first written submission, para. 115 (referring to Panel Report, *US – Upland Cotton*, paras. 7.1377 and 7.1378).
[131] European Union's third-party submission, paras. 21 and 22 (referring to Panel Report, *Thailand – H-Beams*, para. 7.124).
[132] Turkey's third-party submission, para. 8.

7.3.2.4.3 Evaluation by the Panel

7.100. In its final determination, the USDOC found that it could not calculate the profit cap called for in Article 2.2.2(iii) because it did not have domestic market profit data for other exporters and producers of the same general category of products in Korea.[133] The principal legal issue before us is whether the USDOC's failure to calculate and apply a profit cap is inconsistent with Article 2.2.2(iii) and Article 2.2 of the Anti-Dumping Agreement.

7.101. The text of Article 2.2.2(iii) makes it clear that the determination of the profit cap is mandatory. When the CV profit cannot be determined using the preferred method set out in the *chapeau* of Article 2.2.2, subparagraph (iii) allows the use of "any other reasonable method" for determining the amount of profit, provided that the amount determined does not exceed the profit cap, which is "the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin".

7.102. The mandatory nature of the obligation to determine and apply a profit cap flows from the use of the imperative "shall not" in Article 2.2.2(iii). In addition, previous panels have found that both conditions, "any other reasonable method" and the profit cap, must be fulfilled in order for the determination of an amount for profit to be consistent with Article 2.2.2(iii).[134]

7.103. The United States contends that the USDOC examined whether there were producers who sold products of the same general category in the domestic market whose data might have been used to calculate the profit cap.[135] However, no such data existed in the record, and it was therefore unable to calculate the profit cap.[136]

7.104. We understand the situation that the United States presents as one in which the USDOC attempted to calculate the profit cap but was unable to do so because it lacked data pertaining to sales of products of the same general category in the domestic market. We recall, however, that we have concluded[137] in this dispute that the USDOC wrongly defined the "same general category of products" more narrowly than the like product in the underlying investigation. Based on that same conclusion, we consider that the USDOC's finding that it did not have profit data pertaining to sales of the same general category of products was similarly erroneous. This was because the USDOC's conclusion that it lacked data was premised on an erroneous definition of the same general category of products. Therefore, even assuming that a lack of data might otherwise justify failure to calculate and apply a profit cap, the USDOC's failure to do so in the underlying investigation is not justified. We therefore find that by failing to calculate and apply a profit cap, which is mandatory under Article 2.2.2(iii), in the underlying investigation, the USDOC acted inconsistently with its obligations under that provision.

7.105. Korea also argues that the USDOC's failure to calculate a profit cap is inconsistent with Article 2.2 of the Anti-Dumping Agreement, which imposes an obligation to calculate a "reasonable amount" for profits.[138]

7.106. The text of Article 2.2.2 indicates that the preferred and alternative methods set out in its *chapeau* and subparagraphs (i)-(iii), respectively, are used for purposes of determining "a reasonable amount" for SG&A and for profits within the meaning of Article 2.2 of the Anti-Dumping Agreement. This is clear from the use of the phrase "[f]or the purpose of paragraph 2" in the *chapeau* of Article 2.2.2. Previous panels have found that the methods set out in Article 2.2.2, including the use of "any other reasonable method" subject to a profit cap under subparagraph (iii)

[133] Final Decision Memorandum, (Exhibit KOR-21), p. 21.
[134] Panel Reports, *EU – Footwear (China)*, paras. 6.52, 6.55, and 7.300; *Thailand – H-Beams*, para. 7.125; and *EC – Bed Linen*, paras. 6.97 and 6.98.
[135] United States' first written submission, para. 120.
[136] United States' first written submission, para. 88.
[137] In para. 7.75 above.
[138] Korea's first written submission, paras. 111, 112, and 119 (referring to Panel Reports, *EC – Bed Linen*, paras. 6.96-6.98 and *Thailand – H-Beams*, para. 7.125).

of that provision, are outlined for purposes of fulfilling this obligation under Article 2.2.[139] We agree with that conclusion.

7.107. In light of the foregoing, we conclude that if the methods under Article 2.2.2 are not properly applied, the resulting profit amount would no longer be reasonable under Article 2.2. We therefore find that in the absence of a profit cap, the profit that the USDOC determined was not a "reasonable amount" within the meaning of Article 2.2 of the Anti-Dumping Agreement.

7.108. We find that the United States acted inconsistently with its obligations under Article 2.2.2(iii) because:

a. It failed to calculate and apply a profit cap, which is mandatory under that provision.

b. The USDOC's determination that no profit data pertaining to the same general category of products was available cannot justify its failure to calculate and apply the profit cap, as it erroneously defined the same general category of products.

7.109. We also conclude that the USDOC's failure to calculate a profit cap led it to act inconsistently with its obligation under Article 2.2 of the Anti-Dumping Agreement to use a "reasonable amount for profits" in the construction of normal value for the Korean respondents in the underlying investigation.

7.3.2.5 Whether the USDOC acted inconsistently with Article 2.4 of the Anti-Dumping Agreement by failing to make due allowance for differences in the profit rates reflected in the constructed normal value and the export price

7.110. Korea contends that because the USDOC used the profit rate of Tenaris in constructing the normal value of the Korean respondents, their constructed normal value reflected the Tenaris profit rate, while their export price reflected their own profit rate. In Korea's view, this difference in the constructed normal value and the export price of the Korean respondents affected price comparability, and the USDOC should have made due allowance, by making appropriate adjustments. Korea asserts that by failing to do, the USDOC acted inconsistently with Article 2.4 of the Anti-Dumping Agreement.

7.3.2.5.1 Main arguments of the parties

7.111. Korea argues that the profit rate of Tenaris was not comparable to that of the two Korean respondents because: first, Tenaris focused on the premium segment of the OCTG market, whereas the Korean respondents participated in the low-grade end of the market; second, Tenaris's scale of operations was far bigger than that of the Korean respondents; and third, Tenaris and the two Korean respondents operated at different levels of trade. Therefore, in Korea's view, the USDOC should have attempted to make adjustments to the 26.11% profit rate of Tenaris, which was used in the constructed normal value determined for the Korean respondents.[140]

7.112. Korea acknowledges that the Korean respondents did not make a specific request to the USDOC seeking adjustments to the normal value or export price based on this difference in profit rates.[141] However, Korea notes that because the USDOC did not make an affirmative determination that it would use the Tenaris profit rate until it issued its final determination, the Korean respondents did not know that the USDOC would use this profit rate.[142] Thus, they could not request such an adjustment.

7.113. The United States contends that the profit component of a constructed normal value is not a difference that affects price comparability, and hence is not relevant to the fair comparison obligation under Article 2.4.[143] The United States also disputes the three grounds advanced by

[139] Panel Reports, *EC – Bed Linen*, para. 6.96; and *Thailand – H-Beams*, para. 7.121.
[140] Korea's first written submission, para. 153.
[141] Korea's response to Panel question No. 20, para. 71.
[142] Korea's response to Panel question No. 20, para. 72.
[143] United States' first written submission, para. 141.

Korea as to why the profit rate of Tenaris was not comparable to that of the Korean respondents.[144] Finally, the United States submits that the respondents in the underlying investigation never requested the USDOC to make any adjustments between the constructed normal value and the export price, and notes that an investigating authority does not have an obligation to accept unsubstantiated requests for adjustments between the normal value and the export price.[145]

7.3.2.5.2 Evaluation by the Panel

7.114. Korea asserts that there was a "massive disparity" in the profit rate recorded by Tenaris and that recorded by the Korean respondents, with the Tenaris profit rate being much higher than that of these respondents.[146] Korea alleges that this disparity was attributable to the inherent differences between Tenaris and these respondents, which are noted in paragraph 7.111 above.[147] Thus, in Korea's view, having decided to use the Tenaris profit rate in constructing the normal value, the USDOC should have made due allowance for this difference between the constructed normal value, which reflected Tenaris's high profit rate, and the export price, which reflected the Korean respondents' own, lower profit rates. In particular, Korea argues that the USDOC should have attempted to adjust the 26.11% profit rate of Tenaris used in the constructed normal value.[148]

7.115. In this regard, we have already found that the USDOC acted inconsistently with:

a. the *chapeau* of Article 2.2.2 of the Anti-Dumping Agreement by failing to determine the Korean respondents' profit rate on the basis of their actual data pertaining to production and sales of the like product in the ordinary course of trade;

b. Article 2.2.2(i) and (iii) of the Anti-Dumping Agreement by incorrectly defining the "same general category of products"; and

c. Article 2.2.2(iii) of the Anti-Dumping Agreement by failing to calculate a profit cap.

7.116. It follows, from these findings, that the USDOC did not determine the profit rate of the Korean respondents in a manner consistent with its obligations under the Anti-Dumping Agreement in constructing normal value. We do not find it necessary to decide whether the USDOC should have made adjustments to a CV profit rate that was itself determined in a manner inconsistent with US obligations under the Anti-Dumping Agreement. Hence, we exercise judicial economy with respect to Korea's Article 2.4 claim.[149]

7.3.2.6 Conclusions

7.117. For the foregoing reasons, we find that the USDOC acted inconsistently with the *chapeau* and subparagraphs (i) and (iii) of Article 2.2.2 and with Article 2.2 of the Anti-Dumping Agreement in constructing normal value in the underlying investigation. We exercise judicial economy with respect to Korea's claim under Article 2.4 of the Anti-Dumping Agreement.

7.3.3 The USDOC's profit rate determination in the remand investigation

7.118. Korea expressed its intent to challenge the USDOC's remand determination at the first substantive meeting and particularly in its closing statement at that meeting, but it did not identify the claims that it intended to make with respect to the remand determination.[150] Korea identified

[144] United States' first written submission, paras. 142-145; and response to Panel question No. 22, para. 66.
[145] United States' first written submission, para. 147.
[146] Korea's first written submission, para. 154.
[147] Korea's first written submission, paras. 146-152 and 154.
[148] Korea's first written submission, para. 153.
[149] It is well settled in WTO jurisprudence that a panel is not required to address each and every claim. Instead, a panel is only required to address those claims that are necessary to resolve a dispute. (Appellate Body Report, *Argentina – Import Measures*, para. 5.190).
[150] Korea's closing statement at the first meeting of the Panel, para. 10.

some of these claims in its second written submission and the others in its opening statement at the second substantive meeting.

7.119. In its second written submission, Korea claimed that the USDOC's profit rate determination in the remand investigation (new profit rate determination) was inconsistent with:

a. the *chapeau* of Article 2.2.2 of the Anti-Dumping Agreement because the USDOC refused to use actual data pertaining to the sales of the like product in the ordinary course of trade;

b. Articles 2.2.2(i) and (iii) of the Anti-Dumping Agreement because the USDOC relied on an impermissibly narrow definition of the "same general category of products"; and

c. Article 2.2.2(iii) of the Anti-Dumping Agreement because the USDOC calculated a profit cap based on the average of the profit rates in the 2012 financial statement of Tenaris and the profit rates of a Russian producer/exporter of OCTG, namely, OAO TMK.

7.120. In its opening statement at the second substantive meeting, Korea claimed that the USDOC's new profit rate determination was also inconsistent with Article 2.2.2(iii) of the Anti-Dumping Agreement because the USDOC did not determine the CV profit rate on the basis of a reasonable method, as required by this provision.[151] In addition, Korea claimed that the USDOC acted inconsistently with Article 2.4 of the Anti-Dumping Agreement in the remand investigation by failing to make adjustments to this CV profit rate.[152] As indicated above, we will address these claims only if we find the remand determination, and Korea's claims with respect to it, to be within our terms of reference. We therefore turn first to the parties' arguments on this fundamental question of our jurisdiction.

7.3.3.1 Main arguments of the parties with respect to the Panel's jurisdiction

7.121. Korea notes that measures enacted subsequent to panel establishment may, in certain circumstances, fall within a panel's terms of reference, and states that considering the close nexus between this remand determination and the final determination expressly identified in its panel request, the USDOC's remand determination, which was issued after this Panel was established, is within our terms of reference.[153] Further, Korea asserts that the remand determination is covered by its panel request because that request challenges "[a]ny related measure" in the proceeding entitled Oil Country Tubular Goods from the Republic of Korea, including the anti-dumping investigation itself as well as "all administrative reviews, new shipper reviews, changed circumstances reviews, sunset reviews, and other segments of the proceeding". These references, in Korea's view, are broad enough to cover the remand determination.

7.122. The United States submits that we cannot rule on the remand determination because it was not in existence at the time this Panel was established, and was not subject to consultations between the parties.[154] In addition, the United States asserts that Korea's claims with respect to the remand determination are wholly new claims, considering the differences in the methodologies used by the USDOC to determine the CV profit rate in the final determination and in the remand determination.[155]

[151] Korea's opening statement at the second meeting of the Panel, para. 81. In its response to our questions following the second substantive meeting, Korea clarified that it was making this claim, and cited to its second written submission and its opening statement at the second substantive meeting to assert that it had already presented this claim in these prior submissions. (Korea's response to Panel question No. 40, para. 13). We do not find any reference to this claim in Korea's second written submission but do find such a reference in its opening statement at the second substantive meeting.
[152] Korea's opening statement at the second meeting of the Panel, para. 89.
[153] Korea's response to Panel question No. 39, para. 1.
[154] United States' response to Panel question No. 40, para. 4.
[155] United States' response to Panel question No. 40, para. 5.

7.3.3.2 Evaluation by the Panel

7.123. In accordance with Article 7.1 of the DSU, and as set out in paragraph 1.4 above, our terms of reference require us to examine the "matter referred to the DSB" by Korea in its panel request. Article 6.2 of the DSU, which sets out the requirements applicable to panel requests, states that such a request shall:

> [I]ndicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

Thus, Article 6.2 imposes two distinct requirements: first, to identify the specific measures at issue, and second, to provide a brief summary of the legal basis of the complaint, or the claims.[156] It is well-established that these two elements, the measure(s) and the claim(s) together, comprise the "matter referred to the DSB".[157] Therefore, if we conclude either that the USDOC's remand determination falls outside the scope of the specific measures identified in Korea's panel request, or that Korea's claims with respect to the remand determination differ from the legal basis of the complaint set out in that request, we will find that Korea's claims regarding this determination fall outside the "matter referred to the DSB" and thus, outside our terms of reference. In addressing these issues, we are mindful that fulfilment of the two requirements set out in Article 6.2 is not a mere formality.[158] Instead, these requirements serve a two-fold purpose of forming the basis of a panel's terms of reference and of ensuring due process by informing the respondent and third parties of the matter brought before a panel.[159]

7.124. We commence our analysis by considering whether the remand determination is covered as a specific measure at issue in Korea's panel request. If we find that it is not, then we will have no jurisdiction to examine the USDOC's remand determination, and it will be unnecessary to examine whether we also lack jurisdiction because Korea's claims with respect to this determination differ from the legal basis of the complaint that it set out in its panel request.[160]

7.125. In deciding whether the remand determination is covered as a specific measure at issue by Korea's panel request we have to resolve two issues. First, whether the remand determination can be challenged in these panel proceedings even though it did not exist at the time this Panel was established. Second, whether the following italicised text in Korea's panel request is broad enough to cover the remand determination as a specific measure at issue even though the request makes no express reference to it[161]:

> *Any related measure* in the proceeding entitled Oil Country Tubular Goods from the Republic of Korea, including the anti-dumping investigation itself as well as all administrative reviews, new shipper reviews, changed circumstances reviews, sunset reviews, and *other segments of the proceeding*.[162]

7.126. We recall that the use of the term "specific measures at issue" in Article 6.2 of the DSU suggests that, as a general rule, the measures falling within a panel's terms of reference must be measures that were in existence at the time of panel establishment.[163] However, there are

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[156] See, e.g. Appellate Body Reports, *Argentina – Import Measures*, para. 5.39; and *US – Carbon Steel*, para. 125.

[157] See, e.g. Appellate Body Reports, *Guatemala – Cement I*, paras. 69-76; *US – Carbon Steel*, para. 125; *US – Continued Zeroing*, para. 160; and *EC and certain member States – Large Civil Aircraft*, para. 639.

[158] Appellate Body Report, *Australia – Apples*, para. 416.

[159] Appellate Body Reports, *Australia – Apples*, para. 416; and *US – Carbon Steel*, para. 126.

[160] In addition, the United States contends that considering that the remand determination was not subject to any consultations between the parties, it falls outside our jurisdiction. It will be unnecessary to examine whether the remand determination falls outside our terms of reference for this reason if we are to conclude that the remand determination is not covered as a specific measure at issue in Korea's panel request.

[161] See, e.g. Appellate Body Report, *Chile – Price Band System*, para. 144.

[162] Underlining original; italics added.

[163] Appellate Body Report, *EC – Chicken Cuts*, para. 156.

exceptions to this general rule.[164] In particular, the Appellate Body recognized in *EC – Chicken Cuts*, that in certain limited circumstances, measures that were not in existence at panel establishment may be found to fall within a panel's terms of reference.[165] One such circumstance is when a measure that comes into existence after panel establishment amends the original measure, but does not change its essence.[166] In that case, the amended measure will fall within the panel's terms of reference, provided the panel request is broad enough to cover that determination.

7.127. Korea argues that the remand determination is within our terms of reference because it supplemented and reaffirmed the final determination of the USDOC and did not change its essence.[167] Korea considers the situation here to be analogous to that in *US – Washing Machines*, where the panel found a remand determination issued after panel establishment to be within its terms of reference because it supplemented and reaffirmed the original determination.[168]

7.128. We will examine the relation between the remand determination and the final determination to determine whether the remand determination changes the essence of the final determination.[169] If we find that it does, we will conclude that the remand determination falls outside our terms of reference.

7.129. We recall that in the final determination the USDOC determined CV profit of 26.11% based on the Tenaris financial statements. Further, the USDOC concluded that it could not calculate a profit cap, consistent with Article 2.2.2(iii) of the Anti-Dumping Agreement, because the Korean exporters or producers made no sales of products of the same general category in the domestic market. The USCIT, in its remand order, directed the USDOC to reconsider certain aspects of the CV profit rate calculation used in the dumping margin analysis in the final determination.[170]

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[164] Appellate Body Reports, *EC – Selected Customs Matters*, para. 184; and *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 125. These reports of the Appellate Body discuss the type of exceptions that may apply to this general rule.

[165] Appellate Body Report, *EC – Chicken Cuts*, para. 156.

[166] Appellate Body Report, *EC – Chicken Cuts*, para. 156 (referring to Appellate Body Report, *Chile – Price Band System*, paras. 126-144). Following this Appellate Body report, a number of WTO panels have sought to examine whether a measure not in existence during panel establishment is within its terms of reference by examining whether such a measure changes the essence of the measure that was expressly identified in the panel request. (See, e.g. Panel Reports, *EC – IT Products*, paras. 7.139 and 7.142; and *China – Raw Materials*, para. 7.15).

[167] Korea's response to Panel question No. 39, para. 1; and comments on United States' response to Panel question No. 39, para. 8. Korea does not argue that we should find the remand determination to be within our terms of reference even if it changes the essence of the final determination.

[168] Korea's response to Panel question No. 39, para. 1 (citing Panel Report, *US – Washing Machines*, para. 7.249).

[169] In this regard, we note that in its report in *US – Zeroing (Japan) (Article 21.5 – Japan)*, the Appellate Body found a measure not in existence at the time of panel establishment to be within the panel's terms of reference without specifically examining whether that measure changed the essence of the original measure. However, that case, unlike the one before us, concerned a compliance proceeding under Article 21.5 of the DSU. The Appellate Body's finding in that case was informed by its view that in a compliance proceeding, Article 6.2 of the DSU must be read in light of the specific function of Article 21.5 proceedings and that the "specific measures at issue" to be identified in such proceedings are measures that have a bearing on compliance with the recommendations and rulings of the DSB. (Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 122). As this is not an Article 21.5 proceeding, the question of compliance with DSB recommendations and rulings does not arise. Hence, we consider that whether the remand determination changed the essence of the final determination is the principal question to be resolved in determining whether it is within our terms of reference. Korea does not argue otherwise.

[170] USDOC's Remand Determination, (Exhibit KOR-69), p. 1. The USCIT instructed the USDOC to: (a) either remove the financial statements of Tenaris from the record and not use them in the CV profit calculation, or, alternatively, rectify the alleged prejudice from acceptance of such statements; (b) either exclude from consideration or, alternatively, explain the relevance of market conditions and testing and certification requirements to the determination of which products are in the same general category of merchandise as oil country tubular goods; and (c) either calculate and apply a profit cap or, alternatively, explain why the data on the record could not be used to calculate a "facts available" profit cap under 19 U.S.C. 1677b(e)(2)(B)(iii).

While the USCIT also directed the USDOC to reconsider the issue of whether the two selected mandatory respondents, were representative of the Korean industry, this aspect of the remand determination is not challenged by Korea in these proceedings.

7.130. The USDOC initiated a remand investigation pursuant to that order, where it re-opened the record to allow all interested parties to submit new factual information and comments on the issue of CV profit, and interested parties did submit such information and comments.[171] In its evaluation of the evidence, the USDOC[172]:

a. using a different methodology, determined a CV profit rate of 16.24% based on an average of profit rates in the 2012 financial statements of Tenaris and a Russian company OAO TMK;

b. unlike the final determination, the USDOC calculated a profit cap on the basis of "facts available", taking into account the profits earned by Tenaris and OAO TMK in the global market and calculating the profit cap as the average of those profit rates; and

c. provided further explanation regarding the factors that the USDOC considered in reaching its determination regarding the scope of the products that were in the same general category of products as OCTG.

7.131. Based on the above, it is clear that:

a. the factual evidence on the USDOC's record in the remand investigation insofar as the issue of CV profit rate is concerned is not the same as that in the underlying investigation, as it includes additional evidence and comments provided by interested parties[173];

b. the USDOC's evaluation of that evidence in the remand investigation, and in particular, the methodology used to determine the CV profit rate and the calculation of a profit cap, differed from the underlying investigation[174]; and

c. the USDOC's explanation regarding the factors that it considered in reaching its determination regarding the scope of the same general category of products is not the same as in the underlying investigation as it provides additional explanation beyond that in the underlying investigation.[175]

7.132. These changes in the evidentiary record and in the USDOC's evaluation of that record and consequent determinations in our view show that the remand determination changed the essence of the USDOC's final determination. We do not consider that the remand determination can be said to retain the essence of the final determination simply because the USDOC reached the same ultimate conclusions, albeit at different rates, as to the existence of dumping as it did in the final determination.[176] We recall that a determination of the existence of dumping requires a calculation which must be based on the evidence before the investigating authority, and carried out consistently with the requirements of the Anti-Dumping Agreement. Where, as here, the underlying facts and the methodology used in the determination of normal value are different, resulting in different margins of dumping, we do not agree that the essence of the original determination is unchanged.

7.133. Therefore, we do not consider that the references in Korea's panel request, including that to "[a]ny related measure" or "other segments of the proceeding" permit it to challenge the USDOC's remand determination, because that determination changes the essence of the final determination expressly identified in Korea's panel request. Hence, we consider it unnecessary to

[171] USDOC's Remand Determination, (Exhibit KOR-69), p. 2; and USDOC, Remand Notice, 18 September 2015, (Exhibit KOR-53), p. 1.
[172] USDOC's Remand Determination, (Exhibit KOR-69), pp. 3, 11-14, and 61.
[173] USDOC's Remand Determination, (Exhibit KOR-69), p. 9.
[174] USDOC's Remand Determination, (Exhibit KOR-69), pp. 14-24; Final Decision Memorandum, (Exhibit KOR-21), pp. 19-23
[175] USDOC's Remand Determination, (Exhibit KOR-69), pp. 11-14; Final Decision Memorandum, (Exhibit KOR-21), pp. 16-19.
[176] We find support for this view in the Appellate Body report in *EC – Chicken Cuts*, where the Appellate Body considered that a subsequent measure, not identified in the panel request, could not be said to be covered by the panel's terms of reference simply because it had the same effect as the original measure and brought about the same result. (Appellate Body Report, *EC – Chicken Cuts*, para. 160).

decide whether these phrases were broad yet sufficiently precise to cover the remand determination as a specific measure at issue.[177] In sum, we conclude that the remand determination falls outside the specific measures at issue covered by Korea's panel request, and thus outside our terms of reference.

7.134. For the foregoing reasons, we conclude that we have no jurisdiction to examine Korea's claims with respect to the remand determination. Moreover, we do not find it necessary to decide whether we also lack jurisdiction to address Korea's claims regarding this determination because: (a) Korea brings new claims that are different from the legal basis of the complaint that it set out in its panel request[178]; and (b) the remand determination was not subject to consultations between the parties.

7.4 Whether the USDOC's decision to construct NEXTEEL's export price was inconsistent with Article 2.3 of the Anti-Dumping Agreement

7.135. Under US law, the USDOC is permitted to reject the transaction export price and instead construct the export price where the exporter or foreign producer's export sales are to an *affiliated* purchaser.[179] In the underlying investigation, the USDOC concluded that NEXTEEL was affiliated with the following three entities, which we refer to collectively, together with NEXTEEL, as the "concerned entities":

a. POSCO, which supplied NEXTEEL with steel coils used in the production of OCTG[180];

b. **[[***]]**, a **[[***]]** that purchased OCTG from NEXTEEL, and in which **[[***]]** (Company A)[181]; and

c. **[[***]]**, the **[[***]]** US affiliate of **[[***]]**, through which Company A exported OCTG produced by NEXTEEL to US customers (Company B[182]).[183]

[177] We note Korea's view that a ruling on the remand determination will contribute to the prompt settlement of this dispute, consistent with the objectives set out in Article 3.3 of the DSU. (Korea's response to Panel question No. 39, paras. 9 and 12). However, the goal of prompt settlement of disputes does not take precedence over the clear definition of our jurisdiction in accordance with the DSU. In any event, we do not agree with Korea's view. We have found certain aspects of the USDOC's final determination to be inconsistent with the United States obligations, and as a consequence, the United States may ultimately be recommended to bring its measures into conformity with its obligations. The remand determination may or may not be an element of any implementation of that recommendation. In any event, Korea will have the opportunity to initiate appropriate action under Article 21.5 of the DSU if it considers that the measures taken by the United States to comply with that recommendation are insufficient or themselves inconsistent with the United States' obligations. Therefore, we do not consider that our decision to not examine the remand determination affects the prompt settlement of this dispute.

[178] In this regard, while we do not make a separate ruling on whether Korea's claims with respect to the remand determination differ from the legal basis of the complaint set out in its panel request, we do have some concerns about Korea's decision to not identify the claims that it was seeking to make with respect to the remand determination till a very late stage in the proceedings, despite having an opportunity to do so earlier. We recall that in its closing statement at the first substantive meeting, Korea asked us to rule on the remand determination, which had been issued by the USDOC by that time, as it considered it to be inconsistent with the United States' obligations under the Anti-Dumping Agreement. (Korea's closing statement at the first meeting of the Panel, para. 10). However, as mentioned above, Korea waited till its opening statement at the second substantive meeting to present all of its claims. We consider that the due process objectives, intrinsic in Article 6.2 of the DSU, could be better served if Korea identified the claims that it was seeking to make with respect to the remand determination at the earliest possible opportunity, rather than wait till the second substantive meeting to identify all of its claims in this regard.

[179] Korea's first written submission, para. 6; and USDOC, Affiliation Memorandum for the Final Affirmative Determination in the less than fair value investigation of certain oil country tubular goods from the Republic of Korea, 10 July 2014 (USDOC's Affiliation Memorandum), (Exhibit KOR-43) (BCI), p. 5.

[180] USDOC's Affiliation Memorandum, (Exhibit KOR-43) (BCI), p. 3.

[181] USDOC's Affiliation Memorandum, (Exhibit KOR-43) (BCI), p. 4.

[182] In order to ensure, to the extent feasible, that this Report is comprehensible to those without access to BCI, and to ensure consistency, we refer to **[[***]]** as Company A and **[[***]]** as Company B in this Report.

[183] USDOC's Affiliation Memorandum, (Exhibit KOR-43) (BCI), p. 4.

7.136. Both parties agree that through this conclusion of affiliation under US law, the USDOC in effect sought to find "association … between the exporter and the importer or a third party", within the meaning of Article 2.3 of the Anti-Dumping Agreement.[184] Having found association between the concerned entities, the USDOC rejected the transaction export price of NEXTEEL to Company A and constructed the export price instead.[185]

7.137. Korea argues that in doing so, the USDOC acted inconsistently with Article 2.3 because, first, the USDOC's association determination was not one that an unbiased and objective investigating authority could have reached on the basis of the record evidence, and thus, the USDOC constructed the export price without making a proper determination of association between the concerned entities.[186] Second, in Korea's view, even where association exists, an investigating authority is in addition required to determine whether the export price is actually unreliable because of such association, as the export price may be reliable even in such cases.[187] But the USDOC failed to make such a determination.

7.4.1 Provision at issue

7.138. Article 2.3 of the Anti-Dumping Agreement reads:

> In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.

7.4.2 Factual background

7.139. The USDOC addressed whether there was association between the concerned entities through an examination of affiliation under US law, which specifies that affiliation exists between "[a]ny person who controls any other person and such other person".[188] In turn, a person shall be considered to control another person "if the person is legally or operationally in a position to exercise restraint or direction over the other person".[189] The USDOC first examined whether NEXTEEL was affiliated with POSCO under US law, by examining whether POSCO was legally or operationally in a position to exercise restraint or direction, i.e. control over NEXTEEL.

7.140. The USDOC explained that in its analysis, it would first consider whether these two entities had a close supplier relationship, considering POSCO's status as a supplier of steel coils to NEXTEEL.[190] The threshold issue in finding whether there was such a close supplier relation was whether either the buyer, i.e. NEXTEEL or the supplier, i.e. POSCO, was reliant on the other.[191] Further, if such reliance existed, the USDOC would consider whether one of the parties was in a position to exercise direction or restraint over the other.[192] However, the USDOC would not find affiliation on this basis unless the relationship between the entities had the potential to affect decisions concerning the production, pricing or cost of the subject merchandise or foreign like

[184] Korea's response to Panel question No. 28, para. 88; and United States' response to Panel question No. 28, para. 76.
[185] In this Report, we use the term "affiliation" when we describe the USDOC's own analysis of the record evidence, or what the USDOC did, in determining whether there was "affiliation" between the concerned entities, under US law. We use the term "association" when describing the obligations under the Anti-Dumping Agreement, and in deciding whether the USDOC met these obligations.
[186] Korea's first written submission, paras. 160 and 161; response to Panel question No. 30(a), para. 94.
[187] Korea's response to Panel question No. 30(a), para. 97.
[188] Customs duties, General Provisions, *United States Code*, Title 19, Section 167719 USC 1677 (33) G, (Exhibit KOR-55). See also United States' response to Panel question No. 28, para. 75.
[189] 19 USC 1677 (33), (Exhibit KOR-55). See also United States' response to Panel question No. 28, para. 75.
[190] USDOC's Affiliation Memorandum, (Exhibit KOR-43) (BCI), p. 2. See also 19 C.F.R. § 351.102(b)(3), (Exhibit KOR-52), p. 211.
[191] USDOC's Affiliation Memorandum, (Exhibit KOR-43) (BCI), p. 2.
[192] USDOC's Affiliation Memorandum, (Exhibit KOR-43) (BCI), p. 3.

product, i.e. OCTG.[193] Having set out the criteria that it would apply in examining whether NEXTEEL and POSCO were affiliated, the USDOC proceeded to evaluate the record evidence to determine whether these criteria were met, and concluded, for the reasons described in paragraphs 7.152-7.153 below, that NEXTEEL and POSCO were affiliated with each other.

7.141. The USDOC then turned to examine whether NEXTEEL was affiliated with Company A and Company B. The USDOC noted that Company A was a **[[***]]** of POSCO.[194] The USDOC also found that Company B was **[[***]]** by Company A.[195] The USDOC did not separately examine whether Company A and Company B were in a position to exercise restraint or direction over NEXTEEL. Instead, having already concluded that NEXTEEL was affiliated with POSCO, the USDOC concluded that NEXTEEL was also affiliated with these two entities in which **[[***]]**. Thus, the USDOC concluded that there was association between the concerned entities.

7.4.3 Main arguments of the parties

7.142. Korea asserts that Article 2.3 of the Anti-Dumping Agreement requires an investigating authority to meet two cumulative requirements before it is permitted to construct the export price, both of which the USDOC failed to meet. First, the USDOC constructed the export price without making a proper association determination, contrary to its obligations under Article 2.3. Second, the USDOC "mechanically conclu[ded]" that because of association between the concerned entities, NEXTEEL's export price to Company A was unreliable.[196] That is, it did not affirmatively determine whether or not NEXTEEL's export price was actually unreliable, which Korea maintains is required under Article 2.3. In this regard, Korea states that NEXTEEL submitted evidence to the USDOC showing that its export price was reliable notwithstanding any association between the concerned entities, but the USDOC ignored this evidence.[197]

7.143. The United States rejects both arguments. First, the United States argues that the USDOC made a proper finding of association, based on the record evidence. Second, noting that Article 2.3 of the Anti-Dumping Agreement provides that it should "appear[]" to the investigating authority that the export price is unreliable because of association, the United States asserts that this means that once an investigating authority properly finds association, it may take the view that the export price is unreliable because of that association, without a separate determination that the export price is actually unreliable.[198]

7.4.4 Main arguments of the third parties

7.144. The European Union submits that association itself could be a sufficient basis under Article 2.3 to construct the export price, and that this provision does not impose an additional obligation to determine whether the export price is actually unreliable because of such association.[199] However, if the evidence on record shows that an export price is reliable despite association, an unbiased and objective investigating authority would be required to take that evidence into account.[200]

7.4.5 Evaluation by the Panel

7.145. We will commence our analysis by considering the nature of obligations imposed by Article 2.3 of the Anti-Dumping Agreement on an investigating authority. Then, we will examine whether that provision, as we understand it, was complied with by the USDOC in the underlying investigation.

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[193] USDOC's Affiliation Memorandum, (Exhibit KOR-43) (BCI), p. 3. See also 19 C.F.R. § 351.102(b)(3), (Exhibit KOR-52), p. 211.
[194] USDOC's Affiliation Memorandum, (Exhibit KOR-43) (BCI), p. 4.
[195] USDOC's Affiliation Memorandum, (Exhibit KOR-43) (BCI), p. 4.
[196] Korea's second written submission, para. 242.
[197] Korea's second written submission, para. 244.
[198] United States' first written submission, para. 155.
[199] European Union's third-party submission, para. 41.
[200] European Union's third-party submission, para. 43.

7.146. Article 2.3 permits an investigating authority to disregard the transaction export price and construct the export price where, *inter alia*, "*it appears to the authorities concerned that the export price is unreliable because of association*" between the exporter and the importer or a third party. In our view, it is clear that an investigating authority must have grounds for the view that there is association. If there is no association, the export price cannot appear to be unreliable to the investigating authority "because of" association.[201]

7.147. While it is clear that the appearance of unreliability must be because of association, the text of Article 2.3 does not require any "determination", let alone a determination as to the *reliability* of the export price. If such a determination had been intended, in our view Article 2.3 would have been drafted differently, to require, for example, that the investigating authority determine or demonstrate that the export price is unreliable because of association. Instead, it provides that export price may be constructed where it "appears to the authorities" that the export price is unreliable. The verb "appear" has different definitions but we find the definition "seem to the mind, be perceived as, be considered" to be the most appropriate in respect of the text of Article 2.3.[202] The adjective "unreliable" is defined as "not reliable".[203] "Reliable" in turn is defined as "in which reliance or confidence may be put, trustworthy".[204] Thus to us, the use of the terms "appear to the authorities" and "unreliable" in Article 2.3 denotes a situation in which, because of the association at issue, the investigating authority perceives the export price not to be trustworthy. Of course, an investigating authority must have grounds for this view: it is always obliged to establish facts properly and evaluate them in an unbiased and objective manner. Nothing in our understanding of Article 2.3 would suggest, however, any separate requirement to make a "determination" as to the reliability of the export price.

7.148. It is also clear, in our view, that Article 2.3 does not allow an investigating authority to construct export price whenever there is association. If that were the case, we would again have expected Article 2.3 to have been drafted differently, to require, for instance, that an investigating authority may construct the export price where there is association.[205] An investigating authority could not simply ignore evidence before it suggesting that the export price is reliable notwithstanding association and go on to construct the export price without considering such evidence. As noted above, an investigating authority has an obligation to establish facts properly and evaluate them in an unbiased and objective manner, which entails the consideration of relevant evidence on the issues before it.[206]

7.149. Korea argues that, in the underlying investigation, the USDOC erred in finding association between the concerned entities, and ignored evidence presented by NEXTEEL showing that its export price to Company A was reliable notwithstanding the USDOC's finding of association. Therefore, we must consider both the finding of association, and whether the evidence to which Korea refers is relevant to the question of the reliability of the export price in the circumstances of the underlying investigation, such that the USDOC's failure to consider it undermines its decision to construct the export price. Specifically, we will address the following two questions:

a. Whether the USDOC's conclusion of association between the concerned entities was inconsistent with Article 2.3.

[201] Article 2.3 of the Anti-Dumping Agreement also recognizes that an export price may appear to be unreliable to the investigating authority because of a "compensatory arrangement" between the exporter and the importer or a third party. Both parties agree, however, that in the underlying investigation, the USDOC found association and not a compensatory arrangement between the concerned entities.

[202] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 101.

[203] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 3456.

[204] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 2521.

[205] The United States agrees that a finding of association will not necessarily suffice to meet the requirements under Article 2.3. (United States' response to Panel question No. 33, para. 81).

[206] We recall that in reviewing the USDOC's determination under Article 17.6(i) of the Anti-Dumping Agreement, we are required to examine whether its establishment of the facts was proper and whether its evaluation of those facts was unbiased and objective.

b. Whether the USDOC erred in not considering evidence of the reliability of NEXTEEL's export price.

7.4.5.1 Whether the USDOC's conclusion of association between the concerned entities was inconsistent with Article 2.3

7.4.5.1.1 Meaning of "association" under Article 2.3

7.150. Article 2.3 does not define association. The dictionary definitions of "association" include "action of joining or uniting for a common purpose; the state of being so joined".[207] These definitions are not limiting, and thus "association" may arise from formal legal ties or far less structured and non-binding relationships. But it is clear from the overall context of Article 2.3 that the remedy for the appearance of unreliability resulting from association provided for in that Article is the construction of the export price on the basis of the price at which the exported merchandise is first resold to an *independent* buyer. This strongly suggests that a lack of independent action is central to the nature of "association" and gives rise to the problem Article 2.3 seeks to remedy.

7.151. "Independent" is defined as "not subject to the authority or control of any person, country, etc.; free to act as one pleases, autonomous".[208] Thus, for purposes of Article 2.3, association may be understood to mean a *lack* of autonomy to act as one pleases or the *presence* of authority or control over a person. Therefore, we consider that, at a minimum, there may be association for purposes of Article 2.3 where an exporter and the importer or a third party do not act independently of one another. Based on this understanding, a situation in which export sales are between associated entities, as opposed to *independent* entities, may constitute the problem Article 2.3 seeks to remedy: the appearance of unreliability of export price resulting from association. In considering the USDOC's conclusion of affiliation in the underlying investigation, we will consider whether it was consistent with this understanding of association.

7.4.5.1.2 The USDOC's conclusions regarding association

7.152. In the underlying investigation, the USDOC reached its conclusions regarding association on the basis of US law provisions governing a finding of affiliation, which under US law is based on control. The basis of these conclusions is described in paragraphs 7.139-7.141 above. In examining whether NEXTEEL was affiliated with POSCO based on the evidence before it, the USDOC made the following intermediate factual findings:

a. POSCO supplied NEXTEEL with "virtually all" of the steel coil, the main input used in the production of OCTG, used by NEXTEEL[209];

   i. **[[***]]**% of the steel coil purchased by NEXTEEL during the POI was from POSCO;

   ii. **[[***]]**% of steel coils consumed by NEXTEEL during the POI was from POSCO; and

   iii. Steel coils sourced from POSCO accounted for **[[***]]**% of NEXTEEL's total cost for manufacturing OCTG.

b. **[[***]]** to NEXTEEL related to the production of OCTG[210];

c. **[[***]]** of NEXTEEL's US sales were made through **[[***]]**[211];

d. POSCO had a history of working closely on-site with NEXTEEL departments and providing marketing assistance and other promotional activities for the benefit of NEXTEEL.[212]

[207] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 137.
[208] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 1362.
[209] USDOC's Affiliation Memorandum, (Exhibit KOR-43) (BCI), p. 3.
[210] USDOC's Affiliation Memorandum, (Exhibit KOR-43) (BCI), p. 3.
[211] USDOC's Affiliation Memorandum, (Exhibit KOR-43) (BCI), p. 3.
[212] USDOC's Affiliation Memorandum, (Exhibit KOR-43) (BCI), p. 3.

> POSCO continued to provide marketing support to NEXTEEL during the POI, and POSCO and NEXTEEL shared technology and market information pertaining to OCTG.[213]

7.153. On the basis of these factual findings the USDOC reached the following overall conclusion regarding the relationship between POSCO and NEXTEEL[214]:

> The combination of [POSCO's] involvement on both the production and sales side creates a unique situation where POSCO is operationally in a position to exercise restraint or direction over NEXTEEL in a manner that affects the pricing, production, and sale of OCTG. Being in a position both to establish the primary input cost and **[[***]]** enables POSCO to influence the cost of inputs and additionally to **[[***]]**. The preamble to the [USDOC's] regulations states that section 771(3) of the [US Tariff] Act, which refers to a person being "in a position to exercise restraint or direction," focuses the [USDOC] on the ability to exercise "control" rather than the actuality of control over specific transactions. In this case, by playing the role **[[***]]** supplier and, **[[***]]** POSCO is in a rather unique position to exercise restraint or control over NEXTEEL.

7.154. In addition, as stated above, the USDOC concluded that NEXTEEL was affiliated with Company A and Company B because of POSCO's **[[***]]**.

7.155. In reviewing the USDOC's finding of affiliation, which served as its conclusion regarding association between the concerned entities for purposes of Article 2.3, we recall that pursuant to our standard of review, we must examine whether, in light of the evidence and arguments before it, the conclusions reached by the USDOC are such as could be reached by an unbiased and objective investigating authority.[215] Further, considering that the USDOC's overall conclusion was based on several intermediate factual findings, not only must we examine each of these findings, to the extent necessary, but we must also consider whether these findings, taken as a whole, supported the USDOC's overall conclusion.[216] This means that even were we to conclude that an intermediate factual finding or a particular piece of evidence might not, viewed in isolation, support the USDOC's overall conclusion, if taken as whole, they support that conclusion, we must uphold it.

7.156. Korea contends that in reaching its intermediate factual findings, the USDOC ignored alternative explanations of the record evidence, as well as other evidence which undermined these findings. In particular, Korea argues that:

a. in examining the extent to which NEXTEEL sourced its steel coil supply from POSCO, the USDOC failed to consider that NEXTEEL had alternative sources from which it purchased and consumed steel coils during the POI. The USDOC also drew improper inferences from the nature of the services provided by **[[***]]** to NEXTEEL during the production process of OCTG;

b. the USDOC failed to consider evidence regarding marketing and technology collaboration between NEXTEEL and POSCO that undermined its findings; and

c. the USDOC failed to consider that the volume of NEXTEEL's US sales through Company A and Company B was on the **[[***]]**.

Korea also questions the linkage between the intermediate factual findings and the overall conclusion reached by the USDOC. We will examine each of these arguments below.

7.157. In addition, Korea contends that the USDOC acted inconsistently with the relevant US law provisions governing findings of affiliation based on control.[217] Korea asserts that such a violation

[213] USDOC's Affiliation Memorandum, (Exhibit KOR-43) (BCI), p. 3.
[214] USDOC's Affiliation Memorandum, (Exhibit KOR-43) (BCI), p. 4.
[215] See paras. 7.3-7.5 above.
[216] See, e.g. Appellate Body Reports, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 94; and *US – Countervailing Duty Investigation on DRAMS*, para. 157.
[217] Korea's response to Panel question Nos. 65(a) and (b), para. 78.

of US law led to a violation of Article 2.3 of the Anti-Dumping Agreement in this case, because having decided to find association under Article 2.3 on the basis of US law, the USDOC was required to comply with the requirements of US law.[218] Thus, Korea essentially requests us to determine whether the USDOC's conclusion regarding association or affiliation was consistent with US law.

7.158. As a panel established under the DSU, our role is to determine the consistency of the United States' measures with its obligations under, in this instance, Article 2.3 of the Anti-Dumping Agreement and not under US law. It is not our role, nor are we competent, to review the consistency of the USDOC's findings with governing US law. Therefore, it would be entirely inappropriate for us to review whether the USDOC complied with US law in its examination of affiliation based on control, and we will not do so. At the same time, however, we must consider the consistency of the United States' measure with Article 2.3 on the basis of the conclusions reached by the USDOC. We may not engage in a *de novo* review of the evidence and arguments that were before the USDOC to determine whether it could have found association under Article 2.3 on some other basis than that on which it reached its conclusions.

7.159. Keeping these considerations in mind, we will proceed in the following manner: We will first review the USDOC's intermediate factual findings, and whether taken as a whole, these findings support the USDOC's overall conclusion regarding affiliation. Then, we will examine whether this overall conclusion was a sufficient basis for a conclusion that there was association between the concerned entities within the meaning of Article 2.3 of the Anti-Dumping Agreement.[219]

7.4.5.1.2.1 NEXTEEL's purchases and consumption of steel coils during the POI and USDOC's inferences based on the nature of services provided by [[***]] to NEXTEEL during the production process of OCTG

7.160. In the underlying investigation, the USDOC considered the role of POSCO in the production of OCTG by NEXTEEL. The USDOC noted that POSCO supplied NEXTEEL with "virtually all" of the steel coils used to produce OCTG and that steel coils purchased from other sources were negligible.[220] Further, the USDOC found that **[[***]]** to NEXTEEL related to the production of OCTG.

7.161. Korea argues that the USDOC failed to consider submissions made by NEXTEEL that it had alternative sources of supply available to it, and that it had, in fact, used steel coils sourced from other suppliers during the period of investigation.[221] The United States notes, and the record confirms, that the USDOC did not ignore this evidence, but nonetheless found that POSCO accounted for **[[***]]**% of NEXTEEL's consumption of steel coils in the POI and **[[***]]**% of its total POI purchases of steel coils.[222] As stated above, the USDOC did not conclude that POSCO supplied NEXTEEL with all steel coils used in the production of OCTG[223], and the evidence does

[218] Korea's response to Panel question Nos. 65(a) and (b), para. 80.

[219] Noting the USDOC's conclusion that "[b]eing in a position to establish the primary input cost and **[[***]]** enables POSCO to influence the cost of inputs and additionally to **[[***]]**", Korea asserts that this statement shows that instead of determining association between NEXTEEL and POSCO on the basis of control, as it sought to do, the USDOC determined association on the basis of the **[[***]]** exercised by POSCO over **[[***]]**. (Korea's second written submission, para. 235). Considering that our role is not to adjudge the consistency of this conclusion with US law, we do not find it necessary to consider whether the concept of **[[***]]** is consistent with that of control, under US law.

[220] USDOC's Affiliation Memorandum, (Exhibit KOR-43) (BCI), p. 3.

[221] Korea's first written submission, para. 171 (referring to NEXTEEL Rebuttal Brief, 23 June 2014, (Exhibit KOR-42) (BCI), pp. 63 and 64); response to Panel question No. 61, para. 65.

[222] United States' comments on Korea's response to Panel question No. 61, para. 52 (citing USDOC's Affiliation Memorandum, (Exhibit KOR-43) (BCI), p. 3).

[223] We recognize that just because a buyer purchases its inputs predominantly or even exclusively from a single seller does not necessarily mean that the buyer and seller do not act independently of each other. Otherwise, association between a buyer and seller would exist whenever the seller has a monopoly on the production and sale of a particular input used in the production of the product being investigated. However, this was not the only basis of the USDOC's conclusion in the underlying investigation.

support the finding that the USDOC did make.[224] Thus, the USDOC did not ignore evidence or arguments before it.

7.4.5.1.2.2 Marketing and technology collaboration between POSCO and NEXTEEL

7.162. The USDOC found that POSCO had a history of working closely with NEXTEEL, providing marketing assistance and conducting other promotional activities for NEXTEEL's benefit.[225] The USDOC also found that POSCO continued to provide marketing support to NEXTEEL and both companies shared technology and market information pertaining to OCTG.[226] The USDOC relied on evidence furnished by the domestic industry in making this finding.[227]

7.163. That evidence relates to technical consulting provided by POSCO to NEXTEEL, technical checks provided by POSCO on finished products, joint development of new materials and POSCO's takeover of NEXTEEL's overseas public relations campaign, as well as NEXTEEL's acknowledgement that "mutual cooperation" between NEXTEEL and POSCO boosted its competitiveness, and would continue in the future.[228] In addition, a **[[***]]** between NEXTEEL and POSCO provides for **[[***]]**.[229][230] Korea does not question the reliability of this evidence in these proceedings.

7.164. Korea argues that the evidence relied on by the USDOC could not have supported the USDOC's intermediate factual finding of marketing and technology collaboration between NEXTEEL and POSCO, and that the USDOC ignored evidence other than these that could have undermined its conclusions regarding association.[231] First, Korea notes that the record evidence showed that POSCO shared technology and market information pertaining to OCTG with other companies with which it did business, and that instances of such cooperation were not exclusive between POSCO and NEXTEEL but in line with normal supplier-customer relations, and asserts that this evidence was not considered by the USDOC in its analysis.[232]

7.165. Korea essentially argues that evidence of marketing and technology collaboration between NEXTEEL and POSCO could have probative value only if these two entities had an *exclusive* collaborative relationship. We find nothing in the notion of association as we understand it for purposes of Article 2.3 that would suggest that the lack of an exclusive relationship means that the evidence is not probative on the question of association or cannot support the inferences drawn by the USDOC on the basis of this evidence. Indeed, an exporter may have associations with multiple entities, in which case, the relationship between the exporter and any one of those entities will not be exclusive. Yet, that relationship may nonetheless suffice to show association for purposes of Article 2.3.

7.166. Second, Korea notes that the **[[***]]** was not **[[***]]** and there were no **[[***]]** agreements between POSCO and NEXTEEL.[233] Korea has failed to explain why the fact that an agreement regarding various aspects of the relations between two companies is not **[[***]]**

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[224] Similarly, we do not consider that evidence that **[[***]]** to NEXTEEL to be sufficient, in and of itself, to show that there was association between NEXTEEL and POSCO.

[225] USDOC's Affiliation Memorandum, (Exhibit KOR-43) (BCI), p. 3.

[226] USDOC's Affiliation Memorandum, (Exhibit KOR-43) (BCI), p. 3.

[227] USDOC's Affiliation Memorandum, (Exhibit KOR-43) (BCI), p. 3 and fns 18 and 19 (referring to evidence in Exhibit USA-17 as well as a **[[***]]** between NEXTEEL and POSCO contained in Exhibit USA-46 (BCI)).

[228] U.S. Steel Deficiency Comments, 20 November 2013, (Exhibit USA-17), attachment C, pp. 3-5; and Korea's response to Panel question No. 64, para. 68.

[229] NEXTEEL confirmed that this actually occurred, stating that [[***]]. (NEXTEEL's supplemental section D questionnaire responses, 23 December 2013, (Exhibit USA-46) (BCI), p. 24).

[230] United States' response to Panel question No. 66, para. 43 (quoting **[[***]]** between NEXTEEL and POSCO, NEXTEEL's supplemental section D questionnaire responses, 23 December 2013, (Exhibit USA-46) (BCI), pp. 1 and 2).

[231] See, e.g. Korea's response to Panel question No. 64, para. 69.

[232] For example, as noted by Korea, NEXTEEL submitted that it cooperated with POSCO as part of the **[[***]]**, but that 1600 companies participated in that program and that POSCO itself partnered with 400 companies as part of that program. (Korea's first written submission, para. 180; and NEXTEEL Rebuttal Brief, 23 June 2014, (Exhibit KOR-42) (BCI), p. 67). See also Korea's first written submission, paras. 179 and 180 (referring to NEXTEEL Rebuttal Brief, 23 June 2014, (Exhibit KOR-42) (BCI), pp. 63-69); and response to Panel question No. 64, paras. 69 and 71.

[233] Korea's comments to the United States' response to Panel question No. 66, para. 100.

demonstrates that it is not relevant to the question of association between those companies. Indeed, as we understand it, association for purposes of Article 2.3 can exist without any formal agreement, much less a **[[***]]** agreement. Accordingly, we are not persuaded that an objective and unbiased investigating authority could not have found, on the basis of the evidence in question, that there was marketing and technological collaboration between NEXTEEL and POSCO with respect to OCTG, or that these two entities did not act independently of each other in the production and sale of OCTG.

7.4.5.1.2.3 [[***]] in US sales through Company A and Company B[234]

7.167. The USDOC found that **[[***]]**.[235] However, Korea notes that NEXTEEL's US sales through Company A and Company B **[[***]]** throughout the POI.[236] In particular, while in the first half of POI, NEXTEEL sold **[[***]]** of its OCTG, by volume, through Company A and B, that percentage **[[***]]** to **[[***]]** in the second half of POI.[237] Korea argues that the **[[***]]** proportion of sales through these entities contradicts the notion that NEXTEEL was controlled by Company A and Company B.

7.168. The USDOC recognized that the proportion of NEXTEEL's sales through Company A and Company B **[[***]]** during the POI in its evaluation[238]:

> [W]e note that while POSCO's **[[***]]** the Department must make its decision regarding affiliation and its impact for purposes of sales and cost based on the POI, the period of time being examined.

7.169. Thus it is clear that the USDOC did consider this issue. However, we recall the USDOC's conclusion that POSCO was in a position to **[[***]]** and that by playing the role of **[[***]]** supplier and **[[***]]** Company A **[[***]]** POSCO was in a position to exercise restraint or direction over NEXTEEL was based, in part, on the fact that POSCO through Company A and Company B sold a **[[***]]** of finished products to the United States.[239] While a more thorough discussion of whether the **[[***]]** in sales through these entities at the end of the POI affected its view that POSCO was in a position to exercise restraint or direction over NEXTEEL would have been desirable, the USDOC's assessment was based on the data for the POI. During the entire POI the volume of exports to the United States that NEXTEEL made through Company A and Company B was a **[[***]]** **[[***]]**, notwithstanding the **[[***]]** at the end of the POI.

7.4.5.1.2.4 The USDOC's overall conclusion of association within the meaning of Article 2.3

7.170. Korea has failed to demonstrate that the evidence relied on by the USDOC did not support its intermediate factual findings. The question that we now turn to is whether the USDOC's overall conclusion of affiliation between the concerned entities was reasonably based on these intermediate factual findings and whether this conclusion sufficed to demonstrate "association" between the exporter and the importer or a third party, within the meaning of Article 2.3 of the Anti-Dumping Agreement.

7.171. We recall that the USDOC's overall conclusion, as set out in paragraph 7.153 was that there was affiliation based on control between NEXTEEL and POSCO because:

a. The combination of POSCO's involvement on both the production and sales side created a unique situation where POSCO was operationally in a position to exercise restraint or

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[234] We understand from Korea's response to our questions that NEXTEEL's exports through both Company A and Company B **[[***]]** during and after the period of investigation. (Korea's response to Panel question No. 63, para. 66).
[235] USDOC's Affiliation Memorandum, (Exhibit KOR-43) (BCI), p. 3.
[236] Korea's response to Panel question No. 31, para. 107.
[237] Korea's response to Panel question No. 31, para. 107. The volume of sales through these entities **[[***]]** further after the POI.
[238] USDOC's Affiliation Memorandum, (Exhibit KOR-43) (BCI), p. 4.
[239] USDOC's Affiliation Memorandum, (Exhibit KOR-43) (BCI), p. 4.

direction over NEXTEEL in a manner that affected the pricing, production, and sale of OCTG.

b. Being in a position to establish the primary input cost and **[[***]]** enabled POSCO to influence the cost of inputs and additionally to **[[***]]**.

c. By playing the role **[[***]]** supplier and **[[***]]** POSCO was in a rather unique position to exercise restraint or control over NEXTEEL.

7.172. The USDOC also concluded that there was affiliation between NEXTEEL, Company A, and Company B because of POSCO's **[[***]]**.

7.173. We recall that the USDOC reached this conclusion based on: (a) undisputed evidence of marketing and technology collaboration between POSCO and NEXTEEL, including through a **[[***]]** that **[[***]]**; and (b) evidence of POSCO's direct and indirect involvement in NEXTEEL's production and sale of OCTG. We recall our view that where the exporter and the importer or a third party are joined or united for a common purpose, this may suggest that they do not act independently of one another, but are instead, dependent on each other, and thus are associated within the meaning of Article 2.3 of the Anti-Dumping Agreement. We consider that the USDOC's overall conclusion of affiliation between POSCO and NEXTEEL sufficed to demonstrate that they were joined or united for a common purpose, and thus there was "association" between the exporter and the importer or a third party, within the meaning of Article 2.3 of the Anti-Dumping Agreement.

7.174. We further consider that the USDOC's conclusion of affiliation between NEXTEEL and Company A and B sufficed to demonstrate that they were joined or united for a common purpose, and thus there was "association" between the exporter and the importer or a third party, within the meaning of Article 2.3 of the Anti-Dumping Agreement. It remains undisputed that POSCO had **[[***]]** and **[[***]]**. Indeed, in its questionnaire response before the USDOC, Company B stated that it was **[[***]]**.[240] Because these entities were **[[***]]** of POSCO, we consider that the conclusion of association between NEXTEEL and POSCO sufficed as a basis to find that these entities, like POSCO, did not act independently of NEXTEEL.

7.175. Therefore, we consider that the USDOC's conclusions regarding the relationship between the concerned entities were supported by the evidence, and sufficed to satisfy the requirement of Article 2.3 that there be association between the exporter and the importer or a third party.

7.4.5.2 Whether the USDOC erred in not considering evidence allegedly pertaining to the reliability of the export price

7.176. During the underlying investigation, NEXTEEL presented evidence to the USDOC, which Korea alleges showed that NEXTEEL's export price was reliable despite association between the concerned entities:

a. evidence that NEXTEEL's relationship with both POSCO and its relationship with the Company A predated the relationship between POSCO and Company A;

b. sales agreement between NEXTEEL, Company A and a US customer that predated POSCO's affiliation with Company A, and the terms of which remained unchanged since POSCO **[[***]]**, and even into the POI;

c. Company A testified that **[[***]]** was not directly or indirectly involved in the sales negotiation or sale of OCTG between NEXTEEL and Company A; and

d. NEXTEEL's sales through Company A **[[***]]** throughout the period of investigation, demonstrating that neither POSCO nor Company A was in a position to control NEXTEEL's sales.

[240] Company A supplemental questionnaire responses, 14 March 2014, (Exhibit KOR-89) (BCI), p. A-7.

Korea argues that the USDOC erred in ignoring this evidence.

7.177. Considering that NEXTEEL's relationship with POSCO, Company A, and Company B predated POSCO's **[[***]]** in Company A, and **[[***]]** in Company B, in Korea's view, there was no effect on NEXTEEL's export price.[241] The United States disagrees with Korea's assertion, stating that because NEXTEEL's export price to Company A was set on a short-term basis, this export price was not set on terms that existed prior to POSCO's **[[***]]** in Company A and Company B.[242] The record supports the United States' assertion in this regard.

7.178. First, the sales agreement between NEXTEEL, Company A, and a US customer cited by Korea does not state **[[***]]**, but rather provides for **[[***]]**. This shows that the export price during the POI was not set on terms that existed prior to POSCO's affiliation with Company A or Company B. This is further confirmed by Company A's questionnaire response[243]:

> **[[***]]**

7.179. Thus, while the sale agreement appears to predate the affiliation between POSCO and Company A, the export price during the POI was not based on the terms in that agreement, but on a [[***.]][244] Therefore, we are of the view that NEXTEEL's export price to Company A could have appeared unreliable to the investigating authority, without a separate evaluation of the timing of NEXTEEL's relationship with POSCO, Company A, and Company B.

7.180. In addition, during the underlying investigation, Company A testified that **[[***]]** was not directly or indirectly involved in the sales negotiations or sale of OCTG between NEXTEEL and Company A. However, we recall that **[[***]]** had an **[[***]]** in Company A, and the USDOC found that Company A and Company B were affiliated with NEXTEEL on this basis. Considering that Company A and Company B were affiliated with NEXTEEL, we consider that NEXTEEL's export price to Company A could have appeared unreliable to the investigating authority, without a separate evaluation of whether **[[***]]** was involved, directly or indirectly, in the export sales made by NEXTEEL.

7.181. Finally, Korea refers to the fact that NEXTEEL's sales of OCTG through Company A **[[***]]** in the POI. We have already found above that the USDOC considered this fact in finding affiliation. It is not clear, however, and Korea has not shown, the relevance of this fact to the reliability of NEXTEEL's export prices.

7.182. Therefore, we consider that Korea has not demonstrated that the USDOC erred in not considering evidence allegedly showing that the export price was reliable notwithstanding the association between NEXTEEL, POSCO, and the concerned entities.

7.4.6 Conclusion

7.183. For the foregoing reasons, we find that Korea has not demonstrated that the USDOC acted inconsistently with Article 2.3 of the Anti-Dumping Agreement in the underlying investigation.

7.5 Whether the USDOC's decision to reject the price at which NEXTEEL purchased steel coils from POSCO was inconsistent with Article 2.2.1.1 of the Anti-Dumping Agreement

7.184. In constructing the normal value for NEXTEEL on the basis of its cost of production, the USDOC rejected the price that NEXTEEL paid to POSCO for the principal input, steel coils (NEXTEEL's steel coil purchase price), on the ground that NEXTEEL and POSCO were affiliated entities. Korea contends that the USDOC's rejection of this price, reflected in NEXTEEL's records, on the ground that these records did not "reasonably reflect the costs associated with the

[241] See, e.g. Korea's response to Panel question No. 67, paras. 84-86.
[242] United States' comments on Korea's response to Panel question No. 67, para. 65.
[243] Company A supplemental questionnaire responses, 14 March 2014, (Exhibit KOR-89) (BCI), p. A-15.
[244] We note that NEXTEEL did not argue before the USDOC that its export price was reliable regardless of whether there was association because the price at which it sold OCTG to Company A was set on terms determined prior to POSCO's affiliation with Company A.

production and sale" of OCTG, was inconsistent with Article 2.2.1.1 of the Anti-Dumping Agreement.[245]

7.5.1 Provision at issue

7.185. Article 2.2.1.1 reads, in part, as follows:

> For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration.

7.5.2 Factual background

7.186. As discussed above, in the underlying investigation, the USDOC found that POSCO was affiliated with NEXTEEL. To consider whether, in this situation, NEXTEEL's steel coil purchase price should be used in constructing normal value, the USDOC calculated the weighted-average price of POSCO's steel coil sales to unaffiliated customers[246], and compared NEXTEEL's steel coil purchase prices (transfer prices) with POSCO's cost of production of OCTG and with the prices at which POSCO sold this product to unaffiliated customers.[247]

7.187. The USDOC found that the transfer prices of all **[[***]]** examined grades of steel coils were above POSCO's corresponding cost of production.[248] However, it found that POSCO had sold **[[***]]** of the **[[***]]** examined grades to unaffiliated customers at prices that were **[[***]]** than the corresponding transfer price to NEXTEEL.[249] The USDOC used the prices of these **[[***]]** grades to the unaffiliated customers in constructing the normal value of NEXTEEL, rather than NEXTEEL's steel coil purchase price.[250]

7.5.3 Main arguments of the parties

7.188. Korea argues that the USDOC acted inconsistently with Article 2.2.1.1 by rejecting NEXTEEL's steel coil purchase price because: (a) the USDOC's finding of affiliation between NEXTEEL and POSCO was erroneous; and (b) there was no evidence on the record of the underlying investigation indicating that NEXTEEL's records did not reasonably reflect the costs associated with production and sale of OCTG. In this regard, Korea acknowledges that the USDOC examined NEXTEEL's steel coil purchase price to assess whether it was an arm's length price. However, Korea contends that in considering whether a producer's records reasonably reflect the costs associated with production and sale of the product under consideration, an investigating authority is required to assess whether the producer's *records* are reliable, and not whether the *costs* reflected in those records are reliable.[251] In Korea's view, the USDOC did not examine, as part of this arm's length test, whether NEXTEEL's *records* were reliable, and thus had no proper basis under Article 2.2.1.1 to reject NEXTEEL's steel coil purchase price.

7.189. The United States contends that the USDOC disregarded NEXTEEL's steel coil purchase price because NEXTEEL's records did not reasonably reflect the costs associated with production and sale of OCTG.[252] The United States notes that the USDOC reached this conclusion based on: (a) a proper finding of affiliation; as well as (b) an arm's length test which compared NEXTEEL's steel coil purchase price with POSCO's cost of production and POSCO's steel coil sales price to

[245] In this regard, there is no dispute between the parties that NEXTEEL's records were kept in accordance with Korean GAAP, as provided in Article 2.2.1.1.
[246] USDOC, Constructed Value calculation adjustments for the Final Determination, 10 July 2014 (USDOC's Constructed Normal Value Memorandum), (Exhibit USA-39) (BCI), p. 3.
[247] USDOC's Constructed Normal Value Memorandum, (Exhibit USA-39) (BCI), p. 3.
[248] USDOC's Constructed Normal Value Memorandum, (Exhibit USA-39) (BCI), p. 3.
[249] USDOC's Constructed Normal Value Memorandum, (Exhibit USA-39) (BCI), p. 3.
[250] USDOC's Constructed Normal Value Memorandum, (Exhibit USA-39) (BCI), p. 3.
[251] See, e.g. Korea's second written submission, para. 235.
[252] United States' second written submission, para. 54.

other unaffiliated customers. The United States asserts that this provided a sufficient basis under Article 2.2.1.1 to reject NEXTEEL's steel coil purchase price.

7.5.4 Main arguments of the third parties

7.190. The European Union argues that the use of the term "normally" in Article 2.2.1.1 means that an investigating authority is permitted to depart from the norm, which is to calculate costs based on the exporter or producer's records provided the two express conditions provided in this Article are met.[253] However, the investigating authority must explain why it departed from this norm.[254]

7.5.5 Evaluation by the Panel

7.191. The issue before us is whether the USDOC's rejection of NEXTEEL's steel coil purchase price, on the ground that NEXTEEL's records did not "reasonably reflect the costs associated with production and sale of" OCTG, was consistent with Article 2.2.1.1 of the Anti-Dumping Agreement. Korea presents two main arguments in support of its claim. First, the USDOC's finding of affiliation between POSCO and NEXTEEL was not proper and hence did not provide a basis under Article 2.2.1.1 to disregard NEXTEEL's steel coil purchase price. Second, even assuming this finding of affiliation was proper, there was still no basis under Article 2.2.1.1 to reject this price because NEXTEEL's records reasonably reflected costs associated with the production and sale of the product under consideration. The United States disagrees with both arguments presented by Korea.[255]

7.192. We begin by noting that nothing in Article 2.2.1.1 sets out any criteria or consideration for determining whether the "records kept by the exporter or producer under investigation … reasonably reflect the costs associated with the production and sale of the product under consideration". It certainly does not address questions of affiliation among companies. The issue before us with respect to this claim is thus not whether the USDOC's finding of affiliation was consistent with Article 2.2.1.1, but whether its rejection of NEXTEEL's steel coil purchase price on the ground that its records did not reasonably reflect the costs associated with production and sale of OCTG was consistent with that provision. Indeed, Korea appears to recognize that there is no basis for concluding that the USDOC's affiliation finding was inconsistent with Article 2.2.1.1, as it makes no argument in this regard. Instead, Korea argues that because the USDOC's finding of affiliation between NEXTEEL and POSCO was inconsistent with Article 2.3 of the Anti-Dumping Agreement, it could not provide a basis under Article 2.2.1.1 to reject NEXTEEL's steel coils purchase price.[256]

7.193. We have already concluded above that the USDOC's conclusion on affiliation was sufficient with respect to the requirements of Article 2.3 of the Anti-Dumping Agreement regarding association. Korea makes no other argument under Article 2.2.1.1 challenging the USDOC's finding of affiliation, and thus there is no basis for us to find error in USDOC's conclusion that, as affiliated companies, NEXTEEL and POSCO did not have an independent buyer-supplier relationship. The issue that we have to consider is whether the USDOC acted inconsistently with Article 2.2.1.1

[253] European Union's third-party submission, para. 46.
[254] European Union's third-party submission, para. 46.
[255] With respect to Korea's second argument, the United States submits that while in its panel request Korea stated that the USDOC acted inconsistently with this provision "because *due to its erroneous finding of affiliation*" between NEXTEEL and POSCO, the USDOC failed to calculate costs on the basis of the records kept by the exporter or producer, as required under Article 2.2.1.1, it is now arguing that the Panel should find that the USDOC violated this requirement even if its finding of affiliation was proper. (United States' second written submission, para. 53 (emphasis added by the United States)). However, the United States does not argue that Korea is precluded from making this argument under Article 6.2 of the DSU. In any case, we do not consider that this argument by Korea deviates from the legal basis of its Article 2.2.1.1 claim, as set out in its panel request. Korea was not required to set out its arguments in the panel request, and is free to present this argument in the panel proceedings. Moreover, the reference in the panel request to the erroneous finding of affiliation between NEXTEEL and POSCO merely identifies the factual basis on which the USDOC made its determination, which was that NEXTEEL and POSCO were affiliated under US law. The legal basis of Korea's claim was, and continues to be, that the USDOC acted inconsistently with Article 2.2.1.1 by failing to calculate costs on the basis of the exporter or producer's, i.e. NEXTEEL's records.
[256] See, e.g. Korea's first written submission, para. 186; and opening statement at the first meeting of the Panel, para. 111.

when it disregarded the price at which NEXTEEL purchased steel coils from POSCO based on its findings that (a) POSCO was an associated supplier; and (b) the price at which POSCO sold **[[***]]** grades of steel coils to NEXTEEL was **[[***]]** than the price at which it sold them to non-affiliated customers.

7.194. Article 2.2.1.1 does not permit an investigating authority to disregard an exporter's or producer's record costs because it considers such costs to be unreasonable or to not be a cost that the exporter or producer would incur under normal circumstances.[257] In *EU – Biodiesel (Argentina)*, the panel and Appellate Body recognized that the focus of this condition is on the exporter's or producer's *records* and on whether these records reasonably reflect the costs incurred by the exporter or producer.[258] The focus is not on whether the reported *costs* are themselves reasonable.[259]

7.195. However, the issue in this case is whether an investigating authority is permitted to disregard the price reflected in an exporter's or producer's records for the purchase of an input from an associated or non-independent supplier, when this price is found to be **[[***]]** that supplier's arm's length prices. In other words, is an investigating authority permitted to conclude, in such a circumstance, that the exporter's or producer's records do not "reasonably reflect" the cost associated with production and sale of the product under consideration? While the panel and Appellate Body reports in *EU – Biodiesel (Argentina)* are relevant to our consideration, this issue was not raised in that dispute, and has not been directly addressed in any previous case.

7.196. The Appellate Body in *EU – Biodiesel (Argentina)* clarified that the phrase "reasonably reflect" means that the records of the exporter or producer *must suitably and sufficiently correspond to or reproduce* the costs that have a genuine relationship with the production and sale of the specific product under consideration.[260] The panel in *EU – Biodiesel (Argentina)*, noting that the ordinary meaning of "reflect" is "to reproduce, esp. faithfully or accurately; to depict" and the ordinary meaning of "reasonable", the adjective underlying the adverb "reasonably" which modifies the verb "reflect", is "rational or sensible, in accordance with reason, and fair and acceptable in amount", found that the requirement that the records *reasonably reflect* the incurred costs means that the records "must depict all the costs [the producer] has incurred in a manner that is – within acceptable limits – accurate and reliable".[261]

7.197. However, this does not mean that the figures reported in an exporter's or producer's records must be accepted for purposes of constructing normal value without further consideration in all cases. Both the panel and the Appellate Body in *EU – Biodiesel (Argentina)* recognized that if the prices recorded in an exporter's or producer's records do not reflect arm's length prices, an investigating authority may find that the records, insofar as those prices are concerned, do not "reasonably reflect" the costs associated with production and sale of the product under consideration.[262] In such a situation, the investigating authority would be entitled to disregard those prices when determining the exporter's or producer's cost of production. Thus, we consider that when the transactions between the exporter or producer and an associated or non-independent entity are found not to be at arm's length, the costs reflected in the exporter's or producer's records cannot be said to be "accurate or reliable" or "suitably and sufficiently correspond" to, i.e. reasonably reflect, the costs associated with production and sale of the product under consideration.

7.198. To examine whether such transactions are or are not at arm's length, and therefore whether the reported prices should be used in constructing normal value, an investigating authority would have to examine the transactions in question. This is what the USDOC did in the underlying investigation. The USDOC calculated the weighted-average price of POSCO's steel coil sales to unaffiliated customers, and compared NEXTEEL's steel coil purchase prices (transfer

[257] Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.30 and 6.37.
[258] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.20; Panel Report, *EU – Biodiesel (Argentina)*, paras. 7.230 and 7.231.
[259] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.37; Panel Report, *EU – Biodiesel (Argentina)*, para. 7.242
[260] Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.20 and 6.22. (emphasis added)
[261] Panel Report, *EU – Biodiesel (Argentina)*, paras. 7.229-7.232.
[262] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.33; Panel Report, *EU – Biodiesel (Argentina)*, fn 400.

prices) with POSCO's cost of production of OCTG and with the prices at which POSCO sold steel coils to unaffiliated customers. The USDOC found that the prices of **[[***]]** grades of steel coils purchased by NEXTEEL from POSCO were **[[***]]** the prices at which POSCO sold these grades of steel coils to other non-affiliated customers. In our view, it was not unreasonable for the USDOC to conclude that NEXTEEL's steel coil purchases were not at arm's length prices, and therefore that NEXTEEL's records did not reasonably reflect the costs associated with the production and sale of OCTG within the meaning of Article 2.2.1.1. In this regard, we note that Korea does not dispute that an investigating authority may conduct an arm's length test in this context.[263] However, Korea asserts that an arm's length test cannot be used to assess whether the costs reflected in the exporter or producer's records reflect some "hypothetical costs" which the investigating authority considers to be more reasonable than the costs actually incurred by the producer or exporter.[264] We agree. As discussed above, the enquiry under Article 2.2.1.1 is not whether costs reported in the producer or exporter's records are reasonable. But this is not the question the USDOC was addressing in this case. In the underlying investigation, the USDOC did not compare NEXTEEL's steel coils purchase price with some "hypothetical" reasonable cost or price. Instead, the USDOC compared the actual price at which POSCO sold steel coils to NEXTEEL with the actual price at which POSCO sold steel coils to non-affiliated customers, and concluded that the former was **[[***]]** the latter.

7.199. In light of the above, we conclude that the USDOC did not act inconsistently with Article 2.2.1.1 in the underlying investigation when it rejected the price at which NEXTEEL purchased **[[***]]** grades of steel coils from POSCO that were found to be **[[***]]** POSCO's arm's length prices to non-affiliated customers.[265]

7.200. For the foregoing reasons, we conclude that the USDOC did not act inconsistently with the second condition in Article 2.2.1.1 in concluding that NEXTEEL's records did not reasonably reflect the costs associated with production and sale of OCTG, and rejecting NEXTEEL's steel coil purchase price for purposes of constructing normal value.

7.6 Whether the USDOC acted inconsistently with Articles 6.2, 6.4, and 6.9 of the Anti-Dumping Agreement

7.201. As discussed above, in its final determination in the underlying investigation, the USDOC determined the CV profit for the Korean respondents on the basis of the Tenaris profit data. It did not, however, make known to interested parties that it had accepted that data on the record or that it had relied on that data for purposes of CV profit determination until the final determination.

7.202. On 17 June 2014, one day before the deadline to submit case briefs in the underlying investigation, the USDOC posted to the record[266] a letter signed by 57 US Senators dated 15 May 2014. On 23 June 2014, the same day as the deadline to submit rebuttal briefs, the USDOC posted to the record a letter signed by 155 Members of the US House of Representatives dated 10 June 2014.[267] These letters, as well as other letters from US lawmakers, local government leaders, and industry representatives and memoranda to the file describing phone calls and meetings with US lawmakers and industry representatives, set out concerns regarding the USDOC's preliminary determination and the impact of OCTG imports on the domestic market in the United States.[268] We refer collectively to these letters and memoranda as the "communications".

7.203. Korea makes the following claims under Articles 6.2, 6.4, and 6.9 of the Anti-Dumping Agreement:

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[263] Korea's response to Panel question No. 68, para. 88.
[264] Korea's response to Panel question No. 68, para. 88.
[265] We note that there is no claim in this dispute regarding the USDOC's choice of information on steel input costs to use in constructing normal value for the Korean respondents, and we express no views on that issue.
[266] As we understand, in USDOC practice, all interested parties have access to all information posted to the non-confidential record, which was the case with the communications at issue here.
[267] Letter dated 10 June 2014 from various members of US Congress and Other Memoranda, (Exhibit KOR-22); and Letter dated 15 May 2014 from various senators, (Exhibit KOR-23).
[268] Letter dated 10 June 2014 from various members of US Congress and Other Memoranda, (Exhibit KOR-22).

a. The USDOC acted inconsistently with Articles 6.2, 6.4, and 6.9 in not disclosing, until its final determination, its decision to accept the Tenaris financial data on the record of the underlying investigation; and

b. The USDOC acted inconsistently with Articles 6.4 and 6.9 of the Anti-Dumping Agreement in not posting to the record certain communications in a timely manner.

7.6.1 Provisions at issue

7.204. **Article 6.2** of the Anti-Dumping Agreement provides:

> Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting, and failure to do so shall not be prejudicial to that party's case. Interested parties shall also have the right, on justification, to present other information orally.

7.205. **Article 6.4** of the Anti-Dumping Agreement provides:

> The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.

7.206. **Article 6.9** of the Anti-Dumping Agreement provides:

> The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

7.6.2 Whether the USDOC acted inconsistently with Articles 6.2, 6.4, and 6.9 in connection with the Tenaris financial statements

7.6.2.1 Main arguments of the parties

7.207. Korea's main arguments are as follows:

a. The USDOC did not afford Korean respondents an opportunity to present evidence in defence of their interests under Article 6.2 because they had no notification from the USDOC that the Tenaris financial statements submitted by U.S. Steel, which Korean respondents contended were submitted untimely, were properly on the record.[269]

b. The Tenaris financial statements constitute "relevant" information under Article 6.4, and the USDOC failed to notify the Korean respondents of its decision to accept the Tenaris financial data and failed to provide the Korean respondents with any opportunity to prepare presentations regarding such data, inconsistently with Article 6.4.[270]

[269] Korea's first written submission, paras. 189, 203 and 204 (referring to Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 241); opening statement at the first meeting of the Panel, para. 115.

[270] Korea's first written submission, paras. 205 and 206 (referring to Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 145; and Panel Reports, *EC – Salmon (Norway)*, para. 7.769; and *EC – Fasteners (China) (Article 21.5 – China)*, para. 7.89).

c. Finally, the USDOC's decision to accept the Tenaris financial statements on the record constitutes an "essential fact" which was not disclosed in sufficient time before the final determination, inconsistently with Article 6.9. In addition, the USDOC's reliance on the Tenaris financial statements was an essential fact that was not disclosed to interested parties in sufficient time before the final determination, inconsistently with Article 6.9.[271]

7.208. The United States argues that:

a. The Korean respondents had the opportunity, which they utilized, to challenge the Tenaris financial data. They submitted written arguments against its use on several occasions, as well as oral arguments at the USDOC hearing.[272] Therefore, the USDOC provided Korean respondents a full opportunity to defend their interests under Article 6.2.

b. The USDOC did notify the respondents, in its preliminary determination, that it had accepted the Tenaris financial data and examined it as one of three possible options for CV profit. In addition, all interested parties had access to the Tenaris financial statements once U.S. Steel filed the information on the record, four months before the final determination.[273] Therefore, the Korean respondents did see all the information, which was relevant to the presentation of their case, and were able to, and did, prepare presentations responding to it in accordance with Article 6.4.[274]

c. Korea's allegations that "whether the USDOC would accept the placement of the Tenaris financial statements on the record" and the "USDOC's reliance on the financial statements" were essential facts conflate "essential facts" with an investigating authority's deliberations and conclusions.[275] Article 6.9 does not require an authority to disclose its reasoning or conclusions. Therefore, the USDOC was not required to inform the respondents that it had chosen to accept the financial statements submitted by the petitioners or that it would rely on the information in those statements.[276]

7.6.2.2 Main arguments of third parties

7.209. The European Union makes the following arguments:

a. Whether an investigating authority's decision to accept a party's submission into the record could, in itself, be considered "information" within the meaning of Article 6.4, is questionable.[277] Whether an investigating authority's decisions pertaining to the formation of the record could, in themselves be considered as "essential facts" is also questionable. A document which formed the basis for the profit rate calculation would, however, set out "essential facts".[278]

b. Where the authority's decision shifts significantly between the preliminary and final determinations due to the submission of new essential facts, it may not suffice that such

[271] Korea's first written submission, para. 212.
[272] United States' first written submission, paras. 206 and 208 (referring to AJU BESTEEL Case Brief, 18 June 2014, (Exhibit USA-18), pp. 5-7; HUSTEEL Case Brief, 18 June 2014, (Exhibit USA-19), pp. 17-24; HYSCO Rebuttal Brief, 24 June 2014 (complete), (Exhibit USA-25), pp. 34-41; HYSCO Case Brief, 19 June 2014, (Exhibit USA-24), pp. 41-55; NEXTEEL Case Brief, 19 June 2014, (Exhibit USA-22); NEXTEEL Rebuttal Brief, 24 June 2014, (Exhibit USA-23); and OCTG Hearing Transcript, 26 June 2014, (Exhibit KOR-32) pp. 112-122).
[273] United States' first written submission, para. 212 (referring to Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, paras. 5.121-5.123).
[274] United States' first written submission, para. 214.
[275] United States' first written submission, para. 216.
[276] United States' first written submission, paras. 219 and 220 (referring to Panel Reports, *China – GOES*, para. 7.407; *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 7.148; and *EC – Salmon (Norway)*, para. 7.808).
[277] European Union's third-party submission, para. 57 (referring to Appellate Body Report, *EC – Fasteners (China)*, para. 480).
[278] European Union's third-party submission, para. 62.

facts are on the record of the investigation, but the investigating authority's reliance on them may need to be additionally disclosed.[279]

7.6.2.3 Evaluation by the Panel

7.210. For purposes of its preliminary determination, the USDOC had considered determining the CV profit on the basis of the Tenaris profit data as one of several options. However, it did not do so for two reasons: (a) the Tenaris data did not relate to production or sales of OCTG in the home market; and (b) it was based on a research paper the accuracy of which was questionable. Ultimately, in its preliminary determination, the USDOC determined CV profit for HYSCO based on sales of non-OCTG pipe products in Korea, and for NEXTEEL using the audited financial statements of six Korean OCTG producers.[280] The USDOC noted in the preliminary determination that it intended to continue exploring other possible options for determining CV profit for both respondents.[281]

7.211. After the preliminary determination, the USDOC issued a supplemental questionnaire to NEXTEEL[282], to which NEXTEEL submitted a response. Subsequently, the petitioner in the underlying investigation, U.S. Steel, made a submission under 19 C.F.R. § 351.301(c)(1)(v), purportedly to rebut, clarify, or correct factual information contained in that questionnaire response. U.S. Steel's submission included Tenaris's audited financial statements.[283] In response, NEXTEEL requested the USDOC to remove the Tenaris financial data from the record, asserting that it had been filed past the deadline for such submissions.[284] The USDOC did not respond separately to that request, but in its final determination noted that the Tenaris financial statements were properly on the record and went on to determine the CV profit, for both HYSCO and NEXTEEL, on the basis of that data.[285]

7.212. The principal legal issue before us is whether the USDOC, in not disclosing its acceptance of the Tenaris financial statements on the record until its final determination, failed to:

a. provide a full opportunity for respondents to defend their interests in accordance with Article 6.2;

b. provide timely opportunities for Korean respondents to see all non-confidential information relevant to the presentation of their cases and to prepare presentations on the basis of this information in accordance with Article 6.4; and

c. disclose "essential facts under consideration which form the basis for the decision whether to apply definitive measures" in a timely manner in accordance with Article 6.9.

7.6.2.3.1 Whether the USDOC acted inconsistently with Article 6.2 in not disclosing, until its final determination, that it had accepted the Tenaris financial statements on the record

7.213. Korea argues that the USDOC's failure to notify its acceptance of the Tenaris financial statements on the record until the final determination precluded the Korean respondents from: (a) launching a "full-scale argument"[286]; and (b) submitting factual information rebutting the content

[279] European Union's third-party submission, para. 65 (referring to Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.130).
[280] Preliminary Decision Memorandum, (Exhibit KOR-5), p. 22.
[281] Preliminary Decision Memorandum, (Exhibit KOR-5), p. 22.
[282] USDOC, Third supplemental section D questionnaire to NEXTEEL, 20 February 2014, (Exhibit KOR-18) (BCI).
[283] U.S. Steel Submission of Tenaris Audit Report, 21 March 2014, (Exhibit KOR-19).
[284] NEXTEEL Request to reject untimely new factual information, 27 March 2014, (Exhibit KOR-20).
[285] Final Decision Memorandum, (Exhibit KOR-21), pp. 28 and 29.
[286] Korea's second written submission, para. 285; opening statement at the first meeting of the Panel, para. 115.

of those statements[287], and thus denied them the opportunity to defend their interests under Article 6.2.

7.214. Article 6.2 of the Anti-Dumping Agreement provides, in relevant part, that "throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests". It is understood that while Article 6.2 imposes a general duty on an investigating authority to ensure that interested parties have a full opportunity throughout an anti-dumping investigation for the defence of their interests, it does not give specific guidance on the type of procedural steps an investigating authority should take in ensuring the rights of interested parties.[288]

7.215. We are not persuaded that because USDOC did not disclose its acceptance of the Tenaris financial statements on the record until the final determination, the Korean respondents were prevented from launching a "full-scale argument".[289] The record shows that the Korean respondents did, in fact, make several submissions commenting on the substantive aspects of the Tenaris profit data and arguing against its use in determining CV profit.[290] Thus, it is clear that the Korean respondents were aware of the data in question, did have opportunities to present arguments against its use as a basis for CV profit determination, and did make use of those opportunities.

7.216. Korea also contends that without notice of an affirmative decision by the USDOC that the Tenaris data was properly on the record, the Korean respondents were not "permitted to" submit factual information to support their arguments against the use of that data as a basis for CV profit determination.[291] In particular, Korea asserts that the Korean respondents could not make factual submissions in response to the Tenaris financial statements (rebuttal facts) because those statements were submitted in contravention of the governing relevant USDOC regulation, 19 C.F.R. § 351.301. Korea contends that even though U.S. Steel stated that it was submitting the Tenaris financial statements under 19 C.F.R. § 351.301(c)(1)(v), the submission was not consistent with the requirements of that provision because it did not "rebut, clarify or correct" factual information in NEXTEEL's Supplemental Questionnaire Response.[292]

7.217. The facts on the record of these proceedings do not support Korea's assertion that the Korean respondents were precluded from presenting rebuttal facts unless the USDOC notified them of its acceptance of those statements on the record. We are also not persuaded that the Korean respondents were prevented from presenting rebuttal facts because the Tenaris statements were submitted in contravention of the governing relevant USDOC regulation. As described above, after the preliminary determination, the USDOC issued a supplemental questionnaire to NEXTEEL[293], in reply to which NEXTEEL submitted its response. The United States relies on US regulation 19 C.F.R. § 351.301(c)(1)(v). That regulation provides that an interested party, other than the original submitter of a supplemental questionnaire response – here U.S. Steel – has one opportunity to submit factual information to rebut, clarify, or correct factual information contained in that questionnaire response within a specified time-frame. Korea has not pointed to any other conditions for such a submission in this regulation.

7.218. The regulation further provides that the original submitter of the supplemental questionnaire response – here NEXTEEL – has one opportunity to submit a sur-rebuttal containing

[287] Korea's second written submission, paras. 285 and 293; first written submission, paras. 189, 203 and 204 (referring to Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 241).
[288] Panel Reports, *Argentina – Poultry Anti-dumping Duties*, para. 7.160; and *Guatemala – Cement II*, para. 8.162
[289] Korea's opening statement at the first meeting of the Panel, para. 115.
[290] United States' first written submission, paras. 206 and 208 (referring to AJU BESTEEL Case Brief, 18 June 2014, (Exhibit USA-18), pp. 5-7; HUSTEEL Case Brief, 18 June 2014, (Exhibit USA-19), pp. 17-24; HYSCO Rebuttal Brief, 24 June 2014 (complete), (Exhibit USA-25), pp. 34-41; HYSCO Case Brief, 19 June 2014, (Exhibit USA-24), pp. 41-55); NEXTEEL Case Brief, 19 June 2014, (Exhibit USA-22); NEXTEEL Rebuttal Brief, 24 June 2014, (Exhibit USA-23); and OCTG Hearing Transcript, 26 June 2014, (Exhibit KOR-32) pp. 112-122).
[291] Korea's second written submission, para. 294.
[292] Korea's response to Panel question No. 69, paras. 96-99.
[293] USDOC, Third supplemental section D questionnaire to NEXTEEL, 20 February 2014, (Exhibit KOR-18) (BCI).

factual information to rebut, clarify, or correct the interested party's rebuttal, clarification, or correction to its supplemental questionnaire response, within seven days of the filing of such a rebuttal, clarification, or correction. Again, Korea has not pointed to any other conditions for such a submission in this regulation. U.S. Steel submitted the Tenaris financial statements under 19 C.F.R. § 351.301(c)(1)(v), purporting to rebut, clarify, or correct factual information contained in NEXTEEL's Supplemental Questionnaire Response.[294] As we understand it, NEXTEEL, as the original submitter of the supplemental questionnaire response, could have submitted rebuttal facts. NEXTEEL did not do so.[295]

7.219. Korea does not dispute the United States' description of the operation of 19 C.F.R. § 351.301(c)(1)(v). Rather, Korea argues that NEXTEEL did not file a sur-rebuttal because the Tenaris financial statements did not constitute rebuttal information under 19 C.F.R. § 351.301(c)(1)(v) and the provision for sur-rebuttal was therefore, not applicable.[296] We are not convinced by Korea's argument. Whether or not the Tenaris financial statements were submitted consistently with the governing regulation was a decision for the USDOC to make in its capacity as investigating authority, and not for NEXTEEL. NEXTEEL did, in fact, object to the U.S. Steel submission as inconsistent with the governing regulation. However, Korea has not shown that anything in the USDOC regulation requires that, having chosen to object to the Tenaris statements' submission, NEXTEEL was thereby automatically precluded from also responding to the substance of those statements. Apparently, it was their choice to await a decision on that objection, which was not forthcoming from the USDOC, rather than seek to make their own sur-rebuttal submission. Pending a decision, NEXTEEL, even if it believed that the Tenaris financial statements should be rejected, was not, in any formal sense, prevented from taking the opportunity to counter the contents of that submission, without prejudice to its objections to the USDOC's acceptance of those statements. Moreover, even if the USDOC erred in not responding to NEXTEEL's objection, a question which is outside our purview, we fail to see how NEXTEEL was precluded from at least attempting to file a sur-rebuttal.

7.220. Korea further argues that NEXTEEL did not file a sur-rebuttal under 19 C.F.R. 351.301(c)(1)(v) because to do so would have amounted to acknowledging that the Tenaris financial statements constituted rebuttal information under that provision and were therefore on the record.[297] Korea has failed to explain how NEXTEEL was precluded from filing a sur-rebuttal and stating that its submission did not amount to an acknowledgement that the Tenaris financial statements had been properly submitted. We agree with the United States that NEXTEEL could have requested that the USDOC reject the U.S. Steel submission because it was improperly submitted while, at the same time arguing in the alternative that the USDOC should accept the sur-rebuttal information should it decide to accept the U.S. Steel submission.[298] In this regard, we recall that Article 6.2 requires that an investigating authority provide *opportunities* for interested parties to defend their interests. We consider the fact that NEXTEEL did not act to defend its own interests in the underlying investigation cannot be equated with a failure by the USDOC to provide opportunities to interested parties to defend their interests.[299]

7.221. Korea also argues that 19 C.F.R. § 351.301(c)(1)(v) permitted only the submitter of the original factual information to submit rebuttal facts, and therefore only NEXTEEL, and not HYSCO, would have been able to submit such rebuttal facts under these regulations.[300] The United States submits that HYSCO and other Korean respondents could also have filed such rebuttal facts "generally" under 19 C.F.R. § 351.301.[301] Korea denies that HYSCO and other Korean respondents had an opportunity to submit rebuttals under the relevant provisions because 19 C.F.R. § 351.301 only permits parties to present arguments that the record is deficient, and does not permit parties to submit unsolicited factual information.[302]

[294] U.S. Steel Submission of Tenaris Audit Report, 21 March 2014, (Exhibit KOR-19), p. 1.
[295] United States' response to Panel question No. 70, paras. 44-46.
[296] Korea's response to Panel question No. 69, paras. 96-98.
[297] Korea's response to Panel question No. 69, para. 99.
[298] United States' comments on Korea's response to Panel question No. 69, para. 75.
[299] See Panel Report, *Egypt – Steel Rebar*, para. 7.88.
[300] Korea's comments on the United States' response to Panel question No. 70(a), para. 102 and fn 96.
[301] United States' response to Panel question No. 70(a), para. 47.
[302] Korea's comments on the United States' response to panel question no. 70, para. 103.

7.222. We recall, however, that Korea's claim under Article 6.2 does not raise the question whether the *USDOC regulation* in question, 19 C.F.R. § 351.301, prevented Korean respondents from making factual submissions to rebut the Tenaris financial statements. Rather, Korea's claim is that the *absence of* a *USDOC notification of its acceptance of those statements on the record* until its final determination prevented them from doing so. Korea has pointed to no specific evidence to show that NEXTEEL, or for that matter, any other Korean respondent, was prevented from filing sur-rebuttal evidence in response to the submission of the Tenaris financial statements only because the USDOC had not notified its acceptance of the Tenaris data on the record. In particular, Korea has not identified any US laws or procedures or any specific requirement imposed by the USDOC in the underlying investigation that made the filing of rebuttal facts by the Korean respondents conditional upon prior notification by the USDOC of its acceptance of the Tenaris financial statements on the record. Korea has also failed to identify any instance in the course of the underlying investigation where the USDOC declined to accept rebuttal facts from the Korean respondents by invoking 19 C.F.R. § 351.301 or any other provision of US domestic law, or for that matter, even without invoking any legal provision.

7.223. As Korea has failed to demonstrate that the USDOC's failure to notify the Korean respondents that it had accepted the Tenaris financial statements on the record until its final determination prevented the Korean respondents from launching a "full-scale argument" and submitting rebuttal facts, we conclude that Korea has failed to establish that the USDOC acted inconsistently with Article 6.2 in this regard.

7.6.2.3.2 Whether the USDOC acted inconsistently with Article 6.4 in not disclosing, until its final determination, that it had accepted the Tenaris financial statements on the record and that it was using those statements in determining CV profit

7.224. As we understand it, Korea's claim under Article 6.4 is that, because the Korean respondents were not informed that the USDOC had accepted the Tenaris financial statements on the record until the final determination, they were not provided a timely opportunity to prepare presentations on the basis of the fact that the Tenaris financial statements were *being used* by the USDOC.[303]

7.225. Article 6.4 requires an investigating authority to provide interested parties timely opportunities to see all non-confidential information that is relevant to the presentation of their cases and that is used by that authority in the anti-dumping investigation, and to prepare presentations on the basis of this information. We see nothing in Article 6.4 that would suggest that an investigating authority must "inform" interested parties of procedural decisions to accept and/or use certain information in the anti-dumping investigation. In any event, we fail to see how a procedural decision to accept and/or use certain information itself would constitute "information that is relevant to the presentation" of an interested party's case.

7.226. Korea characterizes the Tenaris financial statements as the "information" that is "relevant" to the presentation of the Korean respondents' cases and which was "used" by the investigating authority in the anti-dumping investigation.[304] We do not disagree with this characterisation. However, Korea is not arguing that the Korean respondents did not have timely opportunities to see the Tenaris profit data and prepare presentations on that basis. Rather, Korea is arguing that the "information" the Korean respondents did not have timely opportunities to see, and to prepare presentations on the basis of, is the *decision by the USDOC to accept and/or use* the Tenaris financial data on the record.

7.227. Korea also argues that the USDOC's failure to notify the interested parties that it had accepted the Tenaris financial statements on the record until its final determination precluded the Korean respondents from submitting rebuttal facts[305], and thus denied them the opportunity to prepare presentations on the basis of those statements, as required under Article 6.4. We have rejected Korea's claim that the USDOC's failure to notify the interested parties that it had accepted the Tenaris financial statements on the record until its final determination precluded the Korean

[303] Korea's opening statement at the first meeting of the Panel, para. 116.
[304] Korea's first written submission, para. 206.
[305] Korea's second written submission, para. 293.

respondents from submitting rebuttal facts. Therefore, there is no basis for Korea's argument in this regard.

7.228. Based on the foregoing, we conclude that Korea has not established that, in not disclosing until its final determination, that it had accepted the Tenaris financial data on the record and was using that data for determining CV profit, the USDOC failed to provide timely opportunities for Korean respondents to see all non-confidential information relevant to the presentation of their cases used by the USDOC and to prepare presentations on the basis of this information.

7.6.2.3.3 Whether the USDOC acted inconsistently with Article 6.9 in not disclosing, until its final determination, that it had accepted the Tenaris financial statements on the record and that it relied on those statements in determining CV profit

7.229. We have before us two main questions in regard to this claim:

a. whether the USDOC's reliance on the Tenaris profit rate in determining CV profit constitutes an "essential fact" within the meaning of Article 6.9, whose disclosure was therefore required under that provision; and

b. whether the USDOC's acceptance of the Tenaris financial statements on the record constitutes an "essential fact" within the meaning of Article 6.9, whose disclosure was therefore required under that provision.

7.230. We understand from Korea's submissions that the "acceptance on the record" of a submission containing financial statements by the USDOC means a decision to include that submission on the record of the investigation. We understand the USDOC's "reliance" on the submitted financial statements in determining CV profit to be a decision to use the substance of that submission in making its determination. In view of that difference, we will evaluate these two questions separately.

7.231. Article 6.9 provides that:

> The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

It is well accepted that Article 6.9 does not require the investigating authority to disclose its decisions or conclusions.[306]

7.232. Article 6.9 requires the disclosure of essential facts "under consideration", which form the basis for the decision whether to apply definitive measures. That the essential facts, which must be disclosed are "under consideration" at the time of their disclosure, implies that the investigating authority has not yet reached conclusions regarding its reliance on them at that stage. We agree with the views of the panel in *EC – Salmon (Norway)* that essential facts for purposes of Article 6.9 are not only those facts that support a determination, but rather are the body of facts essential to any determination *that are being considered* in the process of analysis and decision-making by the investigating authority.[307] That panel further observed that:

> [I]n our view, the essential facts to be disclosed under Article 6.9 are not affected by the substance of the determination an investigating authority may ultimately make. Indeed, they cannot be, as the essential facts to be disclosed are those "under consideration that form the basis of the decision" – that is, the disclosure of essential facts *precedes* the decision. Thus, at the time of the Article 6.9 disclosure, no decision

[306] Panel Report, *China – GOES*, para. 7.407.
[307] Panel Report, *EC – Salmon (Norway)*, para. 7.796.

> has yet been taken, and, it seems to us, the disclosure of essential facts may not enable an interested party to foresee the ultimate decision.[308]

7.233. Given that the final determination may be affected by further arguments or information submitted after the Article 6.9 disclosure, the investigating authority cannot be required to include conclusions in that disclosure. This view is in keeping with the panel's statement in *EC – Salmon (Norway)* that the requirement in Article 6.9 for disclosure of "essential facts" is not necessarily satisfied by the disclosure of the investigating authority's *conclusions on issues of fact* that must be resolved before a decision to apply definitive measures is taken.[309]

7.234. Turning first to the question whether the USDOC's reliance on the Tenaris profit data to determine CV profit constitutes an "essential fact", as we have stated, the USDOC's reliance on the Tenaris profit data to determine CV profit constitutes a decision to use that data in its determination. In light of the foregoing, we are of the view that Article 6.9 requires an investigating authority to disclose only the essential facts and not its reasoning or its conclusions.[310] Given that the USDOC's reliance on the Tenaris profit data to calculate profit constitutes its conclusion to use that data (as opposed to other data it had before it) in calculating CV profit, in our view, that reliance was not an essential fact within the meaning of Article 6.9, and there was therefore no obligation on the USDOC to disclose it.

7.235. We next consider the question whether the USDOC's acceptance of the Tenaris profit data on the record of the underlying investigation constitutes an "essential fact" within the meaning of Article 6.9.

7.236. Korea argues that the acceptance of the Tenaris profit data on the record constitutes an "essential fact" because: (a) that data was "under consideration" as evidenced by the USDOC's decision to rely on it to calculate CV profit; and (b) it formed the basis for the decision whether to apply definitive measures as the use of that data was the most important factor that raised the respondents' dumping margins from a preliminary *de minimis* to a positive final margin.[311]

7.237. The question raised by Korea's assertion is whether the *acceptance* of the Tenaris profit data on the record rather than the *Tenaris profit data* itself was an essential fact under consideration. There is no issue in Korea's claim regarding whether the *Tenaris profit data* itself was an essential fact. What is pertinent to deciding Korea's claim is therefore not whether the Tenaris data was a fact under consideration by the USDOC for the determination of CV profit, but whether "the acceptance of that data on the record" was a fact under consideration for that determination. We are of the view that the acceptance of the Tenaris profit data on the record does not constitute an "essential fact" within the meaning of Article 6.9.

7.238. We recall that what facts are essential is decided by reference to the determinations that must be made by the investigating authority.[312] In the context of Article 2.2.2(iii), the essential facts were those that were under consideration as forming the basis for the USDOC's CV profit determination. While *data* which is used in the CV profit determination is substantively relevant to that determination, the fact of *acceptance of that data on the record* is not. This is because the fact of acceptance of data on the record, unlike the data itself, cannot be used in making the CV profit determination. The fact of acceptance of a submission on the record, even given that the submission contained the Tenaris profit data that was ultimately relied on, is not required to understand the basis for the USDOC's CV profit determination, because the fact of acceptance of the submission on the record has no substantive relevance to the CV profit determination. We do not consider that the fact of acceptance of the Tenaris profit data on the record was substantively relevant to the *content of the USDOC's findings* on the CV profit and therefore, to the content of its findings on the dumping margin. The fact of acceptance of the Tenaris profit data therefore did not *underlie* the USDOC's final findings and conclusions in respect of any of the three essential

[308] Panel Report, *EC – Salmon (Norway)*, para. 7.796. (emphasis added)
[309] Panel Report, *EC – Salmon (Norway)*, para. 7.806.
[310] United States' first written submission, para. 219.
[311] Korea's response to Panel question No. 36, para. 123.
[312] Appellate Body Report, *China – GOES*, para. 241.

elements – dumping, injury and causation – that must be present for application of definitive anti-dumping measures.[313]

7.239. Our conclusion in this regard is consistent with the views of the Appellate Body in *China – GOES*:

> In order to apply definitive measures at the conclusion of countervailing and anti-dumping investigations, an investigating authority must find dumping or subsidization, injury and a causal link between the dumping or subsidization and the injury to the domestic industry. What constitutes an "essential fact" must therefore be understood in light of *the content of the findings* needed to satisfy the substantive obligations with respect to the application of definitive measures under the Anti-Dumping Agreement and the SCM Agreement, as well as the factual circumstances of each case.
>
> Hence, in the context of the second sentence of Articles 3.2 and 15.2, we consider that the essential facts that investigating authorities need to disclose are *those that are required to understand the basis for their price effects examination*, leading to the decision whether or not to apply definitive measures, so that interested parties can defend their interests.[314]

7.240. Moreover, in our view, the acceptance of the Tenaris profit data on the record forms part of the authority's consideration or reasoning with regard to that data, which is not subject to the disclosure obligation under Article 6.9. It is well accepted that the Article 6.9 disclosure obligation does not apply to the reasoning of the investigating authority, but to the "essential facts" that form the factual basis for that reasoning.[315]

7.241. Korea also argues that the acceptance of the Tenaris profit data on the record constitutes an essential fact because it defined the universe of sources that the USDOC was considering for its CV profit determination. In particular, it enabled the USDOC to determine CV profit on the basis of the Tenaris profit data, which according to Korea, in and of itself, also constitutes an "essential fact" that must be disclosed under Article 6.9. Korea argues that the USDOC's failure to disclose its acceptance of the Tenaris profit data on the record is, therefore, tantamount to its failure to disclose the Tenaris profit data itself as an "essential fact".[316]

7.242. The acceptance of the Tenaris profit data on the record would not mean that the USDOC would necessarily consider that data as the basis for its CV profit determination. Acceptance of a submission on the record by an authority does not necessarily mean that the contents of that submission become "essential facts under consideration" which form the basis for its decision whether to apply definitive measures. Even if the USDOC had disclosed its acceptance of the Tenaris profit data on the record, that disclosure in itself would not have identified the Tenaris data as an "essential fact".

7.243. Based on the foregoing, we conclude that Korea has not established that the USDOC's acceptance of the Tenaris profit data on the record constituted an "essential fact" within the meaning of Article 6.9. We therefore find that the USDOC did not act inconsistently with Article 6.9 in not disclosing its acceptance of that data on the record until its final determination.

7.6.2.4 Conclusion

7.244. For the foregoing reasons, regarding Korea's claims under Articles 6.2 and 6.4 of the Anti-Dumping Agreement, we find that:

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[313] In *Mexico – Olive Oil*, the Panel observed that, in the context of the SCM Agreement, "essential facts" are the "specific facts that underlie the investigating authority's final findings and conclusions in respect of the three essential elements – subsidization, injury and causation – that must be present for application of definitive measures". (Panel Report, *Mexico – Olive Oil*, para. 7.110).

[314] Appellate Body Report, *China – GOES*, paras. 241 and 242. (fns omitted; emphasis added)

[315] Panel Report, *China – GOES*, para. 7.407.

[316] Korea's second written submission, para. 302.

a. The USDOC did not act inconsistently with Article 6.2 because Korea has not established that the USDOC, by not notifying its acceptance on the record of the Tenaris financial statements, prevented the Korean respondents from making factual submissions to counter the contents of those statements, thus denying them a full opportunity for the defence of their interests.

b. The USDOC did not act inconsistently with Article 6.4 because:

   i. it was not required under that provision to inform interested parties of its decision to accept and/or use the Tenaris financial statements on the record; and

   ii. Korea has failed to establish a legal or factual basis for its assertion that the USDOC's failure to disclose that it had accepted the Tenaris financial statements on the record prevented the Korean respondents from making factual submissions to counter the substance of those statements.

7.245. Regarding Korea's claim under Article 6.9, we find that:

a. the USDOC's decision to rely on the Tenaris profit data to determine CV profit did not constitute an "essential fact" within the meaning of Article 6.9 and the USDOC was therefore not required to disclose that reliance by Article 6.9; and

b. the USDOC's acceptance of the Tenaris profit data on the record did not constitute an "essential fact" within the meaning of Article 6.9 and the USDOC was therefore not required to disclose that acceptance by Article 6.9.

7.6.3 Whether the USDOC acted inconsistently with Articles 6.4 and 6.9 in connection with the disclosure of certain communications

7.6.3.1 Main arguments of the parties

7.246. Korea argues that the USDOC's delay in disclosing certain communications was inconsistent with Articles 6.4 and 6.9 of the Anti-Dumping Agreement.[317] According to Korea, these communications constituted "relevant" information used by the investigating authority in the anti-dumping investigation under Article 6.4, as well as "essential facts under consideration" within the meaning of Article 6.9 that formed the basis for the USDOC's decisions.[318]

7.247. The United States contends that Korea fails to explain why the communications at issue constituted information that was "relevant" to the presentation of the respondents' cases, or how the information would have been "used" by USDOC in its investigation.[319] Korea also fails to demonstrate that the communications at issue constitute "essential facts" under consideration that formed the basis for USDOC's decision to apply definitive measures.[320] Moreover, the record shows that the Korean respondents had ample opportunity to and did respond to the relevant letters from the US lawmakers and industry representatives.[321] Further, the United States asserts that it is evident from the face of Korea's panel request that it does not include a claim that the USDOC's delay in disclosing the communications in question was inconsistent with Articles 6.4 and 6.9 of the Anti-Dumping Agreement. Therefore, the Panel should find that this claim falls outside its terms of reference.[322]

[317] Korea's first written submission, paras. 216 and 224; opening statement at the first meeting of the Panel, para. 121 (referring to Letter dated 10 June 2014 from various members of US Congress and Other Memoranda, (Exhibit KOR-22)).
[318] Korea's first written submission, para. 221; second written submission, para. 314.
[319] United States' first written submission, para. 226.
[320] United States' first written submission, para. 226.
[321] United States' first written submission, para. 228.
[322] United States' comments on Korea's response to Panel question No. 75, paras. 85 and 86.

7.6.3.2 Main arguments of third parties

7.248. As regards Korea's claim under Article 6.4, the European Union submits that the Panel should first examine whether the content of the letters was relevant from the respondents' standpoint and whether it related to a required step in the analysis, such as to the determination of normal value.[323] The next issue is whether the investigating authority allowed "timely opportunities" for the respondents to see the information and prepare presentations on the basis of it.[324] As regards Korea's claim under Article 6.9, it is doubtful that a letter that merely expresses support for a certain outcome of the investigation constitutes an essential fact, however important its signatories might be. Article 6.9 could only be relevant if such a letter provides new essential facts which formed the basis of the final determination.[325]

7.6.3.3 Evaluation by the Panel

7.249. The principal legal issues before us are whether the timing of the placement of certain communications on the record deprived Korean respondents of timely opportunities to see non-confidential information that was relevant to the presentation of their cases that was used by the USDOC, inconsistently with Article 6.4, and whether the communications at issue constituted "essential facts" within the meaning of Article 6.9 which were not disclosed to interested parties in a timely fashion. Before addressing these questions, however, we consider it necessary to ascertain whether Korea's panel request includes a claim that that the timing of USDOC's posting of these communications to the record resulted in inconsistency with those provisions.

7.250. We recall that a panel request must identify, by way of a brief summary, the "legal basis of the complaint" and that summary must be "sufficient to present the problem clearly". We also recall that compliance with DSU Article 6.2 must be assessed on the face of the panel request and on the merits of each case, considering the panel request as a whole, and in the light of attendant circumstances.[326]

7.251. Korea's panel request states, in relevant part:

> IV. PROCEDURAL CLAIMS UNDER THE ANTI-DUMPING AGREEMENT AND THE GATT 1994
>
> Korea further considers that the USDOC's actions taken in the course of its anti-dumping investigation of Oil Country Tubular Goods from Korea failed to protect the respondents' due process rights and were otherwise inconsistent with procedural obligations under the following provisions of the Anti-Dumping Agreement or GATT 1994:
>
> 1. Articles 6.2, 6.4, and 6.9 of the Anti-Dumping Agreement because the USDOC did not inform interested parties of its decision to accept the petitioners' submission of Tenaris SA's financial statements for inclusion in the record after all regulatory deadlines for the submission of new factual information had passed.
>
> a. Because the USDOC did not address Korean respondent's request to remove the untimely submission from the record until its Final Determination, the respondents were not granted a full opportunity to defend their interests under Article 6.2.
>
> b. By failing to respond to Korean respondent's request to remove the untimely submission from the record or to clarify whether the financial statements were properly admitted to the official administrative record, the USDOC did not ensure an opportunity for Korean respondents to prepare presentations on the basis of this information under Article 6.4.

[323] European Union's third-party submission, para. 70.
[324] European Union's third-party submission, para. 71.
[325] European Union's third-party submission, para. 72.
[326] Appellate Body Report, *US – Carbon Steel*, para. 127.

c. Because the USDOC did not respond to Korean respondents' requests or clarify whether the financial statements were properly on the record, and because the USDOC used the Tenaris SA financial statements to calculate anti-dumping margins for the Korean respondents for the first time in the Final Determination, the USDOC failed to inform interested parties of "essential facts" that formed the basis of its decision to apply definitive measures under Article 6.9.[327]

7.252. On its face, Korea's panel request does not mention the communications at issue at all. The only "brief summary" with respect to claims under Articles 6.4 and 6.9 relates to the facts surrounding the submission, acceptance, and disclosure of the Tenaris financial data. We thus find it difficult to see how the panel request can be understood to set forth a claim that the timing of the USDOC's posting of the communications at issue to the record was inconsistent with Articles 6.4 and 6.9 of the Anti-Dumping Agreement.[328] At a minimum, we would have expected some reference to the facts surrounding the alleged violation in connection with the communications as brief summary of the legal basis of the complaint, giving some indication of *how* or *why* Korea considered the measure at issue to be inconsistent with Articles 6.4 and 6.9 in this regard. However, in this case, there is nothing on this point in the panel request at all. The panel request does not even mention the communications in question, much less give any indication of the nature of any violation of Articles 6.4 and 6.9 in connection with those communications. We therefore conclude that Korea's panel request does not set out a claim that the USDOC acted inconsistently with Articles 6.4 and 6.9 of the Anti-Dumping Agreement in connection with the communications at issue.

7.253. Korea contends, however, that the circumstances surrounding the USDOC's treatment of the communications in question do not constitute a claim, but are "evidence" to support the claim, identified in its panel request, that the USDOC failed to comply with Articles 6.2, 6.4, and 6.9 in the course of the underlying investigation.[329] Korea submits that in its panel request, it described certain instances in which the USDOC's actions were inconsistent with these provisions as evidence supporting that claim. It contends that having enumerated certain evidence in its panel request does not preclude it from presenting additional evidence in these proceedings, because a party is under no obligation to identify, in its panel request, all the evidence that it intends to advance to support its claims.[330]

7.254. We understand Korea's position to be that it was not precluded from relying on the facts surrounding the communications in question as additional evidence supporting the claim of violation of Articles 6.2, 6.4, and 6.9 set out in its panel request. We are not persuaded by Korea's argument. We do not agree that Korea's panel request set out a general claim that "the USDOC failed to comply with Articles 6.2, 6.4 and 6.9 in the course of the underlying investigation". As is clear from the text of the panel request, Korea's claim is that the USDOC acted inconsistently with Articles 6.2, 6.4, and 6.9 of the Anti-Dumping Agreement *because it did not inform interested parties of its decision to accept the petitioners' submission of Tenaris SA's financial statements for inclusion in the record after all regulatory deadlines for the submission of new factual information had passed*. We recall that the panel request serves an important function of giving notice to Members of the substance of the dispute. In light of the limiting nature of Korea's summary of its claim, we fail to see, and Korea has failed to explain, how the circumstances surrounding the USDOC's treatment of the communications in question could be relevant "evidence" to support that claim.[331] In particular, Korea has not shown how an alleged delay in disclosing the communications in question has any relevance to the question of the USDOC's alleged failure to

[327] Emphasis original.

[328] Korea's first written submission, paras. 216 and 224; second written submission, paras. 314 and 316; and opening statement at the first meeting of the Panel, para. 119.

[329] We note that in its arguments presented over the course of these proceedings, as part of submissions referred to in footnote 328 above, Korea has argued that the USDOC's delay in disclosing certain letters from US lawmakers was inconsistent with Articles 6.4 and 6.9 of the Anti-Dumping Agreement. However, in its response to Panel question No. 75, it characterizes the USDOC's delay in disclosing certain letters from US lawmakers as evidence in support of its claim that the USDOC acted inconsistently with Article 6.2 *in addition to* Articles 6.4 and 6.9 of the Anti-Dumping Agreement. (Korea's response to Panel question No. 75, para. 108).

[330] Korea's response to Panel question No. 75, paras. 108 and 109.

[331] Similarly, Korea's claims under Articles 6.2, 6.4, and 6.9, set out under paragraphs 1 (a)-(c) of its panel request, pertain to the USDOC's conduct in relation to the Tenaris financial statements.

give Korean respondents a full opportunity to defend their interests under Article 6.2, to provide timely opportunities to see relevant information and prepare presentations on the basis of this information under Article 6.4, or to disclose "essential facts" concerning the acceptance of the Tenaris data under Article 6.9. Moreover, Korea has expressly argued in these proceedings that the USDOC's alleged delay in disclosing the communications in question violated Articles 6.4 and 6.9, and has requested us to make a finding in this regard.[332] In light of the foregoing, we reject the notion that the circumstances surrounding the treatment of the communications in question are merely evidence in support of a claim of violation of Articles 6.2, 6.4, and 6.9.

7.255. Korea's allegations in connection with the communications in question constitute an entirely new claim, based on different facts and legal arguments, that were not set forth in the panel request. As discussed above, the USDOC's alleged delay in disclosure of the communications in question is not covered by the claims set out in Korea's panel request.

7.256. We find that Korea's claim that the USDOC acted inconsistently with Article 6.4 because it failed to post the communications in question to the record in a timely fashion, and failed to disclose these communications as essential facts pursuant to Article 6.9 falls outside our terms of reference because it is not set out in Korea's panel request.[333] We will therefore make no findings in this regard.

7.7 Whether the USDOC's decision to limit its examination to NEXTEEL and HYSCO was inconsistent with Articles 6.10 and 6.10.2 of the Anti-Dumping Agreement

7.257. In the underlying investigation, the USDOC concluded that it would be impracticable to examine all known exporters and producers of the subject merchandise because of the large number of exporters or producers involved in the investigation and in light of its limited resources.[334] The USDOC selected NEXTEEL and HYSCO as the two mandatory respondents for examination. Korea claims that the USDOC acted inconsistently with Article 6.10 of the Anti-Dumping Agreement by limiting its examination to only these two exporters, and also acted inconsistently with Article 6.10.2 of the Agreement by failing to individually examine the voluntary respondents.

7.7.1 Provisions at issue

7.258. Article 6.10 of the Anti-Dumping Agreement provides:

> The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.

Article 6.10.2 of the Anti-Dumping Agreement further provides:

> In cases where the authorities have limited their examination, as provided for in this paragraph, they shall nevertheless determine an individual margin of dumping for any exporter or producer not initially selected who submits the necessary information in time for that information to be considered during the course of the investigation,

[332] Korea's first written submission, paras. 216, 224, and 277(c)(ii).
[333] Panels are not permitted to address legal claims falling outside their terms of reference. The terms of reference of a panel define the scope of the dispute. (Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 152). Pursuant to Article 7.1 of the DSU, a panel's terms of reference are governed by the request for the establishment of a panel. Article 6.2 of the DSU sets forth the requirements applicable to such requests.
[334] USDOC, Antidumping duty investigation of certain oil country tubular goods from the Republic of Korea: Respondent Selection Memorandum, 26 August 2013 (Respondent Selection Memorandum), (Exhibit KOR-3), p. 6.

except where the number of exporters or producers is so large that individual examinations would be unduly burdensome to the authorities and prevent the timely completion of the investigation. Voluntary responses shall not be discouraged.

7.7.2 Factual background

7.259. In the underlying investigation, the USDOC issued a Respondent Selection Memorandum (Exhibit KOR-3) in which it explained why it considered that the individual examination of all known Korean exporters would be impracticable. It stated that it was selecting the two Korean exporters, NEXTEEL and HYSCO which together accounted for the largest volume of subject imports from Korea into the United States, for individual examination.[335] The USDOC also issued a Treatment of Voluntary Respondents Memorandum (Exhibit KOR-50) in the underlying investigation, in which it explained why it would be unduly burdensome to individually examine voluntary respondents, i.e. exporters other than NEXTEEL and HYSCO which submitted voluntary responses to the USDOC questionnaire.[336]

7.7.3 Main arguments of the parties

7.260. Korea makes two main arguments under Article 6.10. First, Korea argues that the USDOC did not provide a reasoned explanation as to why it would be impracticable to examine all known exporters, and further, why it would be practicable to examine only two exporters.[337] Second, Korea notes that where it is impracticable to examine all known exporters, Article 6.10 permits an investigating authority to limit its examination to either: (a) a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the investigating authority at the time of the selection (first method) or, in the alternative; (b) the largest percentage of the volume of exports from the country in question which can reasonably be investigated (second method). Korea asserts that the USDOC relied on the first method in the underlying investigation, but did not properly comply with this method.[338] In particular, the USDOC failed to explain why only two Korean respondents constituted a *reasonable* number of exporters to be examined, and did not limit its examination on the basis of a statistically valid sample.[339] Regarding its claim under Article 6.10.2, Korea asserts that the USDOC failed to provide any explanation as to why it would be "unduly burdensome" to individually examine voluntary respondents.[340]

7.261. The United States asserts that in its Respondent Selection Memorandum, the USDOC adequately explained why it would be impracticable to examine all known exporters.[341] The United States further submits that the USDOC's record shows that the USDOC relied on the second rather than the first method for limiting its examination provided for in Article 6.10.[342] According to the United States, the USDOC fully complied with this second method.

7.262. The United States maintains that the "Treatment of Voluntary Respondents Memorandum" explained why it would be unduly burdensome to individually examine voluntary respondents in light of its resource constraints, and thus there is no violation of Article 6.10.2.

7.7.4 Main arguments of the third parties

7.263. The European Union submits that a decision under Article 6.10.2 to not determine individual dumping margins for voluntary respondents cannot be arbitrary, and the authority must

[335] Respondent Selection Memorandum, (Exhibit KOR-3), p. 8.
[336] USDOC, Treatment of Voluntary Respondents Memorandum, 30 December 2013, (Exhibit KOR-50), p. 6.
[337] Korea's second written submission, para. 265.
[338] Korea's second written submission, para. 273.
[339] Korea's first written submission, para. 232; response to Panel question No. 37(a) and (b), para. 128.
[340] Korea's first written submission, para. 236.
[341] United States' first written submission, paras. 186 and 188.
[342] United States' second written submission, para. 58.

explain why the number of voluntary respondents would make it unduly burdensome to make an individual examination and prevent the timely completion of the investigation.[343]

7.7.5 Evaluation by the Panel

7.7.5.1 Article 6.10 of the Anti-Dumping Agreement

7.264. Korea's Article 6.10 claim raises the following two principal issues:

a. Was the USDOC's explanation as to why it would be "impracticable" to examine all known exporters sufficient to discharge its obligation under Article 6.10?

b. Did the USDOC act inconsistently with Article 6.10 by failing to properly limit its examination in accordance with one of the methods provided under this provision?

7.7.5.1.1 The USDOC's determination that it would be "impracticable" to examine all known exporters

7.265. The first sentence of Article 6.10 establishes the general rule that an investigating authority shall determine an individual margin of dumping for each known exporter or producer of the product under investigation. However, the second sentence, recognizing that this may not be possible in all cases, permits an investigating authority to deviate from the general rule where it would be "impracticable" to do so, and provides for individual examination of a limited number of exporters. Article 6.10 further provides for two methods of choosing the limited number of exporters for individual examination.[344] However, Article 6.10 contains no guidance on how large the number of exporters must be in order for an investigating authority to limit its examination to a smaller number. Instead, it specifies that the number of exporters must be "so large" as to make an individual determination "impracticable". This is necessarily a judgment which must be made by the investigating authority in each case in which it limits the individual examination, based on the relevant facts and circumstances.

7.266. In the underlying investigation, the USDOC provided the following explanation as to why it would be impracticable to examine all known exporters of the product under investigation[345]:

> Because of the large number of known exporters or producers involved in this investigation, and after careful consideration of our resources, we conclude that it would not be practicable in this antidumping duty investigation to examine all known exporters and producers of the subject merchandise as identified in the Petition and the CBP import data. Antidumping and Countervailing Duty (AD/CVD) Operations Office 7, the office to which this antidumping duty investigation is assigned, does not currently have the resources to examine all such exporters or producers. We find that the number of potential respondents identified in the CBP data is large relative to the resources available to AD/CVD Operations Office 7 and Import Administration that can be dedicated to the investigation. This office is conducting numerous concurrent antidumping duty proceedings, which place a constraint on the number of analysts that can be assigned to this case. Not only do these other cases present a significant workload, but the deadlines for a number of the cases coincide or overlap with deadlines in this antidumping proceeding. In addition, because of the significant workload throughout Import Administration, we do not anticipate receiving additional resources to devote to this antidumping proceeding.[346]

Thus, the USDOC's decision to limit the individual examinations was based on the following considerations: (a) there were a large number of exporters or producers involved in the underlying investigation; and (b) the USDOC lacked the resources to examine all such exporters or producers, considering that the relevant office was conducting numerous concurrent anti-dumping

[343] European Union's third-party submission, para. 84.
[344] See, e.g. Panel Report, *EC – Salmon (Norway)*, para. 7.162.
[345] Respondent Selection Memorandum, (Exhibit KOR-3), pp. 6 and 7.
[346] Fns omitted.

proceedings and the deadline for a number of the cases coincided or overlapped with deadlines in the underlying investigation.

7.267. Korea contends that the USDOC did not provide a reasoned and adequate explanation as to why the number of exporters was so large so as to render individual examination of all these exporters impracticable.[347] Korea also asserts that the USDOC's resource constraints do not evidence the existence of "any extraordinary circumstances" in the underlying investigation considering that such constraints are faced by investigating authorities on a regular basis.[348] In Korea's view, institutional resource constraints are not unique to the investigation at issue and cannot be the basis for a conclusion that it is impracticable to examine all known exporters or producers. Finally, Korea submits that the USDOC did not explain why it would be impracticable to examine more than two respondents, which Korea contends is required by Article 6.10.[349] We are not persuaded by these arguments.

7.268. First, Korea itself acknowledges that the USDOC explained that the number of exporters was large relative to the resources at its disposal.[350] Whether or not Korea agrees with the explanation, it is clear that the USDOC did explain its conclusion that the number of exporters was so large so as to render individual examination of all of them impracticable. It is not clear to us, and Korea does not explain, what else the USDOC could have said in this regard.

7.269. Second, nothing in the text of Article 6.10 supports Korea's position that an investigating authority may limit individual examination only when "extraordinary circumstances" exist. In our view, the text is clear that the trigger for limiting individual examination is the existence of a large number of exporters. Article 6.10 contains no mention of extraordinary circumstances as a relevant consideration, and we see no basis to read such a consideration into the text. Similarly, nothing in Article 6.10 suggests that examination of all exporters may only be found to be "impracticable" for reasons that are unique to the investigation at issue. The text of Article 6.10 simply does not support Korea's position that institutional resource constraints, of the kind cited by the USDOC, cannot be a ground for such limited examination.[351]

7.270. Our conclusion is consistent with the views of the panel in *EU – Footwear (China)* on an analogous question. There the panel was considering whether, under Article 6.10.2 of the Anti-Dumping Agreement, an investigating authority was justified in citing institutional resource constraints and administrative burden as the reason why it would be "unduly burdensome" to examine voluntary responses filed by exporters who were not selected for individual examination. That panel concluded as follows[352]:

> These are precisely the criteria set forth in Article 6.10.2 which an investigating authority may cite in order to justify declining to grant individual examination requests. To the extent China is arguing that it would not, in fact, have been unduly burdensome, and that the Commission could, and should, have allocated its available resources so as to enable it to undertake the individual examinations requested, we reject China's argument. Even assuming China is correct that the Commission had sufficient resources, and/or could have allocated its available resources differently, we consider that it would be entirely inappropriate for us to interfere in this manner in an investigating authority's conduct of anti-dumping investigations.

7.271. Article 6.10.2 is drafted differently from Article 6.10, allowing voluntary responses to not be examined if to do so would be "unduly burdensome". Article 6.10, on the other hand, allows limited examination if it is impracticable to examine all known exporters. However, the underlying rationale of the panel's finding in *EU – Footwear (China)* applies here as well. In particular, both provisions permit some flexibility in examining a limited subset of all exporters of the product

[347] Korea's second written submission, para. 267.
[348] Korea's second written submission, para. 267.
[349] Korea's second written submission, para. 265.
[350] Korea's second written submission, para. 267.
[351] Indeed, it would seem to us that this is the most likely reason for an investigating authority to consider examining all known exporters to be impracticable, given that an anti-dumping investigation is complex and must be completed within 12 months, as a rule, and no more than 18 months in any case, under Article 5.10.
[352] Panel Report, *EU – Footwear (China)*, para. 7.146.

under investigation in certain circumstances. Indeed, we see no reason why institutional resource constraints are not equally valid as a basis for a limited examination under Article 6.10 as they are for not examining voluntary respondents under Article 6.10.2. Thus, we consider that the USDOC's reliance on institutional resource constraints as the reason why it was impracticable to examine all known exporters was not inconsistent with Article 6.10.

7.272. Finally, we see nothing in the first sentence of Article 6.10 that would impose an obligation on an investigating authority to specifically explain why it would be impracticable to examine more than a particular number of respondents, in this case two. The second sentence of Article 6.10 consists of two parts, with the first specifying the circumstances in which it may be impracticable to examine all known exporters (the number is "so large"), and the second setting out the methods for choosing the exporters to be individually examined when not all are examined. We consider that the second part of the second sentence, rather than the first part, is relevant to the number of exporters to be selected for limited examination. If the investigating authority selects the exporters subject to individual examination in a manner consistent with the methods prescribed in the second part of the second sentence of Article 6.10, we do not see why that authority would have to provide a separate explanation of why it is practicable to examine only the number of exporters in the resulting pool. Therefore, we consider that the USDOC was not required to specifically explain why it was practicable to examine only two exporters, and not more.

7.273. Thus, for the reasons discussed above, we conclude that USDOC's explanation on why it would be impracticable to examine all known exporters of the product under investigation was not inconsistent with Article 6.10.

7.7.5.1.2 The USDOC's decision to limit its examination to two mandatory respondents

7.274. The second sentence of Article 6.10 sets out two alternative selection methods for an investigating authority to use in deciding which exporters it will individually examine when it does not examine all exporters of the product under investigation. First, the investigating authority may limit its examination to a reasonable number of interested parties by using samples which are statistically valid on the basis of information available to that authority at the time of the selection. Second, and in the alternative, it may limit its examination to the largest percentage of the volume of exports from the country in question which can reasonably be investigated.

7.275. In connection with the second method, we recall that the panel in *EC – Salmon (Norway)* concluded that the volume of sales that may be reasonable for an investigating authority to investigate is a question that must be assessed on a case-by-case basis, taking into account all the relevant facts that are before the investigating authority, including the nature and type of the interested parties, the products involved and the investigating authority's own investigating capacity and resources.[353] We share this understanding of the types of factors that would be relevant to considering an investigating authority's compliance with this second method of selection provided in Article 6.10 and will apply it in this dispute.

7.276. Before we turn to that question, however, we must resolve a factual question. Korea maintains that the USDOC relied on the first method, selecting exporters for limited examination on the basis of a statistically valid sample, while the United States asserts that the USDOC relied on the second method. The USDOC's decision is clearly set forth in its Respondent Selection Memorandum:

> In selecting respondents in this antidumping duty investigation, the [USDOC] finds that, given its limited resources, *it is most appropriate to select the exporters or producers accounting for the largest volume of the subject merchandise that can reasonably be examined*.[354]

In our view, it is undisputable that the USDOC used the second method, selecting producers accounting for the largest percentage of the volume of exports that it could reasonably investigate,

[353] Panel Report, *EC – Salmon (Norway)*, para. 7.188.
[354] Respondent Selection Memorandum, (Exhibit KOR-3), p. 7. (emphasis added)

that is, the two Korean exporters who accounted for the largest volume of imports of the subject merchandise into the United States from Korea, during the POI.[355]

7.277. Notwithstanding the clear statement by the USDOC in this regard, Korea insists that the USDOC used the first method. Korea asserts that the USDOC selected the number of exporters it considered it could examine rather than limiting its examination to the largest percentage of the volume of exports.[356] Korea appears to be of the view that the USDOC used the first method because it did not state that it could only reasonably investigate X% of the total volume of exports into the United States and instead stated that it could reasonably investigate the two exporters who accounted for the largest volume of exports. We disagree. The limited examination allowed for under Article 6.10 is, necessarily, of exporters, not of a volume of exports. It is self-evident that a dumping margin cannot be determined for the "largest percentage of the volume of the exports" from the subject country, but only for exporters which account for that volume of exports.[357] This is what the USDOC did in the underlying investigation.[358] Korea does not dispute that NEXTEEL and HYSCO were, in fact, the two largest exporters of OCTG into the United States.

7.278. Therefore, we conclude that the USDOC did not act inconsistently with Article 6.10 in this regard.

7.7.5.2 Article 6.10.2 of the Anti-Dumping Agreement

7.279. In the underlying investigation, certain Korean exporters not selected for individual examination by USDOC requested such individual examination as voluntary respondents. The USDOC did not individually examine any of these voluntary respondents, concluding that to do so would be unduly burdensome and would inhibit the timely completion of the underlying investigation.[359] Korea asserts that the USDOC's explanation of why it would be "unduly burdensome" to individually examine the voluntary respondents was not reasoned and adequate, and that the USDOC therefore acted inconsistently with Article 6.10.2.

7.280. Article 6.10.2 establishes a general requirement that an investigating authority determine an individual margin of dumping for any exporter or producer not selected for individual examination which submits the necessary information in time for it to be considered during the course of the investigation. However, there is an exception to this general rule. Where the number of exporters or producers is so large that individual examination would be "unduly burdensome" to the investigating authority and prevent the timely completion of the investigation, the authority need not undertake individual examination of exporters or foreign producers who voluntarily submit the necessary information. However, Article 6.10.2 does not identify any circumstance in which, or criteria for determining whether, individual examination of voluntary respondents would be unduly burdensome.

7.281. In deciding not to individually examine any of the voluntary respondents, the USDOC noted the complex factual issues that it had to address in examining the responses filed by the two

[355] United States' comments on Korea's response to Panel question No. 77, para. 90.
[356] Korea's response to Panel question No. 77, para. 112.
[357] We note that Article 9.4 of the Anti-Dumping Agreement establishes a method for determining a dumping margin for exporters not selected for individual examination under Article 6.10. That method is based on the dumping margins determined for the exporters which are selected. Pursuant to Article 9.4, the margin for unexamined exporters cannot exceed either: (a) the weighted average dumping margin of the exporters selected for limited examination; or (b) where the anti-dumping duty is calculated on the basis of a prospective normal value, the difference between the prospective normal value of the exporters who are selected for limited examination, and the export price of those who are not. Thus, it is clear that to apply an anti-dumping measure in an appropriate amount to unexamined exporters, the investigating authority must determine the dumping margins for the exporters selected for limited examination (or normal values, in the case of a prospective normal value system).
[358] To the extent Korea is arguing that the USDOC was required to first determine what was the largest volume of exports of the subject merchandise into the United States it could investigate, and then consider which exporters accounted for that volume, we see no basis for such sequencing in the text of Article 6.10. In any event, such a sequence would not work as a selection methodology, since as discussed above, it is exporters that are examined, not a volume of exports. The impracticability of examining all exporters is a function of the number of exporters, not of the volume of exports.
[359] USDOC, Treatment of Voluntary Respondents Memorandum, 30 December 2013, (Exhibit KOR-50), p. 7.

mandatory respondents, observed that it had already issued extensive supplemental questionnaires to them, and stated that it expected to issue additional ones.[360] The USDOC then went on to explain why it would be unduly burdensome to examine the voluntary responses filed by certain Korean respondents:

> In addition to the work involved in examining the two mandatory respondents in this investigation, the [USDOC] has also considered its available resources in light of its current workload, to determine whether examining Husteel, IUIN and/or SeAH as voluntary respondents would be unduly burdensome and inhibit timely completion of the investigation. We note that our workload has not decreased since our selection of mandatory respondents. AD/CVD Enforcement Office VI, the office to which this antidumping duty investigation is assigned, is conducting numerous concurrent antidumping and countervailing duty proceedings, which place a constraint on the number of analysts that can be assigned to this investigation. Specifically, Office VI is currently conducting eight investigations and approximately 20 administrative reviews (some covering multiple companies), one remand proceeding, and one ant-circumvention inquiry. Not only do these other proceedings present a significant workload, but the deadlines for a number of these proceedings coincide and/or overlap with deadlines in this investigation. In light of the significant workload throughout Enforcement and Compliance, which includes numerous investigations (including 11 concurrent AD and CVD investigations on OCTG from various countries), we do not anticipate receiving additional resources to devote to this proceeding.
>
> The complications presented by this particular investigation have created an additional burden on the Department's already strained resources. As noted above, the Department is currently handling 11 concurrent AD and CVD investigations on OCTG from various countries, as well as other numerous AD and CVD investigations and reviews. Therefore, individual examination of an additional company or companies, which typically requires multiple rounds of supplemental questionnaires and extensive analysis in order to calculate accurate weighted-average dumping margins for the voluntary respondents, would be unduly burdensome and inhibit timely completion of this investigation. The Department has already extended the preliminary determination to the maximum extent allowable by law, based on the significant challenges posed by the collection and examination of information and data for the two mandatory respondents. Even with the additional time afforded by a full extension of the preliminary determination, we would not be able to individually examine an additional company or companies, because an examination of an additional respondent would place an additional burden on our already strained resources and present the possibility of additional complex issues. Critically, individual examination of an additional company or companies would require separate verifications in Korea and in some cases the United States, which would extend the time required for overseas travel, as well as the accompanying verification reports and data analysis, which in turn would add to the Department's burden and further strain its resources. Each of these steps would place additional administrative burden on the Department and inhibit the timely completion of this investigation. [361]

7.282. Thus, the USDOC's conclusion that it would be unduly burdensome to individually examine the voluntary respondents was based on:

a. complexities unique to the underlying investigation, including complexity of legal issues in the case and administrative issues such as travel time that would be needed for the verification of the sales records of additional Korean respondents, if selected;

b. time constraints faced by the USDOC, which had already extended the preliminary determination to the maximum extent allowable under US law; and

[360] USDOC, Treatment of Voluntary Respondents Memorandum, 30 December 2013, (Exhibit KOR-50), p. 6.

[361] USDOC, Treatment of Voluntary Respondents Memorandum, 30 December 2013, (Exhibit KOR-50), pp. 6 and 7. (fns omitted)

c. resource constraints faced by the USDOC.

7.283. Korea asserts that the USDOC did not provide "any basis" for its conclusion that examination of additional voluntary respondents would have increased the administrative burden on its increasingly limited resources.[362] As a factual matter, the clear statements set out above lead us to a different conclusion. In our view, the USDOC did provide the basis on which it made this conclusion, even if Korea disagrees with that basis.

7.284. Insofar as Korea is challenging the quality of the explanation for the USDOC's conclusion that it would be unduly burdensome to examine voluntary responses, Korea makes two main arguments. First, that the USDOC failed to explain why it was unable to examine at least some, if not all, of the voluntary respondents[363], and second, the reasons cited by the USDOC as to why it would be unduly burdensome to individually examine the voluntary respondents were "largely similar" to the reasons cited by USDOC as to why it would be impracticable to examine all known exporters.[364]

7.285. First, the USDOC explicitly stated that it could individually examine *none* of the voluntary respondents for the reasons it gave. We see nothing in Article 6.10.2 that would require an investigating authority to explain why it cannot individually examine some voluntary respondents in a situation where it has decided it cannot individually examine any of them. The explanation for why it can individually examine none of them suffices to explain why it cannot individually examine some of them.

7.286. Second, Article 6.10.2 comes into play "[i]n cases where the authorities have limited their examination" under Article 6.10, having found that the number of exporters, producers, importers, or types of products involved is so large as to make individual examination of all of them impracticable. Therefore, the question whether it would be unduly burdensome to individually examine voluntary respondents will arise only after an investigating authority has already found it impracticable to make an individual determination for each known exporter. There may well be situations where the investigating authority finds it impracticable to examine all known exporters but does not find it unduly burdensome to examine at least some voluntary responses. Thus, the Article 6.10.2 question of whether it would be "unduly burdensome" to individually examine voluntary respondents is separate from, and not answered by, the conclusion that it is "impracticable" to examine all known exporters.

7.287. However, Article 6.10.2 does not preclude that the factual circumstances making it impracticable to examine all known exporters may also affect whether it would be unduly burdensome to individually examine voluntary respondents. In both cases, an investigating authority deviates from the norm, which is to determine an individual margin of dumping for all known exporters. To us, it is not surprising that a justification for the second deviation, under Article 6.10.2, may overlap and share elements with the justification for the first deviation under Article 6.10. Thus, an investigating authority's explanation for why it would be unduly burdensome to examine voluntary responses will not be insufficient merely because of such similarities. Therefore, we consider that the fact that the USDOC's explanation for why it was unduly burdensome to individually examine any voluntary respondents also cited time and resource constraints, and thus was "largely similar" to its explanation for why it was impracticable to individually examine all known exporters, does not establish any inconsistency with Article 6.10.2.[365]

7.288. In any event, the USDOC also considered other elements in concluding that it would be unduly burdensome to individually examine voluntary respondents, including events that arose subsequent to the selection of the two mandatory respondents, namely, the challenges it was facing in examining their responses, and time constraints that it would face were it to individually examine voluntary respondents.

[362] Korea's first written submission, para. 236; second written submission, para. 280.
[363] Korea's first written submission, para. 236; second written submission, para. 280.
[364] Korea's second written submission, para. 280.
[365] We note in this regard the views of the panel in *EU – Footwear (China)*, that institutional resource constraints and administrative burden may be a valid reason for an investigating authority to find it "unduly burdensome" to individually examine voluntary respondents.

7.289. In sum, we are not convinced that the USDOC's explanation of why it would be unduly burdensome to individually examine the voluntary respondents was not reasoned and adequate, and insufficient to discharge its obligations under Article 6.10.2. The USDOC explained why, in light of its institutional resource constraints, as well as challenges faced by the USDOC in the underlying investigation, it was unable to make this individual examination, and we consider that this explanation was consistent with its obligations under this provision. Therefore, we reject Korea's claim that USDOC acted inconsistently with Article 6.10.2 of the Anti-Dumping Agreement.

7.7.6 Conclusion

7.290. For the foregoing reasons, we find that Korea has not established that the USDOC acted inconsistently with Articles 6.10 and 6.10.2 of the Anti-Dumping Agreement.

7.8 Whether the USDOC acted inconsistently with Article 12.2.2 of the Anti-Dumping Agreement by failing to provide reasons for rejecting certain arguments

7.291. Korea claims that the USDOC acted inconsistently with Article 12.2.2 of the Anti-Dumping Agreement by failing to provide, either in the public notice, or through a separate report, the "reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers". In particular, Korea contends that the USDOC failed to provide the reasons for the rejection of the following arguments made by the Korean respondents[366]:

a. arguments concerning the appropriateness of determining the CV profit rate of the Korean respondents on the basis of the Tenaris financial statements; and

b. arguments that contradicted the facts based on which the USDOC found NEXTEEL to be affiliated with Company A and Company B.

7.8.1 Provisions at issue

7.292. Article 12.2.2 of the Anti-Dumping Agreement provides, in pertinent part:

> A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6.

7.8.2 Main arguments of the parties

7.293. Korea's principal arguments are set forth below:

a. The USDOC failed to include, in its public notice, reasons for rejecting relevant arguments made by Korean respondents regarding the inappropriateness of using the Tenaris financial data to determine the CV profit for the Korean respondents, in light of the substantial differences between the companies.[367]

b. The USDOC failed to address arguments that contradict the facts that it relied upon in making its determination of affiliation between NEXTEEL, POSCO, Company A, and Company B.[368]

[366] Korea's first written submission, paras. 228 and 229.
[367] Korea's first written submission, para. 228.
[368] See, e.g. Korea's first written submission, para. 229.

7.294. The United States makes the following arguments:

a. If the investigating authority does not consider an issue of fact or law to be material to its determination, Article 12.2.2 does not require it to address that issue in its public notice.[369]

b. The USDOC's Issues and Decision Memorandum includes a detailed analysis of the reasoning behind the USDOC's determination to use the Tenaris financial data in the final determination.[370]

c. The Issues and Decision Memorandum and accompanying confidential affiliation memorandum provide the factual findings that led the USDOC to find that NEXTEEL, POSCO, Company A, and Company B were associated for the purposes of the anti-dumping determination.[371]

7.8.3 Main arguments of third parties

7.295. The European Union considers it undisputed that the Tenaris profit data used to establish a profit rate, and the findings on affiliation, were "relevant information" and "material" in the meaning of Article 12.2.[372] The main issue is, therefore, whether the USDOC's reasons for rejecting or accepting the Korean respondents' arguments were "set forth in sufficient detail".[373] It notes however, that previous panels have found that where the investigating authority has contravened a substantive requirement under the Anti-Dumping Agreement, the question of whether the notice is sufficient under Article 12.2.2 is immaterial.[374]

7.8.4 Evaluation by the Panel

7.296. Article 12.2.2 of the Anti-Dumping Agreement, and in particular its second sentence, provides that a public notice of conclusion of an investigation, in case of an affirmative determination to impose definitive duty, shall contain, or otherwise make available through a separate report, "the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers".[375] It is clear on the face of the provision that an investigating authority is not required to provide the reasons for rejecting *all* arguments made by the exporters and importers, but the "relevant" ones. In addressing Korea's claim under Article 12.2.2, we will therefore consider:

a. whether these arguments were adequately addressed by the USDOC in the relevant documents, in this case, the Issues and Decision Memorandum and the Affiliation Memorandum[376];

b. whether the arguments made by the Korean respondents were "relevant" within the meaning of Article 12.2.2.

7.297. Article 12.2.2 does not specify the type of arguments that may be considered "relevant" within the meaning of this provision. But a clearer understanding of how a WTO panel should

[369] United States' first written submission, para. 232 (referring to Appellate Body Report, *China – GOES*, para. 256, and Panel Report, *EC – Tube or Pipe Fittings*, para. 7.422).
[370] United States' first written submission, para. 235 (referring to Final Decision Memorandum, (Exhibit KOR-21), pp. 14-23).
[371] United States' first written submission, para. 238.
[372] European Union's third-party submission, para. 77 (referring to Panel Report, *EU – Footwear (China)*, para. 7.844).
[373] European Union's third-party submission, para. 77 (referring to Panel Report, *China – X-Ray Equipment*, para. 7.472).
[374] European Union's third-party submission, para. 75 (referring to Panel Report, *EC – Bed Linen*, para. 6.261).
[375] In this regard, Article 12.2.2 does not only refer to obligations that apply in case of a public notice of conclusion in case of an affirmative determination providing for the imposition of a definitive duty, but also refers to a public notice of suspension of an investigation.
[376] There is no dispute between the parties that these are the relevant documents for purposes of our analysis.

determine the relevance of an argument in this context emerges when Article 12.2.2 is read as a whole and in the context of Article 12.2 of the Anti-Dumping Agreement.

7.298. Article 12.2 is the *chapeau* of Article 12.2.2 and provides guidance for our understanding of the second sentence of Article 12.2.2.[377] Article 12.2 provides, *inter alia*, that a public notice of an affirmative final determination shall set forth, or otherwise make available through a separate report, in sufficient detail, the findings and conclusions reached on all issues of fact and law considered material by the investigating authority. It is generally understood that an issue of fact or law considered material by an investigating authority includes any issue that has arisen in the course of the investigation that must necessarily be resolved by the investigating authority to be able to reach its determination.[378] Furthermore, the facts that an investigating authority may consider material to its determinations are circumscribed by the framework of the substantive provisions of the Anti-Dumping Agreement.[379]

7.299. Article 12.2.2 elaborates on these obligations. Thus, Article 12.2.2 captures the principle that those parties whose interests are affected by the imposition of final dumping duties are entitled to know, as a matter of fairness and due process, the facts, law, and reasons that have led to the imposition of definitive duties.[380] In particular, the requirement under the first sentence of Article 12.2.2, that the public notice or the separate report contain "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures", establishes a requirement to disclose "relevant" information, including the matrix of facts, law, and reasons that logically fit together to render the decision to impose final measures.[381] It is by requiring the disclosure of "all relevant information" in this regard, that Article 12.2.2 seeks to guarantee that interested parties are able to pursue judicial review of a final determination as provided in Article 13 of the Anti-Dumping Agreement.[382]

7.300. Thus, the arguments that are "relevant" under Article 12.2.2 are those that pertain to issues of facts and law that must be resolved in an investigating authority's decision to impose final measures. Therefore, in considering the relevance of arguments for purposes of Article 12.2.2, we will look to whether those arguments pertain to issues of facts and law that must be resolved in the investigation at issue and are therefore necessarily material.[383]

7.301. Article 12.2.2 requires that the investigating authority provide the reasons for the acceptance or rejection of relevant arguments. In this regard, we agree with the views of the panel in *China – X-Ray Equipment* that the reasons for rejecting or accepting such arguments should be set forth in sufficient detail to allow the exporter or importer to understand why their arguments were treated as they were, and to assess whether or not the investigating authority's treatment of the relevant issue was consistent with domestic law and/or WTO law.[384] However, we do not understand Article 12.2.2 to impose a formalistic obligation to identify each and every relevant argument and explicitly provide the reasons for accepting or rejecting each such argument. Instead, in our view, the obligation to provide reasons for rejecting or accepting arguments will be satisfied if the exporter or importer could clearly understand how its arguments were treated by the investigating authority from the explanations given by the investigating authority in resolving the issue to which they pertain. We now turn to the issue before us.

[377] See, e.g. Panel Reports, *China – X-Ray Equipment*, para. 7.458; and *EU – Footwear (China)*, para. 7.844.
[378] See, e.g. Panel Reports, *China – Broiler Products*, para. 7.327; and *EU – Footwear (China)*, para. 7.844.
[379] Appellate Body Report, *China – GOES*, para. 265.
[380] Appellate Body Report, *China – GOES*, para. 258.
[381] Appellate Body Report, *China – GOES*, para. 258.
[382] Appellate Body Report, *China – GOES*, para. 258.
[383] Our approach in this regard is consistent with that followed by previous panels which evaluated specific claims concerning the investigating authority's alleged failure to provide reasons for the rejection of relevant arguments or claims made by the exporters and importers. (See, e.g. Panel Report, *China – X-Ray Equipment*, para. 7.472).
[384] Panel Report, *China – X-Ray Equipment*, para. 7.472.

7.8.4.1 The USDOC's alleged failure to address the Korean respondents' arguments concerning the use of the Tenaris profit data

7.302. We recall that in the underlying investigation, the USDOC determined CV profit for the Korean respondents on the basis of the profit rate of Tenaris and not the profit rate of the Korean respondents. In their submissions to the USDOC, the Korean respondents made several arguments against the USDOC's use of the Tenaris profit data for CV profit determination, alleging significant differences between Tenaris and the Korean respondents, their products, their sales and production volumes, and their customer bases.

7.303. Korea asserts that the USDOC acted inconsistently with Article 12.2.2 because it failed to include, in its public notice, any reasons for rejecting relevant arguments made by the Korean respondents regarding the inappropriateness of using the Tenaris financial data to determine the Korean respondents' CV profit rate. Korea argues, in particular, that the USDOC did not provide reasons for rejecting the Korean respondents' arguments that:

a. OCTG shares more similarities with non-OCTG pipe products than with the OCTG products sold by Tenaris;

b. the products that the Korean respondents sold in the home market were not physically similar to those sold by Tenaris;

c. the structure and scale of Tenaris's business operations was so different to that of the Korean companies as to make Tenaris not comparable to the Korean respondents for purposes of calculating CV profit;

d. the different position of Tenaris in the distribution chain as compared to the Korean respondents rendered Tenaris's profit not comparable to the Korean respondents' profits; and

e. differences in the customer bases of Tenaris and the Korean respondents rendered the Tenaris profit rates not comparable to the Korean respondents' profit rates.[385]

7.304. The USDOC stated, in its Final Decision Memorandum, that in selecting a profit from available record evidence it may not find a profit source that reflects both production and sales in the home market of the exporting country as well as the foreign like product. Its choice of a profit source would, therefore, depend on factors such as the level of specialization of the foreign like product, the percentage of sales of the foreign like product or same general category of products, among others.[386] The USDOC also noted that, in the underlying investigation, it chose to determine CV profit on the basis of the Tenaris profit data and not the Korean respondents' profit data for the following reasons: (a) as OCTG is a specialized product, CV profit needed to be determined on the basis of a source which most closely reflected the profits pertaining to sales of OCTG; and (b) the Tenaris profit data is representative of sales of OCTG across a broad range of geographic markets, while the Korean respondents' profit data reflects profit on non-OCTG products that cannot reasonably be considered to fall in the same general category as OCTG.[387]

7.305. Korea alleges that the USDOC failed to give reasons for rejecting the first of the specific arguments above. The submissions Korea cites in this regard do not show that the Korean respondents argued that OCTG shares more similarities with non-OCTG pipe products than with the OCTG products sold by Tenaris.[388] Korea refers to submissions in which the Korean respondents argued that OCTG and the non-OCTG pipe products that they sold in the home market fall within the same general category of products. They did not argue, however, that OCTG is more similar to non-OCTG than it is to the OCTG products sold by Tenaris.[389] Therefore, Korea

[385] Korea's first written submission, para. 228; second written submission, para. 324.
[386] Final Decision Memorandum, (Exhibit KOR-21), p. 15.
[387] Final Decision Memorandum, (Exhibit KOR-21), pp. 21 and 23.
[388] Korea's second written submission, para. 324 (referring to HYSCO Rebuttal Brief, 24 June 2014, (Exhibit KOR-80), pp. 17-21; and NEXTEEL Rebuttal Brief, 23 June 2014, (Exhibit KOR-79) (BCI), pp. 18-21).
[389] The Korean respondents did argue that determining "CV profit rate that reflects home market experience for sales of steel pipe products that is far more representative" than the financial data of

has not established that the Korean respondents made the argument in question before the USDOC in the underlying investigation, and we are of the view that Korea has thus failed to establish a *prima facie* case of violation of Article 12.2.2 in this respect.

7.306. Korea's second argument is that the Korean respondents presented arguments related to the alleged lack of comparability between the profit data of Tenaris and the Korean respondents due to differences in the companies' products, scale of production, position in the distribution chain and customer bases in support of their view that Tenaris was not an appropriate source for determination of CV profit of the Korean respondents. The USDOC made the following statements in this context[390]:

> We believe due to the nature of this product that it is more consistent with the statute to calculate profit using a company that mainly sells either the identical product or, alternatively, merchandise that is in the same general category of products. Because Tenaris is an OCTG producer that sells OCTG in significant quantities, and in virtually every market in which OCTG is sold, we find its average profit experience is representative of sales of OCTG across a broad range of different geographic markets. As the profit from its financial statements is predominantly of OCTG, it reflects more precisely the profit on products identical to the subject merchandise. While we would prefer to use the financial statements of an OCTG producer that primarily produces and sells OCTG in Korea, such information is not available. The financial statements of the six Korean producers' reflect sales of OCTG almost exclusively to the U.S., and predominantly sales of non-OCTG pipe products and other non-pipe products.

The USDOC went on to state that it "consider[ed] it important … to have a profit reflective of the specialized nature of OCTG products", that it had "analyzed the data for all possible CV profit sources" and the record of the underlying investigation showed that a profit figure from those not selected would predominantly reflect profit of non-OCTG products that could not reasonably be considered to be of the same general category of merchandise. It concluded that it was consistent with US law to calculate profit using a company that mainly produced and sold the merchandise under consideration, and considering that Tenaris met these criteria, it was using its financial statements to determine the profit rate of the Korean respondents.[391]

7.307. In considering whether the USDOC provided reasons for rejecting these arguments, we will, as stated above, consider whether the Korean respondents were, or should have been able to, clearly understand from the public notice or report how their arguments were treated by that authority. In this regard, in our view, it is clear from the USDOC's determination that it considered that it had to choose between two options: determining CV profit rate on the basis of sources that met its criteria, i.e. profit of a company that mainly produced and sold the merchandise under consideration, or alternatively determining CV profit rate on the basis of sources that did not meet its criteria. The USDOC noted that "[w]hile [it] would prefer to use the financial statements of an OCTG producer that primarily produce[d] and [sold] OCTG in Korea" that information was not available. Having decided that it was important to have a "profit reflective of the specialized nature of OCTG products", and having found that the profit from the Tenaris financial statements was predominantly of OCTG, the USDOC considered it appropriate to use that data notwithstanding the alleged lack of comparability between that data and the Korean respondents' profit data. In this regard, we recall that we are considering whether the USDOC provided reasons for rejecting the Korean respondents' arguments, and not the substantive consistency of the USDOC's decision with the Anti-Dumping Agreement.[392] In our view, the USDOC's explanation allowed the Korean respondents to understand why their arguments regarding the inappropriateness of determining

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companies, such as Tenaris, that have no production or known sales in Korea. However, this is a different argument from the one that Korea asserts that the Korean respondents made. Here, the Korean respondents objected to the use of the Tenaris data as a basis for determining CV profit not because the OCTG products sold by Tenaris were less similar to OCTG than non-OCTG pipe products, as Korea contends they argued, but because the Tenaris data pertained to OCTG sales outside of Korea. See HYSCO Rebuttal Brief, 24 June 2014, (Exhibit KOR-80), p. 22; and NEXTEEL Rebuttal Brief, 23 June 2014, (Exhibit KOR-79) (BCI), p. 22.

[390] Final Decision Memorandum, (Exhibit KOR-21), p. 21.

[391] Final Decision Memorandum, (Exhibit KOR-21), p. 23.

[392] We recall that we have found that the USDOC's substantive determination concerning which products fell within the same general category of products was inconsistent with its obligations under Articles 2.2.2(i) and (iii).

CV profit based on the Tenaris profit data were rejected. We therefore consider that Korea has failed to demonstrate that the USDOC acted inconsistently with Article 12.2.2 in this regard.[393]

7.8.4.2 The USDOC's alleged failure to address NEXTEEL's arguments that it was not affiliated with POSCO, Company A, and Company B

7.308. Korea argues that the USDOC failed to address the following arguments made by NEXTEEL[394]:

a. NEXTEEL did not purchase steel coils **[[***]]** from POSCO[395];

b. NEXTEEL's collaboration with POSCO did not create an affiliation because such a collaboration was part of either joint research projects that were common in the industry, or a broader national program that involved thousands of companies[396]; and

c. the USDOC should not have disregarded NEXTEEL's export price to Company A because this price was reliable.[397]

7.309. As discussed above, Korea's view that the USDOC failed to address NEXTEEL's argument that it did not purchase steel coils **[[***]]** from POSCO is incorrect as a matter of fact. The USDOC did recognize that NEXTEEL purchased steel coils from sources other than POSCO.[398] Thus, there is no factual basis for Korea's claim.

7.310. We examined Korea's argument that NEXTEEL's collaboration with POSCO did not create an affiliation because that collaboration was part of either joint research projects that were common in the industry, or a broader national program that involved thousands of companies in evaluating its claim under Article 2.3 of the Anti-Dumping Agreement. We noted that this argument presumes that association under Article 2.3 may only exist if the associated entities have an exclusive relationship. However, we concluded that there is no such requirement under Article 2.3.[399] It follows, in our view, that the USDOC did not have to resolve whether the relationships in question were exclusive, and therefore the argument was not relevant within the meaning of Article 12.2.2, and the USDOC was not required to provide reasons for rejecting it.

7.311. Korea has failed to identify any arguments by NEXTEEL before the USDOC that its export price to Company A was reliable, notwithstanding association in the context of its claim under Article 12.2.2. Korea refers to NEXTEEL's Supplemental Questionnaire Response, but does not identify where such arguments were actually made.[400] Korea's approach would require the Panel to review the relevant documents, identify any arguments pertaining to the reliability of the export price notwithstanding association, and then decide whether the USDOC set out reasons for rejecting such argument(s) in the relevant documents. This would be tantamount to the Panel making a case for Korea.[401] In our view, Korea has failed to make a *prima facie* case of violation in this regard.

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[393] In this regard, we recall that we found that Korea's panel request does not set out a claim that the USDOC's determination of CV profit based on the Tenaris profit data does not constitute a "reasonable method" under Article 2.2.2(iii) and therefore made no findings on the substance of Korea's arguments in that regard. Whether the USDOC *should have* considered the Korean respondents' arguments regarding the differences between Tenaris and the Korean respondents is an issue which goes to the substantive question of whether the USDOC's choice of the Tenaris profit data as a basis for determining CV profit was consistent with Article 2.2.2(iii).

[394] Korea's response to Panel question No. 76, para. 110.

[395] Korea's first written submission, para. 229.

[396] Korea's second written submission, para. 328.

[397] Korea's second written submission, para. 329 (referring to Company A supplemental questionnaire responses, 14 March 2014, (Exhibit KOR-89) (BCI)).

[398] See paras. 7.160-7.161 above.

[399] See para. 7.165 above.

[400] Korea's second written submission, para. 329 and fn 227.

[401] We recall that in respect of its Article 2.3 claim, Korea referred to specific "evidence" presented by NEXTEEL that allegedly showed that its export prices to Company A were, in fact reliable. (Korea's second written submission, para. 245; response to Panel question No. 31, para. 103). However, Korea has not

7.8.5 Conclusion

7.312. For the foregoing reasons, we conclude that Korea has not established that the USDOC acted inconsistently with Article 12.2.2 by failing to provide the reasons for rejecting:

a. an argument that Korean respondents did not make, i.e. that OCTG shares more similarities with non-OCTG pipe products than with the OCTG products sold by Tenaris;

b. an argument that Korea failed to identify in these proceedings, i.e. that the USDOC should not disregard NEXTEEL's export price to **[[***]]** because these export prices were reliable;

c. arguments made by the Korean respondents concerning the appropriateness of determining the CV profit rate of the Korean respondents on the basis of the Tenaris financial statements, in particular:

   i. the products that the Korean respondents sold in the home market were not physically similar to those sold by Tenaris;

   ii. the structure and scale of Tenaris's business operation was so different to that of the Korean companies as to make Tenaris not comparable to the Korean respondents for purposes of calculating CV profit;

   iii. the different position of Tenaris in the distribution chain as compared to the Korean respondents rendered Tenaris's profit not comparable to the Korean respondents' profits; and

   iv. differences in the customer bases of Tenaris and the Korean respondents rendered the Tenaris profit rates not comparable to the Korean respondents' profit rates.

d. arguments that contradicted the facts based on which the USDOC found NEXTEEL to be affiliated with **[[***]]**, and in particular NEXTEEL's arguments that:

   i. NEXTEEL did not purchase steel coils **[[***]]** from POSCO; and

   ii. NEXTEEL's collaborations with POSCO did not create an affiliation between them because they were either joint research projects that were common in the industry, or were part of a much broader national program that involved thousands of companies.

7.9 Whether the USDOC acted inconsistently with Article X:3(a) of the GATT 1994 in the administration of US laws and regulations

7.313. Korea presents two separate factual bases for its claim that the USDOC failed to administer US laws and regulations in a uniform, impartial and reasonable manner, as required by Article X:3(a) of the GATT 1994:

a. First, Korea notes that in its final determination, the USDOC determined the CV profit of the Korean respondents based on the profits earned by Tenaris, but the profits earned by this company had no relationship with profits earned in the Korean market.[402] Korea submits that by determining the profits this way, the USDOC acted contrary to its "established agency practice" of determining CV profit on the basis of sources located in the home market of the exporter or producer under investigation, without providing any justification for this departure.[403] Korea also asserts that the USDOC deviated from this

identified any "arguments" made by NEXTEEL in this regard. If the exporter or the importer does not make an "argument", the obligation on an investigating authority to provide reasons for accepting or rejecting relevant "arguments" would obviously not apply.

[402] Korea's first written submission, para. 265.

[403] Korea's first written submission, paras. 260, 265 and 275.

practice because of "political influence" exerted by different lobbying groups, including US lawmakers.[404]

b. Second, Korea contends that US domestic regulation 19 C.F.R. § 351.301, which establishes deadlines under the US system for submission of new factual information, and establishes deadlines for rebuttals for each type of submission, was administered differently by the USDOC in the underlying investigation than in a parallel investigation on OCTG from Turkey (Turkish investigation).[405]

7.9.1 Provisions at issue

7.314. Article X:3(a) of the GATT 1994 provides:

> Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

Article X:1 of the GATT 1994, referred to in Article X:3(a), provides:

> Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them.

7.9.2 Main arguments of the parties

7.315. Korea asserts that Article X:3(a) of the GATT 1994 imposes three independent obligations on a Member with respect to the administration of its laws, regulations, judicial decisions and administrative rulings of general application (laws and regulations), namely, to administer them in a: (a) uniform; (b) impartial; and (c) reasonable manner. Korea contends that the USDOC acted inconsistently with each of these three obligations because it failed to administer US anti-dumping laws and regulations in either a uniform or impartial or reasonable manner. Korea presents two separate factual bases for its claim under this provision, as noted above.

7.316. First, Korea contends that by determining the CV profit of the Korean respondents on the basis of profits earned by Tenaris, a company which had no production or sales in Korea, the USDOC failed to administer its laws and regulations in:

a. a *uniform* manner, because it acted contrary to its established practice of determining profits on the basis of sources located in the home market of the exporter or producer under investigation[406];

b. a *reasonable* manner, because it did not have a rational basis to deviate from this practice[407]; and

c. an *impartial manner*, because, in Korea's view, the USDOC's decision to deviate from this practice, and accept the Tenaris financial statements for profit determination was attributable solely to political pressure exerted by different lobbying groups, including US lawmakers.[408]

[404] Korea's first written submission, paras. 268-273.
[405] Korea's response to Panel question No. 78, para. 114; second written submission, para. 345.
[406] Korea's first written submission, para. 265.
[407] Korea's first written submission, para. 275.
[408] Korea's first written submission, para. 275.

7.317. Second, Korea contends that the USDOC failed to administer 19 C.F.R. § 351.301 in[409]:

a. A *uniform* manner, because in the Turkish investigation, in which the Tenaris financial statements were also considered as a source for calculating the profit amount, the USDOC gave the Turkish respondents an opportunity to submit factual comments on this data[410], but failed to provide a similar opportunity to the Korean respondents in the underlying investigation.[411]

b. A *reasonable* manner, because the USDOC provided no reasonable explanation for the difference in how it dealt with the Tenaris financial statement in the underlying investigation and in the Turkish investigation.

7.318. The United States contends that Korea does not challenge the administration of US laws and regulations, but instead challenges the substance of the USDOC's determination.[412] Therefore, in the United States' view, Korea's claim in this regard falls outside the scope of Article X:3(a). With respect to the specific issues raised by Korea, the United States submits:

a. Regarding *uniformity*:

   i. Korea has not shown that the facts in the Turkish investigation were similar to those in the underlying investigation such that the same decisions under 19 C.F.R. § 351.301 were warranted.[413]

   ii. While laws need to be administered uniformly, practice need not, and thus Korea's argument, which is based on the USDOC's alleged deviation from past practice concerning determination of profits, must be rejected.[414]

b. Korea does not provide any evidence to support its view that US laws and regulations were not applied in an *impartial* manner, and speculates about the impact of supposed political pressure on the USDOC's decision.[415]

c. The United States has shown, through its arguments under Article 2.2.2 of the Anti-Dumping Agreement, that the USDOC's decision to use the Tenaris financial statements to determine CV profit was reasonable.[416]

7.9.3 Main arguments of the third-parties

7.319. The European Union comments that the nature of issues raised by Korea under Article X:3(a) of the GATT 1994 can be resolved under the substantive provisions of the Anti-Dumping Agreement rather than under this provision.[417]

7.9.4 Evaluation by the Panel

7.9.4.1 Whether the USDOC's alleged deviation from established agency practice for determining CV profit is within the Panel's terms of reference

7.320. The United States does not contend that the first factual basis of Korea's Article X:3(a) claim falls outside our jurisdiction. However, whether we have jurisdiction to address this aspect of Korea's Article X:3(a) claim is a question that we have to decide for ourselves, even though the parties did not raise it. Thus, we commence our analysis by addressing this question.

[409] Korea does not argue that the USDOC failed to administer 19 C.F.R. § 351.301 in an impartial manner. (See, e.g. Korea's first written submission, paras. 267-273).
[410] Korea's first written submission, paras. 255 and 264.
[411] Korea's first written submission, paras. 255 and 264.
[412] United States' first written submission, para. 250.
[413] United States' first written submission, para. 258.
[414] United States' first written submission, para. 257.
[415] United States' first written submission, para. 261.
[416] United States' first written submission, para. 264.
[417] European Union's third-party submission, para. 89.

7.321. The first basis of Korea's Article X:3(a) claim asserts that the USDOC deviated from "established agency practice" of determining CV profit on the basis of sources located in the home market of the exporter or producer under investigation. We see no reference in Korea's panel request to this first basis of its claim. Korea's panel request states, in pertinent part:

> IV. PROCEDURAL CLAIMS UNDER THE ANTI-DUMPING AGREEMENT AND THE GATT 1994
>
> Korea further considers that the USDOC's actions taken in the course of its anti-dumping investigation of Oil Country Tubular Goods from Korea failed to protect the respondents' due process rights and were otherwise inconsistent with procedural obligations under the following provisions of the Anti-Dumping Agreement or GATT 1994:
>
> …
>
> 5. Article X:3 of the GATT 1994 because the *USDOC permitted petitioners to place Tenaris SA's financial statements on the record after the expiration of the regulatory time limit for submission of new factual information, while the USDOC applied its regulatory deadlines for the submission of new factual information with respect to other parties and other submissions*. *Consequently*, the USDOC failed to administer its regulations in a uniform, impartial, and reasonable manner.[418]

7.322. We recall that Article 6.2 of the DSU requires that a panel request "present the problem clearly" by plainly connecting the challenged measure with the provision of the covered agreement claimed to have been infringed, and that the narrative of a panel request functions to explain succinctly how or why the measure at issue is considered by the complaining Member to be violating the WTO obligation in question. We also recall that we must determine compliance with the requirements of Article 6.2 on the merits of each case, considering the panel request as a whole, and in light of attendant circumstances.

7.323. The narrative part of Korea's panel request, and in particular the first sentence of paragraph 5 identifies, without qualification, the USDOC's decision to permit the petitioners to place the Tenaris financial statements on the record after the expiration of the regulatory time-limit for submission of "new factual information", as the basis of Korea's Article X:3(a) claim. This relates to the second factual basis of Korea's claims, i.e. the allegedly different administration of 19 C.F.R. § 351.301 in the Turkish and the underlying investigation.[419] We recall that 19 C.F.R. § 351.301 establishes rules for the submission of new factual information, and the second factual basis for Korea's claim relates to the alleged difference in the USDOC's treatment of what Korea considers to be "new factual information" within the meaning of this US domestic regulation, the Tenaris financial statements, in the two investigations.[420] Korea states that "[c]onsequently", that is, as a consequence of its decision to accept the Tenaris data in the underlying investigation, the USDOC failed to administer its regulation in a uniform, impartial and reasonable manner. Thus, Korea connects what it seeks to challenge, the USDOC's application of regulatory deadlines for the submission of new factual information, with Article X:3 of the GATT 1994.

7.324. We see no reference in paragraph 5, or in the panel request as a whole, to the USDOC's alleged deviation from established agency practice of determining profits on the basis of sources located in the home market of the exporter under investigation. Korea's panel request makes no reference whatsoever to this factual basis in connecting the conduct or action that it seeks to challenge with the provisions of Article X:3(a). Therefore, we see no basis to conclude that Korea

[418] Emphasis added.

[419] This becomes even clearer on reading Korea's first written submission. (Korea's first written submission, paras. 263 and 275). In addition, Korea stated in its second written submission that it was challenging, *inter alia*, the US regulations governing the submission and acceptance of new factual information. In its response to our questions at the second substantive meeting, it specifically identified this regulation as 19 C.F.R. § 351.301. (Korea's second written submission, para. 344; response to Panel question No. 78, para. 114).

[420] Korea's response to Panel question No. 78, para. 114.

intended to challenge the USDOC's conduct under Article X:3(a) on this first factual basis, and this aspect of, Korea's Article X:3(a) claim falls outside our terms of reference. We will thus limit our analysis to the second factual basis for Korea's claim.

7.9.4.2 Whether the USDOC failed to administer 19 C.F.R. § 351.301 in a uniform and reasonable manner

7.325. Korea argues that the USDOC failed to administer 19 C.F.R. § 351.301 in a uniform or reasonable manner because of differences in the administration of this regulation in the underlying investigation and in the Turkish investigation.[421] In particular, in the Turkish investigation, where USDOC also considered whether to determine the CV profit of the Turkish respondents on the basis of the Tenaris financial statements, the USDOC explicitly stated that it was "placing [Tenaris's] financial statements on the record of the antidumping duty investigation of OCTG from Turkey as a possible alternative for the calculation of CV profit for the final determination".[422] The USDOC went on to invite all interested parties to submit factual information to rebut, clarify, or correct the Tenaris financial statements by the stipulated deadline or rebuttal facts, in accordance with US regulation 19 C.F.R. § 351.301(c)(4).[423]

7.326. Korea submits that, in contrast, in the underlying investigation the USDOC did not place the Tenaris financial statements "on the record" of this investigation, and did not invite interested parties to submit rebuttal facts. Korea asserts that 19 C.F.R. § 351.301 prohibited the Korean respondents from submitting such rebuttal facts until the USDOC conveyed to them a formal decision placing the Tenaris financial statements "on the record" of the underlying investigation.[424] Therefore, in Korea's view, the USDOC denied an opportunity to the Korean respondents to submit rebuttal facts in the underlying investigation while granting the respondents in the Turkish investigation an opportunity to do so.

7.327. The United States asserts that it is not the case that the Tenaris financial statements would be "on the record" of the underlying investigation only when and if the USDOC notified the interested parties that these statements were on the record of the investigation.[425] The United States submits that these statements were on the record of the underlying investigation once they were submitted, until and unless the USDOC made a decision to remove them.[426] Further, the United States argues that Korea's view that the Korean respondents did not have an opportunity to submit rebuttal facts is incorrect, and the respondents did have such an opportunity.[427] The difference between the underlying investigation and the Turkish investigation is that because of different factual circumstances, the interested parties in the Turkish investigation had this opportunity to submit rebuttal facts under US regulation, 19 C.F.R. § 351.301(c)(4), whereas the Korean respondents in the underlying investigation had this opportunity under different US regulations, 19 C.F.R. § 351.301 and 19 C.F.R. § 351.301(c)(1)(v).

7.328. There is no dispute between the parties that the Tenaris financial statements were available to the Korean respondents in the underlying investigation, just as they were available to the respondents in the Turkish investigation. The dispute is with respect to whether the Korean respondents in the underlying investigation had an opportunity to submit rebuttal facts or whether they were treated differently from the interested parties in the Turkish investigation in this regard.

7.329. The United States explains that in the Turkish investigation, it was the USDOC itself, rather than an interested party, that introduced the Tenaris financial statements into the record of the underlying investigation. When the USDOC itself introduces factual information in the record of an investigation, at any time during the proceeding, US regulation 19 C.F.R. § 351.301(c)(4) requires it to provide interested parties one opportunity to submit factual information to rebut, clarify, or

[421] Korea's response to Panel question No. 78, para. 114.
[422] USDOC, Memorandum of placement of the Tenaris financial statements on the record of the Turkish OCTG investigation, 12 May 2014, (Exhibit KOR-49).
[423] USDOC, Memorandum of placement of the Tenaris financial statements on the record of the Turkish OCTG investigation, 12 May 2014, (Exhibit KOR-49).
[424] Korea's response to Panel question No. 69, para. 93.
[425] United States' response to Panel question No. 71, para. 48.
[426] United States' response to panel question No. 72, para. 49.
[427] United States' response to Panel question No. 72, para. 53.

correct that information within a stipulated deadline.[428] This is what the USDOC did in the Turkish investigation when it notified interested parties that it had placed the information on the record and gave them seven days to submit rebuttal facts.

7.330. We recall that the Tenaris financial statements were submitted by U.S. Steel in the underlying investigation, in the context of a rebuttal to information submitted by NEXTEEL in response to a supplemental questionnaire from the USDOC, pursuant to a different US regulation 19 C.F.R. § 351.301(c)(1)(v).[429] We further recall that, as described in paragraph 7.218 above, within ten days of the submission of a supplemental questionnaire response, an interested party other than the submitter of that questionnaire response is permitted, under this regulation, one opportunity to submit factual information to rebut, clarify, or correct factual information contained in that questionnaire response. The original submitter of the supplemental questionnaire response then has an automatic time of seven days to sur-rebut, clarify, or correct the information submitted by this interested party.[430] In the underlying investigation, U.S. Steel invoked this provision and stated that it was submitting the Tenaris financial statement as factual information to rebut, clarify, or correct information contained in NEXTEEL's Supplemental Questionnaire Response.[431] Thus, NEXTEEL had seven days to provide rebuttal facts.[432] There was no need for the USDOC to solicit rebuttal facts from the Korean respondents. In addition, according to the United States, HYSCO and other Korean respondents, which were not the original submitters of the information, could also file rebuttal information, under 19 C.F.R. § 351.301.[433] However, neither NEXTEEL nor any other Korean respondent took advantage of this opportunity by making any submissions in this regard.

7.331. Therefore, the United States maintains that the interested parties in the two investigations had the same opportunity to submit rebuttal facts, albeit under different US regulations. Hence, in the United States' view, there was no differential treatment. Korea does not dispute the United States' description of the requirements under 19 C.F.R. § 351.301(c)(4) and 19 C.F.R. § 351.301(c)(1)(v)[434], but denies that NEXTEEL or other Korean respondents had an opportunity to submit rebuttal facts under those provisions. Korea also states that 19 C.F.R. § 351.301 only permits parties to present arguments that the record is deficient, and does not permit parties to submit unsolicited factual information, but does not present evidence in support of this view.

7.332. Korea acknowledges that the USDOC did not decline to accept any rebuttal facts proffered by Korean respondents by citing these regulations.[435] Korea does not challenge the US regulations *per se*, but only the alleged different application in this case. Yet, because it is clear that the USDOC did not in fact apply these regulations to prevent Korean respondents from making rebuttal facts[436], Korea apparently bases its argument on an *assumption* that had the Korean respondents sought to submit such facts, the USDOC would have invoked 19 C.F.R. § 351.301 and rejected it. Moreover, Korea proffers no evidence to demonstrate that 19 C.F.R. § 351.301 prohibited the Korean respondents from submitting such rebuttal facts until the USDOC conveyed to them a formal decision to place the Tenaris financial statements on the record of the underlying investigation. We cannot find a violation of Article X:3(a) of the GATT 1994 on the basis of Korea's counter-factual assumption of how a domestic regulation might have been applied.

[428] United States' response to Panel question No. 72, para. 52.
[429] United States' response to Panel question No. 72, para. 51.
[430] United States' response to Panel question No. 72, para. 51.
[431] United States' response to Panel question No. 72, para. 51.
[432] United States' response to Panel question No. 72, para. 51.
[433] See, e.g. United States' response to Panel question No. 70, para. 47.
[434] However, Korea asserts that 19 C.F.R. § 351.301(c)(1)(v) was not applicable in the underlying investigation.
[435] Korea's response to Panel question No. 69, para. 102.
[436] Korea argues that if it were to submit factual information on Tenaris within the seven day sur-rebuttal period granted under 19 C.F.R. § 351.301(c)(1)(v), that would be tantamount to acknowledging that the Tenaris financial statements were "on the record" and therefore, subject to sur-rebuttal. (Korea's response to Panel question No. 69, para. 99). This suggests to us that NEXTEEL did have an option to submit factual information on Tenaris but chose not to submit it. This undermines Korea's argument that 19 C.F.R. § 351.301(c)(1)(v) prohibited NEXTEEL from filing factual information on Tenaris.

7.333. The fact that the opportunity to provide rebuttal facts was available to interested parties under different US domestic regulations in the Turkish and in the underlying investigation does not establish that the Korean respondents in the underlying investigation were treated differently from the interested parties in the Turkish investigation. On the basis of the foregoing, we conclude that Korea has not shown that the USDOC failed to administer 19 C.F.R. § 351.301 in a uniform or reasonable manner.

7.9.5 Conclusion

7.334. For the foregoing reasons, we conclude that:

a. Korea's claim under Article X:3(a) of the GATT 1994 that the USDOC failed to administer US laws and regulations in a uniform, impartial and reasonable manner because it acted contrary to its established agency practice of determining CV profit on the basis of sources located in the home market of the exporter or producer under investigation, and because this decision was attributable to political influence, falls outside our terms of reference and we make no findings in that regard.

b. Korea has not established that the USDOC acted inconsistently with Article X:3(a) of the GATT 1994 because it failed to administered its domestic regulation 19 C.F.R. § 351.301 in a uniform or reasonable manner.

7.10 Consequential claims under Articles 1, 9.3, and 18.4 of the Anti-Dumping Agreement, Article VI of the GATT 1994, and Article XVI:4 of the WTO Agreement

7.335. Korea claims that as a consequence of the USDOC's violation of the substantive and procedural obligations set out in the Anti-Dumping Agreement, the United States also acted inconsistently with Articles 1, 9.3, and 18.4 of the Anti-Dumping Agreement.[437] In particular, Korea argues that the USDOC acted inconsistently with:

a. Article 1 of the Anti-Dumping Agreement because it failed to ensure that the underlying investigation was initiated and conducted in accordance with this Agreement;

b. Article 9.3 of the Anti-Dumping Agreement because the margin of dumping determined by the USDOC was inconsistent with Articles 2.2, 2.2.1.1, 2.2.2, 2.3, and 2.4 of this Agreement, and thus the anti-dumping duty imposed by the USDOC was necessarily in excess of a margin of dumping determined consistently with Article 2 of this Agreement; and

c. Article 18.4 of the Anti-Dumping Agreement because by maintaining the "viability test", which is inconsistent with Article 2.2 of the Anti-Dumping Agreement, the USDOC failed to take all necessary steps, to ensure the conformity of its laws, regulations and administrative procedures with the provision of this Agreement.

In addition, Korea claims that because the USDOC acted inconsistently with the Anti-Dumping Agreement, it acted inconsistently with Article VI of the GATT 1994.[438] Further, as consequence of this, the USDOC also acted inconsistently with Article XVI:4 of the WTO Agreement.[439] The United States requests that we reject each of Korea's consequential claims.

7.336. We reach the following conclusions regarding Korea's claims under Articles 1, 9.3, and 18.4 of the Anti-Dumping Agreement:

a. Having found substantive violations of Articles 2.2.2, 2.2.2(i), and 2.2.2(iii) of the Anti-Dumping Agreement, we do not find it necessary to address Korea's consequential claims under Articles 1 and 9.3 of the Anti-Dumping Agreement to secure a positive resolution to this dispute, and we therefore exercise judicial economy on these claims.

[437] Korea's first written submission, paras. 238-241.
[438] Korea's first written submission, para. 243.
[439] Korea's first written submission, para. 244.

b. Korea's consequential claim under Article 18.4 of the Anti-Dumping Agreement is dependent on a finding that the "viability test" is inconsistent with Article 2.2 of the Anti-Dumping Agreement. Having found that the "viability test" is not inconsistent with Article 2.2 of the Anti-Dumping Agreement, there is no basis for a finding of a consequential violation of Article 18.4, and we reject Korea's claim.

7.337. With respect to Korea's claim under Article VI of the GATT 1994, Korea simply asserts that the USDOC acted inconsistently with Article VI of the GATT 1994, without identifying either in its panel request or in its written submissions the specific paragraphs or the specific obligations under these paragraphs that it seeks to challenge.[440] We would expect Korea, as the complainant in this dispute, to identify the specific obligations in Article VI it considers the United States has violated. We cannot make a finding of a consequential violation of Article VI of the GATT 1994 in general. Moreover, we decline to attempt to parse Korea's claims so as try to identify which obligations in Article VI may be violated as a consequence of findings of violation based on Korea's claims. This is a task for Korea, which it has failed to undertake. Therefore, we reject Korea's consequential claim under Article VI of the GATT 1994.[441]

7.338. Considering that Korea's consequential claim under Article XVI:4 of the WTO Agreement is contingent on a finding of violation of Article VI of the GATT 1994, which we have rejected, we similarly reject Korea's consequential claim under Article XVI:4 of the WTO Agreement.

7.11 Korea's claim under Article I:1 of the GATT 1994

7.11.1 Provision at issue

7.339. Article I:1 of the GATT 1994 provides that:

> With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

7.11.2 Main arguments of the parties

7.340. Korea asserts that the USDOC acted inconsistently with Article I:1 of the GATT 1994 because its relatively lenient treatment of the exporters and foreign producers from countries that were subject to parallel USDOC investigations on OCTG as compared to the exporters and foreign producers from Korea resulted in an "advantage, favour, privilege or immunity" that was not granted to OCTG originating in Korea.[442]

7.341. The United States submits that Korea's claim is based on bare allegations of different actions in different anti-dumping proceedings, and cannot succeed on this basis.[443]

7.11.3 Main arguments of the third parties

7.342. The European Union anticipates that the matters raised by Korea may be resolved by addressing Korea's claims under Article VI of the GATT 1994 and the Anti-Dumping Agreement without having to address these matters under Article I:1 of the GATT 1994.[444]

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[440] See, e.g. Korea's first written submission, paras. 245-256.

[441] In this regard, we are aware that some other WTO panels appear to have found consequential violations under Article VI, as a whole, without identifying the specific obligation that has been violated. (See, e.g. Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.336; and *Canada – Welded Pipe*, para. 7.223). We are not persuaded, however, that a similar approach is warranted in the present case.

[442] Korea's first written submission, para. 253.

[443] United States' first written submission, para. 241.

7.11.4 Evaluation by the Panel

7.11.4.1 Whether Korea's claims under Article I:1 of the GATT 1994 is within our terms of reference

7.343. The United States has raised an objection to the Panel's jurisdiction over aspects of this claim. Thus, we commence our analysis by addressing this question.

7.344. We recall that Article 6.2 of the DSU requires that a panel request "present the problem clearly" by plainly connecting the challenged measure with the provision of the covered agreement claimed to have been infringed, and that the narrative of a panel request functions to explain succinctly how or why the measure at issue is considered by the complaining Member to be violating the WTO obligation in question. We also recall that we must determine compliance with the requirements of Article 6.2 on the merits of each case, considering the panel request as a whole, and in light of attendant circumstances.

7.345. In its panel request, Korea presented its claim under Article I of the GATT 1994 as follows:

> IV. PROCEDURAL CLAIMS UNDER THE ANTI-DUMPING AGREEMENT AND THE GATT 1994
>
> Korea further considers that the USDOC's actions taken in the course of its anti-dumping investigation of Oil Country Tubular Goods from Korea failed to protect the respondents' due process rights and were otherwise inconsistent with procedural obligations under the following provisions of the Anti-Dumping Agreement or GATT 1994:
>
> …
>
> 4. Article I of the GATT 1994 because, *inter alia*, the USDOC expressly provided interested parties in its investigation of OCTG produced in other subject countries an opportunity to defend their interests by responding to the placement of Tenaris SA's financial statements on the record. Because the Korean respondents were not granted an opportunity to present submissions responding to Tenaris SA's financial statements, the USDOC's actions resulted in less [favourable] treatment of OCTG from Korea compared to like products originating from other countries under investigation.[445]

7.346. In its first written submission, Korea states that the USDOC acted inconsistently with Article I:1 of the GATT 1994 because:

a. The underlying investigation was the only one in which the USDOC required questionnaire responses and on-site verification of companies that were not named as respondents, or identified as affiliates.[446]

b. The questionnaires issued to the Korean respondents were far more extensive than the questionnaires issued to the respondents in any of the other OCTG investigations, although the product at issue as well as the factors that the USDOC considered in reaching its final determination were largely identical.[447]

c. In the Turkish investigation, the USDOC provided the interested parties with an opportunity to respond to the Tenaris financial statements whereas it refused to provide a similar opportunity to the Korean respondents in the underlying investigation.[448]

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[444] European Union's third-party submission, para. 87.
[445] Underlining original; italics added.
[446] Korea's first written submission, para. 253.
[447] Korea's first written submission, para. 253.
[448] Korea's first written submission, para. 256.

7.347. It is clear to us, reading the narrative section of the panel request, in particular, the *chapeau* to Section IV and paragraph 4, that Korea intended to challenge the USDOC's conduct on the basis set out in subparagraph (c) above. However, it is not clear to us, reading this panel request, that Korea also intended to challenge the USDOC's conduct on the basis specified in subparagraphs (a) and (b). The United States contends that Korea is precluded from challenging the USDOC's conduct on these bases, because its panel request makes no reference to them.[449]

7.348. Korea's GATT Article I:1 claim is set out in paragraph 4 of Section IV of its panel request. Korea sets out a series of procedural claims in Section IV, related to different actions taken by the USDOC in the course of the underlying investigation. In the first sentence of paragraph 4, Korea states that the USDOC acted inconsistently with Article I of the GATT because "inter alia" it expressly provided the interested parties in its investigations on OCTG produced in other subject countries an opportunity to defend their interests by responding to the placement of the Tenaris financial statements on the record. Korea contends that the use of the phrase "inter alia" in this paragraph makes it clear that it did not intend to challenge the USDOC's action or conduct on this basis alone, and therefore the other two aspects of its claim argued in its written submissions are also within the Panel's terms of reference.

7.349. We are not persuaded that the use of "inter alia" in this context entitles Korea to challenge any and all actions of the USDOC in the underlying investigation when its panel request specifically refers to one aspect of the USDOC's conduct, the allegedly differential treatment accorded to the Korean respondents by not providing them an opportunity to respond to the Tenaris financial statement. In particular, we note that the USDOC conduct referred in subparagraphs (a) and (b) above is not the conduct challenged in subparagraph (c). In subparagraph (a) Korea challenges the USDOC's decision to ask for questionnaire responses from specific entities. In subparagraph (b), Korea challenges the scope of the USDOC's questionnaires in the underlying investigation. Neither of these two aspects of the USDOC's conduct have anything to do with the USDOC's alleged failure to provide the Korean respondents with an opportunity to respond to the Tenaris financial statements.

7.350. Furthermore, in the second sentence of paragraph 4, unlike the first, Korea did not use the phrase "inter alia". Instead, Korea stated, without any qualification, that "[b]ecause" the Korean respondents were not granted an opportunity to present submissions responding to the Tenaris financial statements, the USDOC's actions resulted in "less [favourable] treatment" of OCTG from Korea. Thus, Korea connected the specific conduct of the USDOC that it was seeking to challenge with the alleged violation of Article I:1 of the GATT 1994. Considering that the basis on which Korea presented its claim under Article I:1 of the GATT 1994 in its panel request is distinctly different from the bases it presents in its written submission, it seems clear to us that Korea has attempted to expand its claims beyond the scope of its panel request. Korea cannot bring claims under Article I:1 of the GATT on wholly new bases not even alluded to in its request for establishment.

7.351. Therefore, we conclude that Korea's claims challenging the USDOC's actions referred in subparagraphs (a) and (b) above fall outside our terms of reference, and we will not address them.

7.11.4.2 The USDOC's alleged denial of an opportunity for the Korean respondents to comment on the Tenaris financial statements

7.352. Korea contends that the USDOC acted inconsistently with Article I:1 of the GATT 1994 because it discriminated against the Korean respondents by providing the interested parties in the Turkish investigation an opportunity to comment on the Tenaris financial statements, while denying that opportunity to the Korean respondents in the underlying investigation.[450] The factual basis of this claim is the same as that of Korea's claim under Article X:3(a) of the GATT 1994, that the USDOC failed to administer 19 C.F.R. § 351.301 in a uniform or reasonable manner in the Turkish and underlying investigations.

[449] United States' comments on Korea's response to Panel question No. 79, para. 99.
[450] Korea's first written submission, paras. 254 and 255.

7.353. We concluded above that Korea has not established the factual basis of its claim that the USDOC discriminated against the Korean respondents by denying them an opportunity to provide rebuttal facts while providing that opportunity to the interested parties in the Turkish investigation.[451] Considering that Korea's Article I:1 claim rests on the same factual basis, we conclude that Korea has also failed to establish the factual basis of its claim under Article I:1 of the GATT 1994. Therefore, we reject Korea's claim under Article I:1 of the GATT 1994.[452]

7.11.5 Conclusion

7.354. For the foregoing reasons, we conclude that Korea's claims that the USDOC acted inconsistently with Article I:1 of the GATT 1994 because: (a) the underlying investigation was the only one in which the USDOC required questionnaire responses and on-site verification of companies that were not named as respondents, or identified as affiliates; and (b) the questionnaires issued to the Korean respondents were far more extensive than the questionnaires issued to the respondents in any of the other OCTG investigations, although the product at issue as well as the factors that the USDOC considered in reaching its final determination were largely identical, are not within our terms of reference.

7.355. We also conclude that Korea has not established that the USDOC acted inconsistently with Article I:1 of the GATT 1994 by discriminating against the Korean respondents because it gave interested parties in the Turkish investigation an opportunity to comment on the Tenaris financial statements but denied such an opportunity to the Korean respondents in the underlying investigation.

8 CONCLUSIONS AND RECOMMENDATIONS

8.1. For the reasons set forth in this Report, we conclude that the United States acted inconsistently with:

a. the *chapeau* of Article 2.2.2 of the Anti-Dumping Agreement because the USDOC did not determine CV profit of the Korean respondents based on actual data pertaining to their sales of the like product in the home market;

b. Articles 2.2.2(i) and (iii) of the Anti-Dumping Agreement because the USDOC relied on an impermissibly narrow definition of the "same general category of products" in concluding it could not determine CV profit under Article 2.2.2(i) and in concluding it could not calculate the profit cap required by Article 2.2.2(iii);

c. Article 2.2.2(iii) of the Anti-Dumping Agreement because the USDOC failed to calculate and apply a profit cap as required by that provision, and as a consequence acted inconsistently with Article 2.2 of the Anti-Dumping Agreement by failing to use a reasonable amount for profits in the construction of normal value for the Korean respondents.

8.2. For the reasons set forth in this Report, we conclude that Korea has failed to demonstrate that the United States acted inconsistently with:

a. Article 2.2 of the Anti-Dumping Agreement "as such" and "as applied" in connection with the "viability test";

[451] See paras. 7.332-7.333 above.
[452] In this regard, we note that the Appellate Body in *EC – Fasteners (China)* stated that in determining whether there was a violation of Article I.1 of GATT 1994, the panel should have considered, as part of its legal analysis, whether and under what circumstances an anti-dumping measure that is inconsistent with the Anti-Dumping Agreement may be reviewed under Article I.1 of the GATT 1994 in the absence of a review under Article VI of the GATT 1994. (Appellate Body Report, *EC – Fasteners (China)*, para. 395). We have concluded that Korea has not established the factual basis of its claim under Article I:1 and thus do not find it necessary to conduct this legal analysis in this particular case.

b. Article 2.3 of the Anti-Dumping Agreement in connection with the USDOC's construction of NEXTEEL's export price where it appeared to the USDOC that NEXTEEL's export price was unreliable because of association;

c. Article 2.2.1.1 of the Anti-Dumping Agreement in connection with the USDOC's rejection, for the purpose of constructing the normal value, of the price at which NEXTEEL purchased steel coils from POSCO;

d. Article 6.2 of the Anti-Dumping Agreement in connection with the absence of notification by the USDOC to the Korean respondents, until its final determination, that it had accepted the Tenaris financial statements on the record;

e. Article 6.4 of the Anti-Dumping Agreement in connection with the absence of notification by the USDOC to the Korean respondents until its final determination that it had accepted the Tenaris financial statements on the record and that it was using these statements in determining CV profit;

f. Article 6.9 of the Anti-Dumping Agreement in connection with the absence of disclosure as an essential fact of the USDOC's decision to accept the Tenaris financial statements on the record and its reliance on the Tenaris financial statements to determine CV profit;

g. Article 6.10 of the Anti-Dumping Agreement in connection with the USDOC's conclusion that and explanation why it would be impracticable to examine all known exporters and why it was limiting its examination to two exporters;

h. Article 6.10.2 of the Anti-Dumping Agreement in connection with the USDOC's conclusion that and explanation why it would be unduly burdensome to individually examine voluntary respondents;

i. Article 12.2.2 of the Anti-Dumping Agreement in connection with the USDOC's reasons for rejecting certain arguments;

j. Article X:3(a) of the GATT 1994 in connection with the USDOC's administration of USDOC regulation 19 C.F.R. § 351.301;

k. Article I:1 of the GATT 1994 in connection with the treatment of interested parties in the Turkish investigation and the treatment of the Korean respondents in the underlying investigation regarding the opportunity to comment on the Tenaris financial statements;

l. Article 18.4 of the Anti-Dumping Agreement as a consequence of the alleged violation of Article 2.2 of the Anti-Dumping Agreement in connection with the "viability test";

m. Article VI of the GATT 1994 as a consequence of alleged violations of the Anti-Dumping Agreement; and

n. Article XVI:4 of the WTO Agreement as a consequence of alleged violations of the Anti-Dumping Agreement and Article VI of the GATT 1994.

8.3. For the reasons set forth in this Report, we find that the following claims asserted by Korea fall outside our terms of reference, and thus do not consider them:

a. alleged violation of Article 2.2.2(iii) of the Anti-Dumping Agreement because the USDOC failed to use a reasonable method to determine the CV profit rate of the Korean respondents by basing this profit rate on the Tenaris financial statements;

b. alleged violation of Article 6.4 of the Anti-Dumping Agreement because the USDOC failed to post certain communications to the record in a timely fashion;

c. alleged violation of Article 6.9 of the Anti-Dumping Agreement because it failed to disclose these communications as essential facts;

d. alleged violation of Article X:3(a) of the GATT 1994 because the USDOC failed to administer US laws and regulations in a uniform, impartial and reasonable manner by acting contrary to its established agency practice of determining CV profit on the basis of sources located in the home market of the exporter or producer under investigation, and because this decision was attributable to political influence;

e. alleged violation of Article I:1 of the GATT 1994 because: (a) the underlying investigation was the only one in which the USDOC required questionnaire responses and on-site verification of companies that were not named as respondents, or identified as affiliates; and (b) the questionnaires issued to the Korean respondents were far more extensive than the questionnaires issued to the respondents in any of the other OCTG investigations.

8.4. For the reasons set forth in this Report, we find the USDOC's remand determination falls outside our terms of reference and therefore we do not consider Korea's claims in connection with it.

8.5. For the reasons set forth in this Report, we exercise judicial economy with respect to Korea's claims that the USDOC acted inconsistently with:

a. the *chapeau* of Article 2.2.2 of the Anti-Dumping Agreement because the USDOC did not determine CV profit of the Korean respondents based on actual data pertaining to their sales of the like product in third-country markets;

b. Article 2.4 because the USDOC did not make a fair comparison between the export price and the constructed normal value by failing to make due allowance for the significant differences between the profit rates of the Korean respondents and that of Tenaris; and

c. Articles 1 and 9.3 of the Anti-Dumping Agreement as a consequence of substantive violations of Articles 2.2.2, 2.2.2(i), and 2.2.2(iii) of the Anti-Dumping Agreement.

8.6. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue are inconsistent with certain provisions of the Anti-Dumping Agreement, they have nullified or impaired benefits accruing to Korea under this agreement.

8.7. Pursuant to Article 19.1 of the DSU, we recommend that the United States bring its measures into conformity with its obligations under the Anti-Dumping Agreement.