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

REPORT OF THE PANEL

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US – Zeroing (EC) (Article 21.5 – EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/AB/RW and Corr.1, adopted 11 June 2009, DSR 2009:VII, p. 2911

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KOR-160	Alloy steel final determination	Memorandum dated 29 March 2017 concerning the final affirmative determination in the less-than-fair-value investigation of certain carbon and alloy steel cut-to-length plate from France
KOR-163	Heavy welded steel final determination	Memorandum dated 14 July 2016 concerning the final affirmative determination in the less-than-fair-value investigation of heavy walled rectangular welded carbon steel pipes and tubes from the Republic of Turkey
KOR-175	Essar Steel Ltd. v. United States	United States Court of Appeals for the Federal Circuit, Essar Steel Ltd. v. United States (12 June 2014)
KOR-176	De Cecco Di Filippo Fara. S. Martino v. United States	United States Court of Appeals for the Federal Circuit, F.Lii de Cecco di Filippo Fara. S. Martino v. United States, (16 June 2000)
KOR-177	Özdemir Boru San. ve Tic. Ltd. Sti. v. United States	United States Court of International Trade, Özdemir Boru San. ve Tic. Ltd. Sti. v. United States, Court No. 16-00206 (16 October 2017)

Exhibit	Short Title (if any)	Description
KOR-178	Lifestyle Enterprise, Inc. v United States	United States Court of International Trade, Lifestyle Enterprise v. United States, Consol. Court No. 09-00378 (11 February 2011)
KOR-206 (BCI)	LPT POR2 court remand	United States Court of International Trade, ABB, INC. v. United States, Consol. Court No. 16-00054, Slip Op. 17-138 (10 October 2017)
KOR-207 (public version)	LPT POR2 draft results of redetermination	USDOC, Draft results of redetermination pursuant to court remand, Consol. Court No. 16-00054, Slip Op. 17-138 (10 October 2017)
KOR-207 (revised, public version)	LPT POR2 final results of redetermination	USDOC, Final results of redetermination pursuant to court remand, Consol. Court No. 16-00054, Slip Op. 17-138 (10 October 2017)
KOR-209	LPT POR3 initial questionnaire	LPT POR3 initial questionnaire (3 December 2015)
KOR-211	LPT POR4 issues and decision memorandum	Memorandum dated 9 March 2018 concerning the final results of the administrative review of the antidumping duty order on large power transformers from the Republic of Korea, 2015-2016
KOR-212	LPT POR4 HHI request for meeting	LPT POR4 HHI request for meeting (10 July 2017)
KOR-213 (BCI)	LPT POR4 second supplemental questionnaire response	LPT POR4 second supplemental questionnaire response (19 June 2017)
KOR-215	LPT POR4 second supplemental questionnaire response	LPT POR4 second supplemental questionnaire response (26 June 2017)
KOR-216 (revised)	List of AFA proceedings	List of all proceedings in which AFA was used since the amendments of Section 502 of the TPEA
KOR-217	Analysis of USDOC cases	Substantive analysis of 12 representative USDOC cases
KOR-226	USDOC Anti-Dumping Manual	Excerpt of USDOC Anti-Dumping Manual
KOR-227 (BCI)	CRS final redetermination	CRS final redetermination (16 October 2018)
KOR-245	Section 776 of the Tariff Act	Section 776 of the Tariff Act, as amended by Section 502 of the 2015 TPEA, codified in 19 U.S.C. 1677e
KOR-248 (BCI)	LPT POR2 supplemental Sections B-C questionnaire response	LPT POR2 supplemental Sections B-C questionnaire response (3 June 2015)
KOR-252 (BCI)	LPT POR3 petitioner's comments	LPT POR3 petitioner's comments (2 December 2016)
KOR-269 (BCI)	LPT POR3 petitioner case brief	LPT POR3 petitioner case brief (5 January 2017)
KOR-270 (BCI)	LPT POR3 HHI rebuttal brief	LPT POR3 HHI rebuttal brief (11 January 2017)
USA-3	CORE initial questionnaire extension	CORE initial questionnaire extension (11 September 2015)
USA-4	USDOC additional guidance	USDOC additional guidance (16 September 2015)
USA-5 (BCI)	CORE first supplemental Section E questionnaire	CORE first supplemental Section E questionnaire (19 November 2015)
USA-8	CORE issues and decision memorandum on PDM	Memorandum dated 21 December 2015 concerning the preliminary determination in the antidumping duty investigation of certain corrosion-resistant steel products from the Republic of Korea
USA-14 (BCI)	CRS part I of Section D questionnaire response	Cold-rolled steel products from Korea: Hyundai Steel Section D questionnaire response (Part I) (4 November 2015)
USA-15 (BCI)	CRS supplemental Sections B-C questionnaire	CRS supplemental Sections B-C questionnaire (19 January 2016)
USA-20 (BCI)	HRS supplemental Sections A-C questionnaire	HRS Supplemental Sections A-C questionnaire (23 December 2015)
USA-23	LPT POR2 initial questionnaire	LPT POR2 initial questionnaire (1 December 2014)
USA-24 (BCI)	LPT POR2 Sections B-C questionnaire response	LPT POR2 Sections B and C questionnaire response, (26 January 2015)
USA-27 (BCI)	LPT POR2 draft results of redetermination	USDOC, ABB INC. v. United States, final results of redetermination pursuant to court remand, Consol. Court No. 16-00054, Slip Op. 17-138 (10 October 2017)
USA-29 (BCI)	LPT POR2 final results of redetermination	USDOC, ABB INC. v. United States, final results of redetermination pursuant to court remand, Consol. Court No. 16-00054, Slip Op. 17-138 (10 October 2017)
USA-35	LPT POR4 initial questionnaire	LPT POR4 initial questionnaire (5 January 2017)

Exhibit	Short Title (if any)	Description
USA-36 (BCI)	LPT POR4 first supplemental sales questionnaire	LPT POR4 first supplemental sales questionnaire (12 April 2017)
USA-37 (BCI)	LPT POR4 first supplemental sales questionnaire response	LPT POR4 first supplemental sales questionnaire response (3 May 2017)
USA-39 (BCI)	LPT POR4 supplemental questionnaire	LPT POR4 supplemental questionnaire (11 July 2017)
USA-40	LPT POR4 meeting memorandum	Memorandum dated 21 July 2017 concerning 2015/2016 administrative review of the antidumping duty order on large power transformers from the Republic of Korea: meeting with Counsel for HHI
USA-41 (BCI)	LPT POR4 supplemental questionnaire response	LPT POR4 supplemental questionnaire response (24 July 2017)
USA-43 (BCI)	LPT POR4 preliminary analysis memorandum	Memorandum dated 31 August 2017 concerning the preliminary results of the 2015-2016 administrative review of the antidumping duty order on large power transformers from the Republic of Korea
USA-46 (BCI)	Hyosung initial anti-dumping questionnaire	Hyosung initial anti-dumping questionnaire (5 January 2017)
USA-61	Viet I-Mei Frozen Foods Co. v. United States	United States Court of International Trade, Viet I-Mei Frozen Foods Co. v. United States, Court No. 14-00092 (30 July 2015)
USA-62	Stainless steel bar from Italy, issues and decision memorandum	Memorandum dated 23 January 2002 concerning the final determination in the countervailing duty investigation of stainless steel bar from Italy
USA-72 (BCI)	CRS supplemental Sections B-C questionnaire	CRS supplemental Sections B-C questionnaire (24 November 2015)
USA-90	Welded line pipe from Korea, issues and decision memorandum	Memorandum dated 5 October 2015 concerning the final negative determination: countervailing duty investigation of welded line pipe from the Republic of Korea
USA-91	Non-oriented electrical steel from Chinese Taipei, issues and decision memorandum	Memorandum dated 6 October 2014 concerning the final affirmative countervailing duty determination in the countervailing duty investigation of non-oriented electrical steel from Chinese Taipei
USA-96		List of duplicative cases in KOR-216

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
[[***]]	[[***]]
AD	anti-dumping
AFA	adverse facts available
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
AHSS	advanced high-strength steel
AUL	average useful life
BCI	Business Confidential Information
CEP	constructed export price
CONNUM	control number
CORE	corrosion-resistant steel
CRS	cold-rolled steel
CVD	countervailing duty
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
DWI	Daewoo International Corporation
E&C	enforcement and compliance
FEZ	free economic zone
GATT 1994	General Agreement on Tariffs and Trade 1994
GOK	Government of Korea
HHI	Hyundai Heavy Industries
HRS	hot-rolled steel
HSA	Hyundai Steel America
Hyosung	Hyosung Corporation
Hyundai Steel	Hyundai Steel Corporation
Iljin Electric	Iljin Electric Co., Ltd.
KEXIM	Korea Export Import Bank
KNOC	Korea National Oil Corporation
KORES	Korean Resources Corporation
LPT	large power transformer
LSIS	LSIS Co., Ltd.
NME	non-market economy
OAF	order of acknowledgement form
PDM	preliminary decision memorandum
POI	period of investigation
POR2	period of review from 1 August 2013 to 31 July 2014 (second administrative review)
POR3	period of review from 1 August 2014 to 31 July 2015 (third administrative review)
POR4	period of review from 1 August 2015 to 31 July 2016 (fourth administrative review)
R&D	research and development
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SEQHs	home market sales sequence numbers
SEQUs	US sales sequence numbers
SSB	skelp, sheet, and blank
2015 TPEA Amendment	Section 502 of the Trade Preferences Extension Act of 2015
TWB	tailor-welded blank
UHSS	ultra-high-strength steel
USCIT	US 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

1 INTRODUCTION

1.1 Complaint by Korea

1.1. On 14 February 2018, the Republic of Korea (Korea) requested consultations with the United States pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994), Articles 17.2 and 17.3 of the Agreement on Implementation of Article VI of the GATT 1994 (Anti-Dumping Agreement), and Article 30 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) with respect to the measures and claims set out below.[1]

1.2. Consultations were held on 22 March 2018, but were unsuccessful in resolving the dispute between the parties.

1.2 Panel establishment and composition

1.3. On 16 April 2018, Korea requested the establishment of a panel pursuant to Article 6 of the DSU with standard terms of reference.[2] Pursuant to Korea's request, the Dispute Settlement Body (DSB) established the Panel at its meeting on 28 May 2018, in accordance with Article 6 of the DSU.[3]

1.4. Under its terms of reference, the Panel is required:

> 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 the Republic of Korea in document WT/DS539/6 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. Based on an Agreement between the parties, the Panel was composed on 5 December 2018 as follows:

Chairperson:	Ms Marta Calmon Lemme
Members:	Ms Leora Blumberg Mr Matthew Kennedy

1.6. Brazil, Canada, China, Egypt, the European Union, India, Japan, Kazakhstan, Mexico, Norway, and the Russian Federation notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel proceedings

1.3.1 General

1.7. Having consulted with the parties, the Panel adopted its Working Procedures[5] together with the timetable for these proceedings on 13 February 2019. The timetable was further revised during the course of the panel proceedings in light of subsequent developments and upon the parties' requests.[6]

1.8. The Panel held its first substantive meeting with the parties on 24 and 25 July 2019. A session with the third parties was convened on 25 July 2019. The Panel's second substantive meeting with the parties was held on 11 and 12 February 2020. The Panel issued its Interim Report to the parties on 24 September 2020, followed by the Final Report to the parties on 17 December 2020.

[1] Request for consultations by Korea, WT/DS539/1 (Korea's consultations request).
[2] Request for the establishment of a panel by Korea, WT/DS539/6 (Korea's panel request).
[3] DSB, Minutes of meeting held on 28 May 2018, WT/DSB/M/413.
[4] Constitution note of the Panel, WT/DS539/7.
[5] Working Procedures in Annex A-1.
[6] The timetable was updated and revised on 29 July 2019, 4 September 2019, 26 February 2020, 28 February 2020, and 3 September 2020.

1.3.2 Working Procedures on Business Confidential Information

1.9. Based on its consultations with the parties, on 13 February 2019 the Panel adopted additional Working Procedures for the protection of Business Confidential Information (BCI).[7]

1.3.3 Preliminary ruling request

1.10. On 23 April 2019, before filing its first written submission, the United States requested a preliminary ruling that one of the claims advanced by Korea – i.e. its "as such" claim against an alleged unwritten measure – was outside the Panel's terms of reference.[8] Korea responded to the United States' request on 21 May 2019.[9] Both parties requested the Panel to issue its preliminary ruling at the earliest moment practicable.[10] Following the Panel's invitation to all third parties to comment on the United States' request, two third parties addressed this issue in their third-party submissions.[11]

1.11. The Panel issued its preliminary ruling to the parties, with the third parties on copy, on 2 July 2019, before its first substantive meeting with the parties.[12] Declining the United States' request, the Panel found that, for purposes of Article 6.2 of the DSU, the alleged unwritten measure that is the object of Korea's "as such" challenge is properly identified in its panel request. The Panel's preliminary ruling and its underlying reasons are presented together in section 7.4.1 of this Report.

2 FACTUAL ASPECTS

2.1 The measures at issue

2.1. Korea's panel request challenges the WTO-consistency of several measures concerning the imposition by the United States of anti-dumping and countervailing duties on imports of products from Korea.

2.2. First, Korea challenges on an "as applied" basis the definitive anti-dumping (AD) and countervailing duty (CVD) measures imposed by the United States pursuant to the preliminary and final determinations and orders issued by the United States Department of Commerce (USDOC) in the following investigations and administrative reviews[13]:

a. Anti-Dumping Duties on Certain Corrosion-Resistant Steel Products (CORE) from the Republic of Korea (USDOC investigation number A-580-878) ("CORE AD Investigation") as set forth, among others, in:

   i. Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, United States Federal Register, Vol. 81, No. 35303 (2 June 2016);

[7] Additional Working Procedures on Business Confidential Information in Annex A-2.
[8] United States' request for a preliminary ruling.
[9] Korea's response to United States' preliminary ruling request.
[10] United States' request for a preliminary ruling, para. 24; Korea's response to United States' preliminary ruling request, para. 54.
[11] Canada's third-party submission, paras. 26-35; European Union's third-party submission, paras. 70-71.
[12] The Panel's preliminary ruling is reproduced in full in Annex A-4.
[13] Korea's panel request, para. 6. The panel request explains that the "measures include the conduct of those investigations and administrative reviews, any preliminary or final anti-dumping and countervailing duty determinations issued in those investigations and administrative reviews, any definitive anti-dumping and countervailing duties imposed as a result of those investigations and administrative reviews, as well as any notices, annexes, decision memoranda, orders, amendments, or other instruments issued by the United States in connection with these anti-dumping and countervailing duty measures". (Ibid. para. 6). The panel request "also concerns any modification, review, replacement or amendment to the definitive anti-dumping and countervailing duty measures listed above and any closely connected, subsequent measures to determine a dumping margin or subsidy amount, or related anti-dumping duty or countervailing duty rates". (Ibid. para. 7).

ii. Issues and Decision Memorandum for the Final Affirmative Determination in the Anti-Dumping Duty Investigation of Certain Corrosion-Resistant Steel Products from the Republic of Korea (24 May 2016); and

iii. Anti-Dumping Duty Order, United States Federal Register, Vol. 81, No. 48390 (25 July 2016).

b. Anti-Dumping Duties on Certain Cold-Rolled Steel Flat Products from the Republic of Korea (USDOC investigation number A-580-881) ("CRS AD Investigation") as set forth, among others, in:

i. Final Determination of Sales at Less Than Fair Value, United States Federal Register, Vol. 81, No. 49953 (29 July 2016);

ii. Issues and Decision Memorandum for the Final Affirmative Determination in the Anti-Dumping Duty Investigation of Certain Cold-Rolled Steel Products from the Republic of Korea (20 July 2016); and

iii. Anti-Dumping Duty Order, United States Federal Register, Vol. 81, No. 64432 (20 September 2016).

c. Countervailing Duties on Certain Cold-Rolled Steel Flat Products from the Republic of Korea (USDOC investigation number C-580-882) ("CRS CVD Investigation") as set forth, among others, in:

i. Final Affirmative Determination, United States Federal Register, Vol. 81, No. 49943 (29 July 2016);

ii. Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Republic of Korea (20 July 2016); and

iii. Countervailing Duty Order, United States Federal Register, Vol. 81, No. 64436 (20 September 2016).

d. Anti-Dumping Duties on Certain Hot-Rolled Steel Flat Products from the Republic of Korea (USDOC investigation number A-580-883) ("HRS AD Investigation") as set forth, among others, in:

i. Final Determination of Sales at Less Than Fair Value, United States Federal Register, Vol. 81, No. 53419 (12 August 2016);

ii. Issues and Decision Memorandum for the Final Affirmative Determination in the Anti-Dumping Duty Investigation of Certain Hot-Rolled Steel Flat Products from the Republic of Korea (4 August 2016); and

iii. Anti-Dumping Duty Order, United States Federal Register, Vol. 81, No. 67962 (3 October 2016).

e. Countervailing Duties on Certain Hot-Rolled Steel Flat Products from the Republic of Korea (USDOC investigation number C-580-884) ("HRS CVD Investigation") as set forth, among others, in:

i. Final Affirmative Determination, United States Federal Register, Vol. 81, No. 53439 (12 August 2016);

ii. Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products from the Republic of Korea (4 August 2016); and

iii. Countervailing Duty Order, United States Federal Register, Vol. 81, No. 67960 (3 October 2016).

f. Anti-Dumping Duties on Large Power Transformers from the Republic of Korea (USDOC investigation number A-580-867) ("LPT AD Investigation") as set forth, among others, in:

i. Final Determination of Sales at Less Than Fair Value, United States Federal Register, Vol. 77, No. 40857 (11 July 2012);

ii. Anti-Dumping Duty Order, United States Federal Register, Vol. 77, No. 53177 (31 August 2012); and

iii. Review determinations and related measures, including:

- Final Results of Redetermination Pursuant to Court Remand, ABB INC. v. United States, Consol. Court No. 16-00054, Slip Op 17-138 (7 February 2018, remand of second administrative review);

- Final Results of Anti-Dumping Duty Administrative Review; 2014-2015 (United States Federal Register, Vol. 82, No. 13432 (13 March 2017), third administrative review);

  - Issues and Decision Memorandum for the Final Results of the Administrative Review of the Anti-Dumping Duty Order on Large Power Transformers from the Republic of Korea; 2014-2015 (6 March 2017);

- Final Results of Anti-Dumping Duty Administrative Review; 2015-2016 (United States Federal Register, Vol. 83, No. 11679 (16 March 2018), fourth administrative review);

  - Issues and Decision Memorandum for the Final Results of the Administrative Review of the Anti-Dumping Duty Order on Large Power Transformers from the Republic of Korea; 2015-2016 (9 March 2018); and

- Final Results of the Expedited First Sunset Review of the Anti-Dumping Duty Order, United States Federal Register, Vol. 82, No. 51604 (7 November 2017);

  - Issues and Decision Memorandum for the Expedited First Sunset Review of the Anti-Dumping Duty Order on Large Power Transformers from the Republic of Korea (31 October 2017).

2.3. Second, Korea challenges "as such" the following provisions of the domestic law of the United States relating to the USDOC's use of facts available and the drawing of adverse inferences[14]:

a. Section 502 of the Trade Preferences Extension Act of 2015, Pub. L. No. 114-27;

b. Section 776 of the Tariff Act of 1930, codified at the United States Code of Federal Regulations, Title 19, Section 1677e;

c. the implementing regulations of the USDOC in the United States Code of Federal Regulations, Title 19, Section 351, including in particular Section 308; and

d. any other related, subsequent measures that enable or implement the use of facts available in anti-dumping and countervailing duty investigations, administrative reviews, and other parts of such proceedings.

[14] Korea's panel request, para. 8. See also fn 19 below.

2.4. Finally, Korea challenges "as such" an unwritten measure allegedly adopted by the United States (the "alleged unwritten measure") as follows:

> **C. *Use of Adverse Facts Available As Ongoing Conduct, or a Rule or Norm of General and Prospective Application***
>
> This request also concerns the ongoing conduct or the practice of the USDOC of using "adverse facts available" as a rule or norm of general and prospective application when a producer or exporter is found to have failed to cooperate by not acting to the best of its ability. Under this ongoing conduct or norm, whenever the USDOC makes a finding that a producer or exporter has failed to cooperate by not acting to the best of its ability, it adopts adverse inferences and, in determining the duty rate for this producer or exporter, selects facts from the record that are adverse to the interests of this producer or exporter without establishing (i) that such inferences can reasonably be drawn in light of the degree of cooperation received, and (ii) that such facts are the "best information available" in the particular circumstances.[[1]][15]

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

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

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. Korea requests the Panel to make the following findings[16]:

a. In relation to each of the anti-dumping and countervailing duty measures identified under the "as applied" claims, the United States acted inconsistently with Article 6.8 and Annex II of the Anti-Dumping Agreement, in particular paragraphs 1, 3, 5, 6, and 7 of Annex II, and Article 12.7 of the SCM Agreement relating to the lack of basis to resort to facts available, the improper application of facts available, and the drawing of adverse inferences in the selection of facts otherwise available.

b. In addition, as a consequence of the undue use of adverse facts available (AFA) when determining dumping or subsidization, the "as applied" anti-dumping measures are also inconsistent with Articles 1, 9.3, and 18.1 of the Anti-Dumping Agreement, and the "as applied" countervailing duty measures are inconsistent with Articles 10, 19.4, and 32.1 of the SCM Agreement.

c. Moreover, the "all others" rate applied by the USDOC in the fourth administrative review of the anti-dumping duties on LPTs from Korea is inconsistent with Article 9.4 of the Anti-Dumping Agreement, as the USDOC failed to disregard the margins established based on facts available pursuant to Article 6.8 of the Anti-Dumping Agreement.

d. In relation to the "as such" claims, the United States acted inconsistently with Article 6.8 and Annex II of the Anti-Dumping Agreement, in particular paragraphs 1, 3, 5, 6, and 7 of Annex II, and Article 12.7 of the SCM Agreement by reason of the AFA rule or norm or AFA ongoing conduct since these measures involve selecting the facts available on the sole basis of the adverse inference and without engaging in the required comparative process of reasoning and evaluation in search of an accurate determination.

[15] Korea's panel request, para. 9 and fn 1.

[16] Korea's first written submission, para. 1040; second written submission, para. 434. See also Korea's first written submission, paras. 455 and 657.

3.2. Korea further requests that, pursuant to Article 19.1 of the DSU, the Panel recommend that the United States bring its measures into conformity with its WTO obligations.

3.3. The United States requests that the Panel 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 23 of the Working Procedures adopted by the Panel (see Annexes B-1 and B-2).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Brazil, Canada, the European Union, Japan, Mexico, and Norway are reflected in their executive summaries, provided in accordance with paragraph 26 of the Working Procedures adopted by the Panel (see Annexes C-1, C-2, C-3, C-4, C-5, and C-6). China, Egypt, India, Kazakhstan, and the Russian Federation did not make written or oral submissions before the Panel.

6 INTERIM REVIEW

6.1. The Panel issued its Interim Report to the parties on 24 September 2020. On 12 October 2020, Korea and the United States each submitted written requests seeking a review of precise aspects of the Interim Report. On 26 October 2020, both parties submitted comments on each other's requests for review. Neither party requested an interim review meeting.

6.2. The requests made at the interim review stage as well as the Panel's discussion and disposition thereof are set out in Annex A-4.

7 FINDINGS

7.1. This dispute concerns several "as applied" claims and one "as such" claim by Korea alleging a violation of the United States' obligations under the Anti-Dumping and SCM Agreements. On an "as applied" basis, Korea challenges individual instances of the USDOC's use of facts available in four anti-dumping[17] and two countervailing duty[18] investigations with respect to the United States' obligations under the covered agreements. In each of the six investigations at issue, Korea claims both that the conditions for the USDOC's *resort* to facts available were not met and that the USDOC's subsequent *selection* of the replacement facts for the missing information was in violation of the applicable legal disciplines. In addition to its "as applied" challenges, Korea also advances an "as such" claim against an alleged unwritten measure concerning the USDOC's use of "adverse facts available".[19] Korea's "as such" challenge does not take issue with the USDOC's *resort* to facts available, but, instead, focuses exclusively on the USDOC's "*selection* of the facts available in a situation where a finding of non-cooperation has been made".[20]

7.2. Our findings and conclusions are organized as follows. We begin by addressing certain issues of general relevance (section 7.1), including the applicable rules of treaty interpretation, the burden of proof, and the standard(s) of review. Subsequently, we consider certain interpretative issues that are common to our analysis of several of Korea's "as applied" challenges as well as its "as such" claim (section 7.2). We then evaluate Korea's claims, beginning with its "as applied" challenges against individual instances of the USDOC's use of facts available in each of the six investigations at issue (section 7.3) and then turning to its "as such" claim against an alleged unwritten measure (section 7.4). Our conclusions and recommendation are set out in section 8 of this Report.

[17] CORE AD Investigation (USDOC investigation number A-580-878); CRS AD Investigation (USDOC investigation number A-580-881); HRS AD Investigation (USDOC investigation number A-580-883); and LPT AD Investigation (USDOC investigation number A-580-867).

[18] CRS CVD Investigation (USDOC investigation number C-580-882); and HRS CVD Investigation (USDOC investigation number C-580-884).

[19] Korea did not pursue its "as such" claim against certain US domestic law provisions identified in paragraph 2.3 of this Panel Report. (Korea's comments on draft descriptive part, para. 1).

[20] Korea's response to Panel question No. 43. (emphasis added)

7.1 General issues

7.1.1 Treaty interpretation

7.3. In Article 3.2 of the DSU, WTO Members "recognize" that the WTO dispute settlement system serves, *inter alia*, 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 also stipulates that the panels "shall interpret the relevant provisions of [that] Agreement in accordance with customary rules of interpretation of public international law".

7.4. The "customary rules of interpretation of public international law" within the meaning of the DSU and the Anti-Dumping Agreement are the rules of interpretation that have attained the status of general customary international law, as codified, in particular, in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (Vienna Convention).[21]

7.5. Article 31(1) of the Vienna Convention, as rendered applicable by Article 3.2 of the DSU, requires that the covered agreements are to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose". The "ordinary meaning" of treaty terms can be ascertained only in their context and in light of the object and purpose of the treaty.[22] Moreover, the principle of effectiveness in treaty interpretation, which is a corollary of the general rule in Article 31, requires that a treaty interpreter must give meaning and effect to each term and not render redundant whole clauses or paragraphs.[23] The rules of treaty interpretation "neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended".[24] Instead, "[t]he fundamental rule of treaty interpretation requires a treaty interpreter to read and interpret the words actually used by the Agreement under examination, and not words which the interpreter may feel should have been used".[25] As reflected in the use of the singular "rule" in the title of Article 31, "interpretation pursuant to the customary rule codified in Article 31 of the *Vienna Convention* is ultimately a holistic exercise that should not be mechanically subdivided into rigid components".[26]

7.6. Pursuant to Article 32 of the Vienna Convention, a treaty interpreter may resort to supplementary means of interpretation either to "confirm" the meaning resulting from the application of Article 31 of the Vienna Convention, or to determine the meaning when the interpretation according to Article 31 leaves the meaning "ambiguous or obscure" or leads to a "manifestly absurd" or "unreasonable" result. Supplementary means of interpretation include "the preparatory work of the treaty and the circumstances of its conclusion".[27]

7.1.2 Burden of proof

7.7. The DSU does not contain any rules concerning burden of proof. However, the "generally accepted canon of evidence in … most jurisdictions, that the burden of proof rests upon the party … who asserts the affirmative of a particular claim or defence" is also followed in the WTO dispute settlement system.[28] In WTO dispute settlement proceedings, it is understood that a complainant must "establish a *prima facie* case of inconsistency with [the] provision [invoked] before the burden of showing consistency with that provision is taken on by the defending party".[29] A "*prima facie* case is one 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 presenting the *prima facie* case".[30]

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[21] Appellate Body Reports, *US – Gasoline*, DSR 1996:I, pp. 15-16; *Japan – Alcoholic Beverages II*, DSR 1996:I, p. 104.
[22] Appellate Body Report, *China – Publications and Audiovisual Products*, para. 348.
[23] See, e.g. Appellate Body Report, *US – Gasoline*, DSR 1996:I, p. 21. See also Appellate Body Report, *Korea – Dairy*, para. 81.
[24] Appellate Body Report, *India – Patents (US)*, para. 45.
[25] Appellate Body Report, *EC – Hormones*, para. 181.
[26] Appellate Body Report, *China – Publications and Audiovisual Products*, para. 348.
[27] See also Appellate Body Report, *EC – Chicken Cuts*, para. 283.
[28] Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1997:I, p. 335.
[29] Appellate Body Report, *EC – Hormones*, para. 104.
[30] Appellate Body Report, *EC – Hormones*, para. 104.

7.1.3 Standard(s) of review

7.8. The standard of review is the criteria by which a panel examines the consistency of a challenged measure with a WTO Member's obligations under the WTO covered agreements. In the present dispute, Korea brings claims under the SCM Agreement and the Anti-Dumping Agreement.

7.9. The SCM Agreement does not contain any special or additional rules on the standard of review to be adopted by the Panel.[31] Panels examining claims under the SCM Agreement are guided by the general function of panels as set out in Article 11 of the DSU, which 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[.]

7.10. A panel's function under Article 11 to make an "objective assessment" embraces both factual and legal aspects of a panel's examination of the "matter".[32] We also note the clarification in Article 3.2 of the DSU that "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered Agreements".

7.11. Article 17.6 of the Anti-Dumping Agreement sets out a "special" standard of review for claims under that Agreement and reads as follows:

> In examining the matter referred to in paragraph 5:
>
> (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.[33]

7.12. The first subparagraph of Article 17.6 concerns the panel's "*assessment* of the *facts* of the matter", while the second guides its interpretative exercise.[34] Under Article 17.6(i), a panel is tasked with determining, first, whether the investigating authorities' "*establishment* of the facts was *proper*" and, second, whether their "*evaluation* of those facts was *unbiased* and *objective*". Article 17.6(ii), like Article 3.2 of the DSU, makes clear that the provisions of the Anti-Dumping Agreement are to be interpreted in accordance with the "customary rules of interpretation of public international law". If, however, such an interpretative exercise "admits of more than one *permissible* interpretation", panels are precluded from reaching a finding of WTO-inconsistency if the challenged measure "*rests upon* one of those permissible interpretations".[35]

7.13. Although the text of Article 17.6(i) is couched in terms of an obligation upon WTO panels, we consider that "the provision, at the same time, *in effect* defines when investigating authorities can be considered to have acted inconsistently with the Anti-Dumping Agreement in the course of their 'establishment' and 'evaluation' of the relevant facts".[36] Only if an investigating authority's "establishment of the facts" is "proper" and its "evaluation of those facts" is "unbiased

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[31] Appellate Body Report, *US – Lead and Bismuth II*, para. 45.
[32] Appellate Body Report, *US – Hot-Rolled Steel*, para. 54.
[33] Emphasis added. Article 17.6 of the Anti-Dumping Agreement is identified in Article 1.2 and Appendix 2 of the DSU as one of the "special or additional rules and procedures" which prevail over the DSU "[t]o the extent that there is a difference" between those provisions and the provisions of the DSU.
[34] Appellate Body Report, *US – Hot-Rolled Steel*, para. 54. (emphasis original)
[35] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 59-60. (emphasis added)
[36] Appellate Body Report, *US – Hot-Rolled Steel*, para. 56. (emphasis added)

and objective" can it successfully withstand the scrutiny of a WTO panel under Article 17.6(i). These requirements are applicable to all aspects of an investigating authority's conduct and to all stages of an investigation.

7.14. While different provisions may apply to the examination of claims under the Anti-Dumping Agreement and the SCM Agreement[37], we note that both agreements envisage a review of measures in the form of agency action, i.e. determinations made by the competent authorities of WTO Members.[38] In terms of the *degree of deference* to be accorded in reviewing agency determinations, our tasks under the two covered agreements are, therefore, not entirely dissimilar.

7.15. When reviewing the WTO-consistency of agency determinations, WTO panels are precluded from engaging in a *de novo* review of the evidence as well as from substituting their own conclusions for those of the competent authorities.[39] Panels must therefore limit their review to the competent authorities' determination, focusing, in particular, on the explanation provided by the competent authorities in their published report.[40]

7.16. The obligation upon panels to make an "objective assessment" of the "matter" and to not engage in a *de novo* review has an important corollary. For purposes of review of their WTO-consistency, competent authorities must support their determinations with explanations establishing that they have discharged the specific obligations imposed by the provisions of the covered agreements that are alleged to be infringed. The "objective assessment" to be made by a panel reviewing an investigating authority's determination is thus enabled and informed by the explanation provided by an authority.

7.17. Whether the explanation provided by a competent authority is sufficiently "reasoned and adequate" for purposes of establishing compliance with the relevant WTO obligations will depend *inevitably* upon the specific facts and circumstances of a given case.[41] Importantly, the exact standard of review to be applied by a panel in examining agency determinations is a "function of the substantive provisions of the specific covered Agreements that are at issue in the dispute"[42] as well as the "specific claim(s) put forth by a complainant" in a given case.[43]

7.18. Although panels must not conduct a *de novo* review, they must not simply defer to the conclusions of the competent authority either.[44] Instead, a panel's examination of a competent authority's conclusions must be "critical and searching", and ought to be "based on the information contained in the record and the explanations given by the authority in its published report".[45] Though ultimately dependent upon the precise claim that is advanced as well as the specific treaty provision at issue, the Appellate Body has identified several "general lines of inquiry" that may be relevant to a panel's task.[46] Specifically, with respect to the "duties that apply to panels in their review of the *factual components* of the findings made by investigating authorities" – as is the case with many of

[37] We do not address the issue of "whether there may ever be circumstances in which separate consideration of a single injury determination would be required in the light of the standards of review under the Anti-Dumping Agreement and the SCM Agreement" as this is not the case before us. (Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 92).

[38] Appellate Body Reports, *US – Countervailing Duty Investigation on DRAMs*, para. 184; *US – Hot-Rolled Steel*, para. 55.

[39] Appellate Body Report, *US – Lamb*, para. 106. In the context of the Anti-Dumping Agreement, see Appellate Body Report, *Thailand – H-Beams*, para. 117 ("[t]he aim of Article 17.6(i) is to prevent a panel from *'second-guessing*' a determination of a national authority when the establishment of the facts is proper and the evaluation of those facts is unbiased and objective" (emphasis added)). See also Appellate Body Report, *Russia – Commercial Vehicles*, para. 5.102.

[40] Appellate Body Report, *US – Lamb*, para. 105.

[41] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

[42] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 95 (referring to Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 184). See also Appellate Body Reports, *US – Countervailing Measures (China)*, para. 4.182; and *EC – Hormones*, para. 115.

[43] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.182.

[44] See also Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

[45] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

[46] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93 (referring to Appellate Body Report, *US – Lamb*, para. 106).

the claims in this dispute – we agree with the Appellate Body's general observations in *US – Softwood Lumber VI (Article 21.5 – Canada)* that:

> [I]t is in the nature of anti-dumping and countervailing duty investigations that an investigating authority will gather a variety of information and data from different sources, and that these may suggest different trends and outcomes. The investigating authority will inevitably be called upon to reconcile this divergent information and data. However, *the evidentiary path that led to the inferences and overall conclusions of the investigating authority must be clearly discernible in the reasoning and explanations found in its report*. When those inferences and conclusions are challenged, it is the task of a panel to assess whether the explanations provided by the authority are "reasoned and adequate" by *testing the relationship between the evidence on which the authority relied in drawing specific inferences, and the coherence of its reasoning*. In particular, the panel must also examine whether the investigating authority's reasoning takes sufficient account of conflicting evidence and responds to competing plausible explanations of that evidence. This task may also require a panel to consider whether, in analyzing the record before it, the investigating authority *evaluated all of the relevant evidence in an objective and unbiased manner*, so as to reach its findings "*without favouring the interests of any interested party, or group of interested parties*, in the investigation."[47]

7.2 Interpretative framework

7.19. Korea's claims in this dispute raise a number of interpretative issues under the covered agreements relating to an investigating authority's use of facts available in anti-dumping and countervailing duty investigations. The following section focuses on certain interpretative considerations relating to an investigating authority's *selection* of the replacement facts – a recurrent issue that bears upon our analysis of several of Korea's "as applied" challenges as well as its "as such" claim. Subsequently, as part of our examination of Korea's claims, we set out our interpretation of the provisions conditioning the *resort* to facts available, and further develop our analysis regarding the *selection* of the replacement facts, as regards each claim.

7.20. Korea argues that, in the context of the selection of the replacement facts, a "basic principle[]"[48] under both the Anti-Dumping Agreement and the SCM Agreement is that "an investigating authority must undertake a comparative evaluation to ensure that it is using the 'best information' available; i.e. the most fitting or 'most appropriate' information available in the case at hand".[49] According to Korea, the panel and Appellate Body in *Mexico – Anti-Dumping Measures on Rice* agreed "that investigating authorities must, in accordance with Article 6.8 and Annex II of the Anti-Dumping Agreement, carry out a comparative evaluation of the evidence available in order to determine which constitutes the 'best information'".[50] As part of all of its claims under Article 6.8 and Annex II of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement, Korea thus alleges that, in selecting the replacement facts, the USDOC does not engage in the "requisite comparative analysis" to select the "best information available".[51] Moreover, in the context of its "as such" claim, Korea uses the term "best information available" as part of identifying the alleged unwritten measure and also in presenting the legal basis of its complaint.[52]

7.21. The United States responds that "neither Article 6.8 nor Annex II of the Anti-Dumping Agreement contains the term 'comparative evaluation'".[53] Referring to the

[47] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97 (quoting Appellate Body Report, *US – Hot-Rolled Steel*, para. 193). (emphasis added)
[48] Korea's first written submission, para. 63.
[49] Korea's first written submission, para. 71.
[50] Korea's first written submission, para. 71 (quoting Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 289, in turn referring to Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.166).
[51] See, e.g. Korea's first written submission, paras. 88, 126, 201, and 859; response to Panel question No. 49, para. 4 ("[s]uch an 'inevitable' exercise of selecting the 'best information available' must necessarily entail a process of (comparative) assessment and evaluation among the facts that are available to the authority"). See also Korea's first written submission, paras. 323, 337, 443, and 853; and second written submission, paras. 264 and 367.
[52] Korea's panel request, paras. 9 and 32-34.
[53] United States' first written submission, para. 34.

Appellate Body Report in *US – Carbon Steel (India)*, the United States submits that neither the Anti-Dumping Agreement, nor the SCM Agreement, imposes an obligation upon investigating authorities to engage in a "comparative evaluation" in all circumstances.[54] The United States also considers "erroneous" Korea's "repeated[] invo[cation of] the title 'best information available' as if it is a separate legal obligation or legal standard by which USDOC's determinations should be assessed".[55]

7.22. Given the parties' disagreement on the obligations that apply to investigating authorities' selection of the replacement facts, we begin by setting out our interpretation – in accordance with the customary rules of interpretation of public international law – of the relevant provisions under the Anti-Dumping Agreement and the SCM Agreement that bear upon investigating authorities' selection of replacement facts. We then address whether and to what extent the covered agreements require investigating authorities to select the "best information available" in order to arrive at an "accurate" determination and to engage in a "comparative evaluation".

7.2.1 Anti-Dumping Agreement

7.23. In accordance with Article 31 of the Vienna Convention, our task is to ascertain the ordinary meaning of the terms of Article 6.8 of the Anti-Dumping Agreement in their context and in light of their object and purpose. Article 6 of the Anti-Dumping Agreement is entitled "Evidence" and sets out the "evidentiary rules that apply throughout the course of an anti-dumping investigation, and provide[s] also for due process rights that are enjoyed by 'interested parties' throughout such an investigation".[56] Article 6.8 provides that:

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

7.24. The first sentence of Article 6.8 *allows* investigating authorities – through the use of the permissive "may" – to overcome a lack of information in the responses of interested parties, by using "facts" that are otherwise "available" to the authorities as the basis for completing their determinations.[57] The provision thus addresses the "dilemma" for investigating authorities when faced with a gap in the responses of interested parties.[58] By allowing the filling of such gaps, Article 6.8 helps ensure that investigating authorities do not cede all control of the investigation to the interested parties.[59]

7.25. At the same time, the first sentence of Article 6.8 also imposes important limitations upon investigating authorities' use of the "facts" that are otherwise "available" in order to overcome a lack of information and complete their determinations.[60] The first sentence limits investigating authorities' *recourse* to facts available only to situations where an "interested party" (a) "refuses access to, or otherwise does not provide, necessary information within a reasonable period of time"; or (b) "significantly impedes the investigation".[61] In both situations, investigating authorities are required to complete their determinations on the basis of "facts" that are "available" to them.[62]

7.26. The second sentence of Article 6.8 and Annex II to the Anti-Dumping Agreement impose further limitations upon investigating authorities' *use* of "facts" that are otherwise "available". The second sentence mandates compliance with the provisions of Annex II – entitled "Best information available in terms of paragraph 8 of Article 6" – in the application of Article 6.8.[63] The reference to

[54] United States' first written submission, paras. 34-35 (quoting Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.434-4.435).
[55] United States' opening statement at the first meeting of the Panel, para. 47; opening statement at the second meeting of the Panel, para. 54; and response to Panel question No. 49, para. 10.
[56] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 136.
[57] Appellate Body Report, *US – Hot-Rolled Steel*, para. 77.
[58] Panel Report, *Egypt – Steel Rebar*, para. 7.146.
[59] See, e.g. Appellate Body Report, *US – Hot-Rolled Steel*, paras. 73 and 86.
[60] Panel Report, *US – Shrimp (Viet Nam)*, para. 7.233.
[61] Panel Report, *Egypt – Steel Rebar*, para. 7.146.
[62] Panel Report, *China – GOES*, para. 7.296.
[63] Panel Reports, *US – Steel Plate*, para. 7.56; *Egypt – Steel Rebar*, para. 7.152.

"this paragraph" in the second sentence of Article 6.8 indicates that "Annex II applies to Article 6.8 in its entirety, and thus contains certain substantive parameters for the application of the individual elements of that article".[64] Moreover, the term "shall be observed" indicates that "these parameters, which address both when facts available can be used, and what information can be used as facts available, must be followed" by investigating authorities.[65] Thus, despite the repeated use of the term "should" in Annex II, its provisions are mandatory because of the use of the term "shall" in the second sentence of Article 6.8. For this reason, investigating authorities acting inconsistently with the "additional preconditions"[66] and "operational requirements"[67] set out in the relevant provisions of Annex II will also be found to be in breach of Article 6.8.

7.27. In this manner, Article 6.8 and Annex II to the Anti-Dumping Agreement together reflect a carefully constructed and fine balance struck by the drafters between, on the one hand, the interests of investigating authorities in controlling and completing their investigations and, on the other hand, the due process and participatory rights of interested parties.[68]

7.28. A question that arises in several claims in this dispute is *what* replacement facts may form the basis for investigating authorities' determinations. We note that Article 6.8 contemplates the use of facts available only to replace the missing information that is "necessary" for purposes of the specific determination that is to be made.[69] By its terms, Article 6.8 is "not directed at mitigating the absence of 'any' or 'unnecessary' information, but is rather concerned with overcoming the absence of information required to complete a determination".[70] This suggests that "the process of identifying the 'facts available' should be limited to identifying replacements for the 'necessary information' that is missing from the record".[71] In this sense, "there has to be a connection between the 'necessary information' that is missing and the particular 'facts available' on which a determination … is based".[72] In our view, the text of Article 6.8 requires investigating authorities to base their determinations on those "facts" that are "available" and that "reasonably replace" the missing "necessary" information.[73] The requirement that investigating authorities must select reasonable replacements for the missing "necessary" information implies that such selection cannot be aimed at punishing a non-cooperating party.

7.29. That said, given that an investigating authority may lack full and complete knowledge of the missing "necessary" information when resorting to the use of facts available under Article 6.8[74], the search for such "reasonable replacements" must be conducted in light of the specific facts and circumstances of each instance in which an investigating authority uses facts available.[75] Importantly, a panel's review of an investigating authority's selection of the replacement facts should be conducted in light of the information that was actually available to the investigating authority during the course of the investigation. Whether an investigating authority selected reasonable replacements for the missing information is, therefore, not to be determined in the

[64] Panel Report, *Egypt – Steel Rebar*, para. 7.152.
[65] Panel Report, *Egypt – Steel Rebar*, para. 7.152.
[66] Panel Report, *China – GOES*, para. 7.385.
[67] Panel Report, *US – Steel Plate*, para. 7.56.
[68] See, e.g. Appellate Body Report, *US – Hot-Rolled Steel*, para. 102. See also Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 241.
[69] See also, in the context of the similarly worded Article 12.7 of the SCM Agreement, Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.178 (quoting Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416, in turn quoting Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 293), noting that that Article 12.7 "permits the use of facts on record solely for the purpose of replacing information that may be missing".
[70] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416. See also Panel Report, *EC – Salmon (Norway)*, para. 7.343.
[71] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416. (emphasis added)
[72] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416.
[73] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 294.
[74] See, e.g. Appellate Body Report, *US – Carbon Steel (India)*, para. 4.426 (referring to "the selection of a replacement for an *unknown fact*" (emphasis added)); Panel Report, *US – Carbon Steel (India)*, fn 734 (noting that "[i]n the case of non-cooperation by an interested party … the investigating authority will not know the actual missing relevant information".)
[75] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.421.

abstract, e.g. by reference to "necessary" information that may subsequently be revealed or discovered outside the context of an investigation.[76]

7.30. Furthermore, we note that Annex II to the Anti-Dumping Agreement is entitled "Best information available in terms of paragraph 8 of Article 6". By its own terms, the title does not create an independent obligation.[77] As discussed in greater detail below, we consider that the title of Annex II usefully highlights that the object and purpose of the disciplines in Article 6.8 and Annex II, as a whole, is to ensure that the conduct of investigating authorities aims to select "best information available" in order to fill the evidentiary void resulting from the missing "necessary" information.[78] This supports our interpretation above that Article 6.8 requires investigating authorities to select those facts that reasonably replace in the specific facts and circumstances surrounding each instance of missing "necessary" information.

7.31. Turning to the context provided by Annex II, we note that the first and second sentences of paragraph 7 require that, in circumstances where investigating authorities "have to base their findings" on information from a "secondary source" they must exercise "special circumspection" and, where practicable, check such information from other independent sources at their disposal.[79] This indicates that investigating authorities are required to exercise their judgment in selecting facts available.[80] In our view, the tasks of exercising "special circumspection" and checking the information[81] provide contextual support for the view that the process of selecting the "facts available" under Article 6.8 is aimed at identifying reasonable replacements for the missing information, and not at punishing a non-cooperating party.[82]

7.32. Article 17.6(i) of the Anti-Dumping Agreement also provides relevant context for the interpretation of Article 6.8. Article 17.6(i) requires that, "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". As we have explained[83], although Article 17.6(i) speaks, in the first instance, to the task of WTO panels, "the provision, at the same time, *in effect* defines when investigating authorities can be considered to have acted inconsistently with the Anti-Dumping Agreement in the course of their 'establishment' and 'evaluation' of the relevant facts".[84] Thus, Article 17.6(i) requires that an investigating authority's "establishment of the facts" be "proper" and that its "evaluation of those facts" be "unbiased and objective". We note, in this regard, that Article 6.8 is also directed at an investigating authority's "establishment" and "evaluation" of "facts", albeit those that are otherwise "available" in the absence of the "necessary" information. By requiring that an investigating authority's establishment of the facts is "proper" and its evaluation of the facts that are available is "unbiased and objective"[85], Article 17.6(i) thus supports the view that the authority must select reasonable replacements for the missing information, and not be aimed at punishing the non-cooperating party.

7.33. We also consider relevant as context paragraph 3 of Annex II, the first sentence of which requires that:

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[76] We note the Appellate Body's observation that "[t]here is no doubt that a Member may not seek to defend its agency's decision on the basis of evidence not contained in the record of the investigation". (Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 161).

[77] See paras. 7.43-7.44 below.

[78] Korea's response to Panel question No. 49, para. 5.

[79] Both Korea and the United States agree that it is not necessary for the Panel to comprehensively define what constitutes "a secondary source" for purposes of this dispute. (Korea's comments on the United States' response to Panel question No. 52, p. 13; United States' response to Panel question No. 52, para. 13).

[80] Panel Report, *Korea – Certain Paper (Article 21.5 – Indonesia)*, para. 6.26.

[81] Panel Reports, *Korea – Certain Paper (Article 21.5 – Indonesia)*, para. 6.27; *Egypt – Steel Rebar*, para. 7.154.

[82] Appellate Body Reports, *US – Anti-Dumping Methodologies (China)*, para. 5.173; *US – Carbon Steel (India)*, para. 4.416.

[83] See para. 7.13 above.

[84] Appellate Body Report, *US – Hot-Rolled Steel*, para. 56. (original emphasis omitted; emphasis added)

[85] This requires an investigating authority to reach its findings "without favouring the interests of any interested party, or group of interested parties" in the investigation. (Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97 (quoting Appellate Body Report, *US – Hot-Rolled Steel*, para. 193)).

> All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by the authorities, *should be taken into account when determinations are made*.[86]

The ordinary meaning of paragraph 3 requires investigating authorities to take into account all information that fulfils certain criteria "when determinations are made". We agree with prior panels and the Appellate Body that paragraph 3 serves as a touchstone for examining whether an investigating authority properly rejected information submitted by an interested party as a *precondition for resorting* to the use of facts available.[87] However, we note that the scope of the first sentence is textually *not* limited to that issue. Rather, it applies "when determinations are made", which includes the time at which replacement facts are selected to form the basis of a determination.[88] Further, the first sentence speaks of "all information", without limiting that to information submitted or supplied by a particular interested party, such as the allegedly non-cooperating exporter.[89] Thus, besides conditioning an investigating authority's *resort* to facts available, paragraph 3 of Annex II, in our view, also provides useful context for an investigating authority's *selection* of the replacement facts under Article 6.8.[90]

7.34. In particular, paragraph 3 of Annex II provides useful context for the requirement under Article 6.8 that determinations be made on the basis of "facts" that are "available" to an investigating authority. The provision supports the interpretation that, in selecting the replacement "facts" for the missing "necessary" information, an investigating authority is required to take into account *all* facts that are properly available to it.[91]

7.35. Finally, we note that the last sentence of paragraph 7 of Annex II makes it "clear … that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate". This indicates that a "less favourable" result is not necessarily WTO-inconsistent and that an investigating authority is not always required to select those replacement facts that are "most favourable" to a non-cooperating party. Rather, "non-cooperation creates a situation in which a less favourable result becomes possible due to the selection of a replacement for an unknown fact".[92] We consider that paragraph 7 provides contextual support for the understanding that the "procedural circumstances in which information is missing" – including the interested party's own conduct and its awareness of the consequences of not providing the "necessary" information[93] – may be relevant to an investigating authority's selection of replacement facts under Article 6.8.[94] At the same time, nothing in the text of paragraph 7 suggests that procedural circumstances entitle investigating authorities to dispense with the requirement to select reasonable replacements for the missing "necessary" information.

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[86] Emphasis added.

[87] See, e.g. Panel Reports, *China – Broiler Products (Article 21.5 – US)*, para. 7.342; *Mexico – Steel Pipes and Tubes*, para. 7.164; *EC – Salmon (Norway)*, paras. 7.346 and 7.355; *US – Steel Plate*, para. 7.55; and *Egypt – Steel Rebar*, para. 7.159; and Appellate Body Report, *US – Hot-Rolled Steel*, paras. 80-81. For a fuller discussion of how paragraph 3 of Annex II disciplines an investigating authority's rejection of information submitted by interested parties, see para. 7.138 below.

[88] The second sentence of paragraph 3 addresses the issue of when "the failure to respond in the preferred medium or computer language should not be considered to significantly impede the investigation", but it does not limit the temporal scope of the requirement in the first sentence to take all information into account "when determinations are made".

[89] In this regard, we note that paragraph 7 of Annex II refers to "information from a secondary source".

[90] The panel in *Mexico – Anti-Dumping Measures on Rice* also discussed paragraph 3 of Annex II in the context of an investigating authority's selection of replacement facts. (Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.166).

[91] Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.172 (referring to Appellate Body Reports, *Mexico – Anti-Dumping Measures on Rice*, para. 294; and *US – Carbon Steel (India)*, para. 4.419).

[92] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.426.

[93] As noted by the Appellate Body, paragraph 1 of Annex II to the Anti-Dumping Agreement, which serves as relevant context for the interpretation of Article 6.8, "makes a connection between the 'awareness' of an interested party, and the ability for an investigating authority to have recourse to the 'facts available'". (Appellate Body Report, *US – Carbon Steel (India)*, para. 4.426).

[94] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.426.

7.36. In sum, we consider that the terms of Article 6.8, interpreted in light of their context and object and purpose, require investigating authorities to select – in an unbiased and objective manner – those facts available that constitute *reasonable replacements* for the missing "necessary" information in the specific facts and circumstances of a given case. In doing so, investigating authorities must take into account *all* facts that are properly available to them. In selecting the replacement facts, Article 6.8 does not require investigating authorities to select those facts that are most "favourable" to the non-cooperating party. Investigating authorities may take into account the procedural circumstances in which information is missing, but Article 6.8 does not condone the selection of replacement facts for the purpose of punishing interested parties.

7.2.2 SCM Agreement

7.37. Having addressed Article 6.8 of the Anti-Dumping Agreement, we turn to Article 12.7 of the SCM Agreement, which states that:

> In cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.

7.38. Article 12.7 of the SCM Agreement shares many textual similarities with the first sentence of Article 6.8 of the Anti-Dumping Agreement, but we note that the term "interested Member or" does not appear in the latter provision.[95] These provisions share a common aim, namely, "permit[ting] an investigating authority, under certain circumstances, to fill in gaps in the information necessary to arrive at a conclusion as to subsidization (or dumping) and injury".[96] Article 12.7 allows recourse to facts available in similar situations to those contemplated in Article 6.8 of the Anti-Dumping Agreement. Moreover, both provisions form part of the disciplines on the identification and collection of evidence and use the term "facts available" to denote replacements for the missing "necessary" information.[97] Our interpretative analysis of the text of the first sentence of Article 6.8 of the Anti-Dumping Agreement, therefore, remains equally relevant to our interpretation of Article 12.7 of the SCM Agreement. For reasons explained above, Article 12.7 requires investigating authorities to select *reasonable replacements* for the missing "necessary" information.

7.39. We note that, unlike the Anti-Dumping Agreement, the SCM Agreement does not set out in an annex the precise parameters that are applicable to an investigating authority's use of facts available.[98] We agree with the Appellate Body that "[t]his does not mean, however, that no such conditions exist in the SCM Agreement".[99] Several provisions of the SCM Agreement provide additional context for interpreting Article 12.7. Article 12.1 supports the understanding that investigating authorities are required to take into account all facts that are properly available to them in selecting reasonable replacements for the missing information under Article 12.7.[100] The context provided by Articles 12.4 and 12.11 "suggest[s] that the manner or procedural circumstances in which information is missing can be relevant to an investigating authority's use of 'facts available' under Article 12.7".[101]

7.40. While we remain mindful of the absence in the SCM Agreement of an equivalent of Annex II to the Anti-Dumping Agreement, we agree with the Appellate Body that "it would be anomalous if Article 12.7 of the SCM Agreement were to permit the use of 'facts available' in countervailing duty investigations in a manner markedly different from that in anti-dumping investigations".[102]

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[95] See also, paras. 7.269-7.270 below.
[96] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 291.
[97] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 291-292 (quoting Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 138, in turn quoting Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 136).
[98] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 291.
[99] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 291.
[100] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 292 and 294. See also Appellate Body Report, *US – Carbon Steel (India)*, para. 4.417.
[101] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.422.
[102] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 295. See also Appellate Body Report, *US – Carbon Steel (India)*, para. 4.423.

Depending upon the interpretative issue at hand[103], therefore, Annex II to the Anti-Dumping Agreement may also provide relevant context for the interpretation of Article 12.7 of the SCM Agreement.[104] We consider our observations regarding the contextual relevance of the provisions of Annex II to the Anti-Dumping Agreement for interpreting Article 6.8 thereof remain also relevant for purposes of interpreting Article 12.7 of the SCM Agreement.

7.41. Thus, like Article 6.8 of the Anti-Dumping Agreement, Article 12.7 of the SCM Agreement requires investigating authorities to select those facts available that constitute *reasonable replacements* for the missing "necessary" information in the specific facts and circumstances of a given case. In selecting *reasonable replacements*, investigating authorities must take into account all facts that are properly available to them. While investigating authorities may take into account the procedural circumstances in which information is missing in their selection of the replacement facts, Article 12.7 does not allow such selection for the purpose of punishing the non-cooperating party.

7.2.3 "Best information available" and "comparative evaluation"

7.42. Korea argues that an investigating authority is under an obligation "to ensure the information used for facts available is the *best* information available that *reasonably replaces* the alleged missing information to arrive at an *accurate* determination".[105] According to Korea, "the investigating authority's obligation to select the 'best information available' is firmly grounded in the express text of Annex II, as well as the context and purpose of Article 6.8 of the Anti-Dumping Agreement, as clearly confirmed by well-established WTO jurisprudence".[106] Korea clarifies "that the concept of 'best' information is not the same as 'the most favourable' information", but relates to the "reliability" and "relevance" of the replacement information with a view to "identifying the 'second best' information when the 'first best' information is not available".[107] The United States, for its part, maintains that "the title of Annex II does not provide a separate legal obligation or legal standard" by which investigating authorities' determinations should be assessed. Rather, for the United States, "the substantive obligations in Annex II are set out in the provisions contained in paragraphs 1 through 7".[108]

7.43. We consider that the title of Annex II usefully highlights that the *object and purpose* of the disciplines in Article 6.8 and Annex II, as a whole, is to ensure that investigating authorities' conduct is aimed at selecting "best information available" in order to fill the evidentiary void resulting from the missing "necessary" information.[109] That said, we note that, despite using these terms in the title of the Annex II, the drafters did not use them in Article 6.8, nor in paragraphs 1 to 7 of Annex II or anywhere else in the Anti-Dumping Agreement. They provided no definition of what constitutes "best information available" in the abstract.

7.44. We consider these choices to be important because the drafters' ends must be distinguished from their chosen means.[110] What constitutes the "best information available" can only be determined in the specific facts and circumstances of a given case. The "first-best" or most "accurate" information is, under all circumstances, the information that is "necessary".[111] In the absence of a reference point provided by actual knowledge of such information – as may be the case when an interested party refuses access to, or otherwise does not provide, "necessary" information – it may be very difficult to ascertain whether information is "second-best" or most

[103] We note the absence in Article 6.8 and Annex II of the Anti-Dumping Agreement of a reference to an "interested Member". We also note that Article 6.11(ii) of the Anti-Dumping Agreement indicates that the term "interested parties" for purposes of that agreement includes "the government of the exporting Member".
[104] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.423.
[105] Korea's response to Panel question No. 49, para. 3. (emphasis original)
[106] Korea's response to Panel question No. 49, para. 7.
[107] Korea's response to Panel question No. 49, para. 8.
[108] United States' comments on Korea's response to Panel question No. 49, para. 3.
[109] Korea's response to Panel question No. 49, para. 5.
[110] See, e.g. International Court of Justice, Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), Judgment, I.C.J. Reports 1991, p. 53, para. 56. See also Panel Report, *Guatemala – Cement II*, para. 8.162.
[111] Panel Report, *US – Hot-Rolled Steel*, para. 7.55.

"accurate" in the abstract.[112] Rather, the important, albeit general, goals of selecting the "best information available" and arriving at an "accurate" determination are operationalized and made effective through the very specific obligations under Article 6.8 and the provisions of Annex II that bear upon an investigating authority's conduct in a given case. The fact that, in selecting the replacements, investigating authorities are entitled to take into upon the "procedural circumstances in which the information is missing"[113] further supports the view that, within the realm of facts available, the "best information available", or an "accurate" determination, is simply one that *results from* complying with the obligations in Article 6.8 and Annex II in the specific facts and circumstances of a given case.[114]

7.45. Relatedly, the parties disagree on the need for a "comparative evaluation" of all the information that is available to an investigating authority. Korea argues that an "investigating authority must undertake a comparative evaluation to ensure that it is using the 'best information' available; i.e. the most fitting or 'most appropriate' information available in the case at hand".[115] The United States rebuts that "neither Article 6.8 nor Annex II of the Anti-Dumping Agreement contains the term 'comparative evaluation'".[116]

7.46. To the extent that Korea suggests that investigating authorities are *always* under an obligation to undertake a "comparative evaluation" in all circumstances, we recall that the Appellate Body rejected a similar argument under Article 12.7 of the SCM Agreement in *US – Carbon Steel (India)*. Rejecting "India's argument that Article 12.7 of the SCM Agreement requires a comparative evaluation of the 'facts available' in every case"[117], the Appellate Body explained that "the extent to which an 'evaluation' of the 'facts available' is required under Article 12.7, and the form it should take, depend on the particular circumstances of a given case, including the quantity and quality of the available facts on the record, and the types of determinations to be made in a given investigation".[118] Disagreeing with India's "proposition that a 'comparative evaluation' is a necessary pre-requisite to making a determination in every instance in which an investigating authority has recourse to the 'facts available'", the Appellate Body explained that "[c]onceivably, there may be circumstances where the kind of 'comparative evaluation' envisaged by India is not practicable".[119]

7.47. The treaty text does not require a comparative evaluation in all circumstances. As discussed, however, it does require investigating authorities to select *reasonable replacements* for the missing "necessary" information. An examination of the "reasonableness" of the replacement facts implies an evaluation and the exercise of judgment by an investigating authority, taking into account – in an objective and unbiased manner – all facts that are properly before it as well as the procedural circumstances in which the information is missing. In certain situations, it may well be that such an evaluative exercise would need to be comparative in nature. There may be other circumstances, however, in which there is no need to engage in a comparative evaluation or where another approach may be better suited.[120] Although investigating authorities remain at all times under an obligation to take into account all information that is properly before them with a view to selecting *reasonable*

[112] The notion of "best information available" is therefore better understood in the sense that there is "no better information" actually available to an investigating authority to serve as a reasonable replacement in a given situation. (Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.166 ("for the conditions of Article 6.8 of the AD Agreement and Annex II to be complied with, there can be no better information available to be used in the particular circumstances")).

[113] We note Korea's statement that the "degree of cooperation may be something to take into consideration when weighing and balancing the pieces of information before the authority". (Korea's response to Panel question No. 50, para. 10).

[114] We note Korea's statement that "it is difficult to isolate the different paragraphs of Annex II as they all reflect the same notion of using the 'best information available' when it becomes necessary to rely on facts available under Article 6.8 of the Anti-Dumping Agreement." (Korea's response to Panel question No. 105, para. 145).

[115] Korea's first written submission, para. 71. See also Korea's response to Panel question No. 49, para. 4 ("such an 'inevitable' exercise of selecting the 'best information available' must necessarily entail a process of (comparative) assessment and evaluation among the facts that are available to the authority").

[116] United States' first written submission, para. 34.

[117] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.434.

[118] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.434.

[119] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.434.

[120] For example, the Appellate Body has observed that "a comparative approach to the evaluation required would not be feasible where there is only one set of reliable information on the record that is relevant to a particular issue and may thus serve as a factual basis for a determination". (Appellate Body Report, *US – Carbon Steel (India)*, para. 4.434).

replacements for the missing information, they enjoy a certain discretion in their choice of the means for discharging this obligation in light of the specific facts and circumstances of the case before them.

7.48. For these reasons, we disagree with Korea insofar as it argues that, under both the Anti-Dumping and the SCM Agreement, "an investigating authority must undertake a comparative evaluation to ensure that it is using the 'best information' available"[121] in *all* circumstances. A comparative evaluation may not be a necessary prerequisite to making a determination in *every* instance in which an investigating authority resorts to "facts available". Rather, we agree with the Appellate Body that the "extent" of the evaluation of the "facts available" that is required, and the "form" it should take, depend upon the "particular circumstances of a given case, including the nature, quality, and amount of the evidence on the record, and the particular determinations to be made" in a given investigation.[122]

7.3 Korea's "as applied" claims

7.3.1 Anti-dumping duties on certain corrosion-resistant steel products from Korea (USDOC investigation number A-580-878)

7.3.1.1 Introduction

7.49. Korea claims that the United States acted inconsistently with Article 6.8 and Annex II to the Anti-Dumping Agreement in the investigation concerning certain corrosion-resistant steel products from Korea (the "CORE AD investigation").[123] Korea alleges that there was no basis for the USDOC to resort to facts available because "Hyundai Steel provided all information requested by the USDOC after spending substantial time, effort, and resources to comply with the extremely complex requests"[124] and it "simply had a hard time making sense of the unguided request".[125] Korea also claims that, in selecting the replacement facts, the USDOC used information from secondary sources without exercising special circumspection, and failed to ensure that the information selected was a reasonable replacement for the missing "necessary" information.[126] Korea's claims concern the USDOC's use of facts available in relation to Hyundai Steel Corporation (Hyundai Steel)'s sales to unaffiliated parties of further manufactured products where CORE was used as an input (i.e. skelp, sheet, and blanks (SSBs); tailor welded blanks (TWBs); and auto parts).[127] The USDOC assigned to these sales a dumping margin of 86.34% – the highest margin available in the petition.[128]

7.50. We begin by setting out the relevant factual background of the underlying investigation. Subsequently, we summarize the parties' main arguments before examining Korea's claims of

[121] Korea's first written submission, para. 71.
[122] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.434. We note Japan's statement that a "comparative evaluation" of all evidence available is not necessarily required in "each and every case", but an "investigating authority should be able to explain, with sufficient basis, what evaluation it undertook". (Japan's third-party submission, para. 22).
[123] Korea's first written submission, para. 86.
[124] Korea's first written submission, para. 144.
[125] Korea's first written submission, para. 135.
[126] Korea's first written submission, paras. 88 and 185.
[127] Korea's first written submission, para. 96. The USDOC excused Hyundai Steel from reporting further manufactured sales when the first unaffiliated sale was of the final product (a completed automobile). (Korea's first written submission, para. 96; CORE issues and decision memorandum, (Exhibit KOR-5), p. 9). According to Korea, [[***]]% of US sales of CORE by Hyundai Steel were made directly to unaffiliated US customers; [[***]]% were sold through Hyundai Steel's affiliated Korean distributor, Hyundai Corporation, who, in turn, sold the products to its US subsidiary Hyundai Corporation USA; and, finally, [[***]]% of the US sales were made through Hyundai Steel's wholly-owned US affiliate, Hyundai Steel America (HSA). HSA, in turn, dealt with these products in one of the three ways: it resold the CORE as coil; it performed minor processing (slitting, shearing, or stamping) and sold the resulting products as SSBs; or it consumed the CORE in manufacturing TWBs. Some of these products (coil, SSBs, and TWBs) were sold to affiliated and unaffiliated vendors, who, after further processing, sold the resulting products (auto parts) to Hyundai Motor Manufacturing Alabama or Kia Motor Manufacturing Georgia, who used them to produce automobiles and sold the final products to unaffiliated US customers through their affiliated distributors (Hyundai Motor America and Kia Motor America). (Korea's first written submission, paras. 93-95; CORE Section A questionnaire response, (Exhibit KOR-2 (BCI)), pp. A-1-A-2).
[128] Korea's first written submission, para. 121.

WTO-inconsistency in respect of the USDOC's resort to facts available and its selection of the replacement facts.

7.3.1.2 Factual background

7.51. In its initial questionnaire dated 27 July 2015[129], the USDOC requested Hyundai Steel to respond to Sections A, B, C, and D, and noted that Hyundai Steel was not "currently" required to respond to Section E, concerning the "Cost of Further Manufacturing or Assembly Performed in the United States".[130] However, the USDOC clarified that "we may request a response to this section if we determine, based on your response to section A, that we require the information to account for further-processing expenses incurred in the United States".[131]

7.52. On 17 August 2015, Hyundai Steel sought an exemption from providing a Section E response[132] and requested the USDOC to calculate the constructed export price (CEP) based on the "special rule" provided in the US anti-dumping statute instead.[133] In the meantime, Hyundai Steel submitted its Section A response on 4 September 2015[134] and its Section C response on 29 September 2015.[135] On 15 October 2015, the USDOC denied Hyundai Steel's request for a "special exemption" in respect of Section E[136], and requested Hyundai Steel to file such a response for the products concerned and to make any necessary revisions to its Sections C-D databases in accordance with its Section E reporting.[137] On 22 October 2015, Hyundai Steel requested "a meeting with and guidance from" the USDOC, noting difficulties in collecting and preparing the data to conform to the USDOC's "standard questionnaire".[138] Hyundai Steel also requested an extension of two weeks to submit its further manufacturing cost data, from the date that the USDOC provided such reporting guidance. On 27 October 2015, Hyundai Steel's counsel met with the USDOC officials to discuss issues relating to Hyundai Steel's Section E response.[139]

7.53. On 2 November 2015[140], Hyundai Steel submitted a revised US sales database (originally submitted on 29 September 2015) including the further manufactured sales and its first Section E

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[129] CORE anti-dumping questionnaire to Hyundai Steel, (Exhibit KOR-6).
[130] CORE anti-dumping questionnaire to Hyundai Steel, (Exhibit KOR-6), p. 2.
[131] CORE anti-dumping questionnaire to Hyundai Steel, (Exhibit KOR-6), p. 2.
[132] Hyundai Steel exclusion request, (Exhibit KOR-7 (BCI)), p. 2.
[133] The "special rule" concerns the calculation of the CEP for subject merchandise imported by an affiliated person when the "value added in the United States by the affiliated person is likely to *exceed substantially the value of the subject merchandise*" (19 U.S.C. § 1677a, (Exhibit KOR-3), Section (e) (emphasis added)). The value added in the United States will normally be determined to "exceed substantially" the value of the subject merchandise if the value added is estimated to be "at least 65 percent of the price charged to the first unaffiliated purchaser for the merchandise as sold in the United States". (CFR § 351.402(c), (Exhibit KOR-4)). In such situations, the "special rule" envisages the calculation of the CEP on the basis of a comparison with the price of identical subject merchandise or other subject merchandise sold by the exporter or producer to an unaffiliated person, provided that there is a "sufficient quantity of sales to provide a reasonable basis for comparison". (19 U.S.C. § 1677a, (Exhibit KOR-3), Section (e)).
[134] CORE Section A questionnaire response, (Exhibit KOR-2 (BCI)).
[135] CORE Section E questionnaire response, (Exhibit KOR-15 (BCI)), p. 1.
[136] USDOC response to exclusion request, (Exhibit KOR-11), p. 1. In its final determination, the USDOC explained that:

> Hyundai [Steel]'s TWBs consist of two subject merchandise CORE inputs. Yet, Hyundai [Steel]'s value added calculations for TWBs treated one imported CORE component as part of the value added in the United States to the other imported CORE component, and then doubled the purchase price for the further manufactured product as part of the calculation of the value added. Instead of allocating the value added in the United States to each subject CORE component of the TWB (two subject CONNUMs), Hyundai [Steel] added the value of one subject CONNUM to the other as value added, e.g., thereby inflating the value added through further manufacturing to approach the 65 percent threshold. Thus, the [USDOC] instructed Hyundai to report its sales of these two products to unaffiliated parties along with the revised U.S. sales and further manufacturing cost databases.

(CORE issues and decision memorandum, (Exhibit KOR-5), p. 9 (emphasis original))
[137] USDOC response to exclusion request, (Exhibit KOR-11), pp. 1-2.
[138] Hyundai Steel request for extension and additional guidance, (Exhibit KOR-13).
[139] Meeting with counsel to Hyundai Steel (27 October 2015), (Exhibit KOR-14).
[140] The USDOC originally provided Hyundai Steel to file its responses by 29 October 2015, but subsequently provided an extension of two business days following a request by Hyundai Steel. (See USDOC response to exclusion request, (Exhibit KOR-11), p. 2; CORE Section E questionnaire response, (Exhibit KOR-15 (BCI)), p. 6).

response.[141] On 19 November 2015, the USDOC issued its second supplemental questionnaire to Sections B-C and first supplemental questionnaire for Section E, noting that it had "identified certain areas in the questionnaire response … that require[d] additional information".[142] In a meeting on 24 November 2015, held in order to discuss issues relating to Hyundai Steel's reporting of further manufactured sales in the United States, Hyundai Steel noted the difficulty in gathering the information requested.[143] On 30 November 2015, Hyundai Steel filed its first supplemental Section E response with additional and revised sales data.[144] The USDOC issued a second supplemental questionnaire on 15 December 2015, seeking, *inter alia*, an explanation for certain "downward" changes in the first supplemental Section E response[145], and asking Hyundai Steel to provide, if necessary, "a new further manufacturing cost database which incorporates all changes resulting from the questions above".[146]

7.54. On 21 December 2015, the USDOC issued its preliminary determination, finding that "necessary information is not available on the record of the investigation and that Hyundai [Steel], because of the issues affecting its further manufactured sales responses … significantly impeded the proceeding".[147] The USDOC observed that "the response and databases for sales of further manufactured sales submitted by Hyundai [Steel] as part of its November 2, 2015 response [i.e. the initial questionnaire response] were deficient and unusable", and due to the multiple deficiencies noted, Hyundai Steel had been instructed to submit revised, usable databases.[148] Noting that Hyundai Steel submitted revised responses and databases on 2 December 2015, the USDOC explained that there was "inadequate time to analyze whether the revisions made by Hyundai to its responses or databases are reliable or accurate" and its analysis of these responses was hindered by shortcomings in the narrative portion of Hyundai Steel's responses. Given that Hyundai Steel did not provide revised data "until very recently", it was "not practicable" for the USDOC to provide Hyundai Steel with another opportunity to remedy its further manufactured sales responses prior to the preliminary determination, and the USDOC intended to "provide such … an opportunity in the weeks ahead".[149]

7.55. Following the preliminary determination, Hyundai Steel filed its second supplemental Section E response on 29 December 2015[150], which included changes to further manufacturing costs and sales databases based on its response.[151] In its third supplemental Section E questionnaire (5 February 2016) the USDOC identified and sought explanations for certain discrepancies between Hyundai Steel's second supplemental Section E response and its initial response[152], but instructed Hyundai Steel not to "submit any new or revised sales, cost, or further manufacturing databases in response".[153] Hyundai Steel responded on 10 February 2016 (third supplemental Section E response), providing explanations for the USDOC's perceived discrepancies.[154] On 8 March 2016, the USDOC informed Hyundai Steel of its decision to cancel the CEP verification of further manufactured sales.[155] In so doing, the USDOC determined that the information for the further manufactured sales is "unverifiable and deficient".[156] The USDOC noted that the further manufactured sales databases (sales and cost) submitted on 30 November 2015 and 29 December 2015 "show inconsistencies, and contain multiple unexplained, or insufficiently explained, changes".[157] On 11 March 2016, Hyundai Steel communicated to the USDOC a request

[141] CORE Section E questionnaire response, (Exhibit KOR-15 (BCI)), pp. 4-8.
[142] CORE first supplemental Section E questionnaire, (Exhibit USA-5 (BCI)), p. 1.
[143] Meeting with counsel to Hyundai Steel (27 November 2015), (Exhibit KOR-16).
[144] CORE first supplemental Section E questionnaire response, (Exhibit KOR-18 (BCI)), pp. S-1-S-2.
[145] CORE second supplemental Section E questionnaire response, (Exhibit KOR-19 (BCI)), p. 4.
[146] CORE second supplemental Section E questionnaire response, (Exhibit KOR-19 (BCI)), p. 10.
[147] CORE issues and decision memorandum on PDM, (Exhibit USA-8), p. 14.
[148] CORE issues and decision memorandum on PDM, (Exhibit USA-8), p. 13. (fn omitted)
[149] CORE issues and decision memorandum on PDM, (Exhibit USA-8), p. 13.
[150] CORE second supplemental Section E questionnaire response, (Exhibit KOR-19 (BCI)), p. 5.
[151] CORE second supplemental Section E questionnaire response, (Exhibit KOR-19 (BCI)), p. 5.
[152] Hyundai Steel response to supplemental Section E questionnaire, (Exhibit KOR-17 (BCI)), p. 1.
[153] Hyundai Steel response to supplemental Section E questionnaire, (Exhibit KOR-17 (BCI)), p. 1.
[154] Hyundai Steel response to supplemental Section E questionnaire, (Exhibit KOR-17 (BCI)), pp. 2-3.
[155] USDOC letter of cancellation of verification, (Exhibit KOR-20).
[156] USDOC letter of cancellation of verification, (Exhibit KOR-20), p. 1.
[157] USDOC letter of cancellation of verification, (Exhibit KOR-20), pp. 1-2.

to reconsider its decision not to verify further manufactured sales.[158] In its case brief filed on 22 April 2016, Hyundai Steel addressed, *inter alia*, the USDOC's decision to cancel verification.[159]

7.56. In its final determination dated 2 June 2016[160], the USDOC decided to resort to "partial facts available" on the basis that "necessary information [was] not on the record, Hyundai [Steel] failed to submit information by the established deadlines, and Hyundai [Steel] ha[d] significantly impeded the proceeding".[161] Recalling its discussion of the shortcomings identified in its preliminary determination, the USDOC found that Hyundai Steel's first and second supplemental Section E responses were "severely deficient" and its third response "was riddled with inconsistencies and effectively made unsolicited changes to its reporting in its further manufactured cost and in its sales databases".[162] Observing that "Hyundai [Steel] has submitted a series of inaccurate value added calculations and discredited claims of difficulty in gathering data and Section E responses that were unusable, unreliable, and unverifiable", the USDOC found that Hyundai Steel, "with respect to its further manufactured U.S. sales of TWBs, auto parts, skelp, blanks, and sheets, failed to cooperate by not acting to the best of its ability to comply with requests for information in this investigation".[163] As the replacement for the missing information, the USDOC selected the highest dumping margin in the petition of 86.34%.[164]

7.3.1.3 Main arguments of the parties

7.57. Korea claims that the USDOC resorted to the use of facts available inconsistently with Article 6.8 of the Anti-Dumping Agreement because there was no "necessary" information missing concerning further manufactured sales, and because Hyundai Steel did not "significantly impede[]" the investigation.[165] According to Korea, Hyundai Steel reported all the relevant input data (raw material input and sales quantity data) that would have allowed the USDOC to "apply whatever methodology it deemed appropriate, including its standard methodology or an alternative methodology".[166]

7.58. Korea further claims that the USDOC acted inconsistently with paragraph 1 of Annex II because it (a) failed to provide details of the information required "as soon as possible after initiation"; (b) failed to "specify in detail" the information required and the manner in which that information was to be structured; and (c) failed to give a reasonable period of time for Hyundai Steel to provide the requested information.[167] Korea contends that, having "originally *determined* that Hyundai Steel did not have to file a Section E response"[168], the USDOC requested a Section E response "almost four months after [the] initiation of the investigation", and "did not specify how it wanted the information to be presented and structured" in light of the reporting concerns expressed early on by Hyundai Steel.[169] According to Korea, despite Hyundai Steel's repeated attempts, the USDOC "did not engage with Hyundai Steel on these requests and never provided guidance on which information it specifically needed in addition to the comprehensive raw data that was already provided".[170] Finally, Korea alleges that considering the sheer volume of information required by the USDOC, and the difficulty in tracing all transactions for further manufacturing, the USDOC should have given a more reasonable deadline to submit the Section E response, instead of the short 14-day period it provided.[171]

7.59. Korea also claims that the USDOC acted inconsistently with paragraph 6 of Annex II by failing to inform Hyundai Steel of the reasons for disregarding the submitted information, and by denying

[158] Hyundai Steel request to reconsider the cancellation of verification, (Exhibit KOR-21).
[159] CORE case brief, (Exhibit KOR-23 (BCI)).
[160] CORE final determination, (Exhibit KOR-27).
[161] CORE issues and decision memorandum, (Exhibit KOR-5), p. 38.
[162] CORE issues and decision memorandum, (Exhibit KOR-5), p. 16.
[163] CORE issues and decision memorandum, (Exhibit KOR-5), p. 16.
[164] CORE issues and decision memorandum, (Exhibit KOR-5), p. 17.
[165] Korea's first written submission, para. 129.
[166] Korea's response to Panel question No. 1(a); first written submission, paras. 132 and 134 (referring to Hyundai Steel response to supplemental Section E questionnaire, (Exhibit KOR-17 (BCI)), pp. 1-5).
[167] Korea's first written submission, para. 150.
[168] Korea's first written submission, para. 151 (emphasis added). See also CORE anti-dumping questionnaire to Hyundai Steel, (Exhibit KOR-6), p. 2
[169] Korea's first written submission, paras. 151-152.
[170] Korea's first written submission, para. 152.
[171] Korea's first written submission, para. 155.

Hyundai Steel an opportunity to provide further explanations.[172] Korea argues that the second and the third supplemental Section E questionnaires did not constitute "opportunities to provide any new information or to conform to any request from the USDOC other than responding to very limited questions", and that these questionnaires only raised practical problems in respect of which Hyundai Steel had already sought guidance from the USDOC.[173]

7.60. Korea also claims that the USDOC acted inconsistently with paragraph 3 of Annex II by disregarding information which was "verifiable" as "it could have been verified had the USDOC not canceled [*sic*] the planned verification", and that was "'appropriately submitted' given that Hyundai Steel supplied the data by the deadlines in question and provided all of the raw data needed to structure the information differently, if this is what the USDOC considered necessary".[174] This information was also provided "in a timely fashion" as it complied with all deadlines.[175] Korea also claims that the USDOC acted inconsistently with paragraph 5 of Annex II by disregarding the information submitted by Hyundai Steel that, even if not ideal, was provided by it acting to the best of its ability.[176]

7.61. As to the USDOC's selection of the replacement facts, Korea claims that the USDOC acted inconsistently with Article 6.8 and paragraph 7 of Annex II by failing to corroborate properly the selected replacement and by not exercising special circumspection in considering the reliability and accuracy of the "secondary source information".[177] According to Korea, the USDOC improperly confirmed the reliability of the petition rate on the basis of its pre-initiation analysis.[178] Korea argues that the only other basis for relying on the petition rate was that the USDOC found it to be equal to or below certain product-specific margins for coils.[179] Korea argues that the USDOC did not engage in a process of reasoning or evaluation, but instead resorted to the highest petition margin because that was its "practice".[180] Finally, Korea argues that the USDOC's application of facts available was not objective or fair, but punitive in nature.[181]

7.62. In response to Korea's argument that there was no "necessary" information missing because Hyundai Steel had provided all the relevant data that would have allowed the USDOC to apply the alternative methodology that Hyundai Steel had proposed, the United States contends that "this argument ignores that [the] USDOC specifically considered and rejected Hyundai's 'alternative methodology'".[182] The United States maintains that the USDOC decided not to apply the alternative methodology proposed by Hyundai Steel given that it had failed to demonstrate that the value added in the United States exceeded the threshold of 65% of the imported coil, which was a precondition for the application of the "special rule".[183] The United States stresses that Korea has not challenged this determination.[184] The United States contends that, contrary to Korea's arguments, Hyundai Steel was offered three opportunities to correct deficiencies, and multiple opportunities to meet with the USDOC in response to its requests for guidance.[185] According to the United States, Hyundai Steel's reporting constituted a significant impediment because of the delays and because it consistently provided unusable information.[186]

7.63. With respect to Korea's claim under paragraph 1 of Annex II, the United States responds that, although the USDOC did not initially require Hyundai Steel to respond to the Section E questionnaire, it did "alert" Hyundai Steel to the possibility of requiring such information in the future depending on Hyundai Steel's Section A response.[187] The United States maintains that the USDOC specified

[172] Korea's first written submission, paras. 157-160.
[173] Korea's second written submission, para. 36.
[174] Korea's first written submission, paras. 164 and 167.
[175] Korea's first written submission, para. 168.
[176] Korea's first written submission, paras. 171 and 173.
[177] Korea's first written submission, paras. 185 and 187-191.
[178] Korea's first written submission, para. 186.
[179] Korea's first written submission, para. 190.
[180] Korea's first written submission, para. 192.
[181] Korea's first written submission, para. 196.
[182] United States' first written submission, para. 64.
[183] United States' first written submission, para. 64.
[184] United States' first written submission, para. 65.
[185] United States' first written submission, paras. 68-69.
[186] United States' first written submission, para. 70 (referring to CORE issues and decision memorandum, (Exhibit KOR-5), p. 14).
[187] United States' first written submission, para. 73 (referring to CORE anti-dumping questionnaire to Hyundai Steel, (Exhibit KOR-6)).

precisely and in great detail what was required from Hyundai Steel, and also provided written and oral clarifications.[188] The United States highlights that the USDOC offered multiple opportunities to Hyundai Steel over the course of almost five months – from 11 September 2015 until 20 February 2016 – to respond adequately to the USDOC's requests for the further-manufactured information, including issuing a total of five supplemental requests for the same information.[189] According to the United States, the USDOC "went to great lengths to understand and address Hyundai [Steel]'s purported difficulties"[190] and provided specific guidance and asked follow-up questions aimed at remedying the discrepancies in Hyundai Steel's responses.[191]

7.64. The United States also contends that the USDOC acted in accordance with paragraph 6 of Annex II because it explained why the information submitted was not verifiable in its letter cancelling the verification for the further manufactured sales.[192] The USDOC also provided multiple opportunities to Hyundai Steel to furnish further explanations.[193] The United States maintains that the USDOC acted consistently with paragraphs 3 and 5 of Annex II as Hyundai Steel's responses were not "verifiable" and could not be used "without undue difficulties" because of the multiple deficiencies therein.[194] Finally, the United States argues that Hyundai Steel did not submit information "to the best of its ability" because it repeatedly provided unusable data despite the multiple opportunities.[195]

7.65. The United States asserts that the USDOC acted consistently with paragraph 7 of Annex II, as it corroborated the petition margin to the extent practicable using sources that were reasonably at its disposal, and used special circumspection in determining whether the rates alleged in the petition were relevant and reliable for purposes of using them as replacement facts for Hyundai Steel's further manufactured sales.[196] The United States explains that the USDOC found the rate to be relevant and reliable because the rate was derived from information from the CORE industry and was within the range of Hyundai Steel's reported product-specific margins for coil.[197] The United States contends that, despite arguing there was "better information on the record", Korea offers no alternative.[198] According to the United States, the USDOC's selection was not made on the "sole basis" of the adverse inference.[199]

7.3.1.4 Evaluation by the Panel

7.3.1.4.1 The USDOC's resort to facts available

7.66. Korea claims that the USDOC acted inconsistently with Article 6.8 and paragraphs 1, 3, 5, and 6 of Annex II of the Anti-Dumping Agreement in resorting to the use of facts available in respect of Hyundai Steel's reporting of information concerning further manufactured sales.

7.67. In its initial questionnaire dated 27 July 2015, the USDOC requested Hyundai Steel to respond to Sections A-D, and clarified that it was not "currently" required to respond to Section E.[200] Contrary to Korea's arguments, we do not consider that the USDOC "originally *determined* that Hyundai Steel did not have to file a Section E response".[201] Rather, in the letter accompanying its initial questionnaire, the USDOC clearly explained that a Section E response "*may*" be requested if it is "*determine[d]*" – based on Hyundai Steel's Section A response – that "information to account for further-processing expenses incurred in the United States" was required.[202]

[188] United States' first written submission, paras. 73-74.
[189] United States' first written submission, paras. 75-76.
[190] United States' response to Panel question No. 2(b), para. 11.
[191] United States' first written submission, para. 77.
[192] United States' first written submission, para. 81.
[193] United States' first written submission, paras. 83-84.
[194] United States' first written submission, paras. 90-92.
[195] United States' first written submission, para. 96.
[196] United States' first written submission, paras. 101 and 103.
[197] United States' first written submission, paras. 103-104.
[198] United States' first written submission, para. 102.
[199] United States' first written submission, para. 106.
[200] CORE anti-dumping questionnaire to Hyundai Steel, (Exhibit KOR-6), p. 2.
[201] Korea's first written submission, para. 151. (emphasis added)
[202] CORE anti-dumping questionnaire to Hyundai Steel, (Exhibit KOR-6), p. 2. (emphasis added)

7.68. Hyundai Steel's subsequent conduct confirms that it was aware of the possibility that it may be required to submit a Section E response. On 17 August 2015, before responding to the initial questionnaire, Hyundai Steel requested an exemption from the obligation to report sales that were substantially further manufactured prior to sale to unaffiliated parties.[203] Hyundai Steel requested the USDOC to calculate the CEP based on the "special rule" provided in the US anti-dumping statute.[204] Specifically, Hyundai Steel argued, first, that the value added in the United States vastly exceeded 65% of the value of the imported merchandise. Second, Hyundai Steel stated that an examination of the further manufactured sales would be "unnecessarily and enormously burdensome" for the USDOC and there were other appropriate and reasonable bases to calculate the CEP.[205] Third, Hyundai Steel argued that the finished merchandise (i.e. automobiles) was not the "same class or kind" as the subject merchandise (i.e. coils from CORE), and therefore the difficulty for applying the standard methodology would be very high for the USDOC.[206] For these reasons, Hyundai Steel suggested that the USDOC could apply an "alternative methodology", similar to what had been adopted in prior cases, and determine dumping margins based on the weighted-average dumping margins calculated on sales of subject merchandise sold to unaffiliated persons, or, alternatively, to exclude from its calculations the sales of the further manufactured products.[207]

7.69. In its Section A response dated 4 September 2015, Hyundai Steel "respectfully suggest[ed]" that a Section E response was not required in the present case, and requiring such data would be "enormously burdensome" for both the USDOC and Hyundai Steel.[208] In a letter dated 11 September 2015, the USDOC stated that it was still evaluating Hyundai Steel's request for an exemption from the Section E response and requested certain additional information with respect to Hyundai Steel's exemption request.[209] Subsequently, in a teleconference with officials from the USDOC on 14 September 2015, Hyundai Steel stated that, based on the USDOC's request for information dated 11 September 2015, "it is unclear to Hyundai [Steel], what additional information it should have, or could have, submitted to further substantiate its request for the alternate calculation method".[210] In the teleconference, the USDOC "agreed to follow up with additional guidance to Hyundai [Steel]'s request for clarification".[211] The USDOC provided such "additional guidance" on "[i]nformation [r]equired to [s]ubstantiate Hyundai Steel Corporation's [r]equest for [a]lternative [c]alculation [m]ethod" through a letter dated 16 September 2015.[212]

7.70. Following the USDOC's guidance, Hyundai Steel provided additional information regarding: the quantity and the value of sales by Hyundai Steel America (HSA), Hyundai Steel's wholly owned US affiliate, to each of its affiliated and unaffiliated customers; the value added by HSA prior to the sale to an unaffiliated vendor; and the materials added to the merchandise under consideration by HSA or the unaffiliated vendors.[213] The USDOC ultimately denied Hyundai Steel's request for a "special exemption" on 15 October 2015, stating that Hyundai Steel had failed to demonstrate that the value added in the United States was equal to or greater than 65% of the imported coil with respect to Hyundai Steel's further manufactured sales of certain auto parts, TWBs, and further processed TWB (after-service parts).[214] On this basis, the USDOC requested Hyundai Steel to

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[203] CORE anti-dumping questionnaire to Hyundai Steel, (Exhibit KOR-6), p. 2.
[204] 19 U.S.C. § 1677a, (Exhibit KOR-3).
[205] Hyundai Steel exclusion request, (Exhibit KOR-7 (BCI)), pp. 4-7.
[206] Hyundai Steel exclusion request, (Exhibit KOR-7 (BCI)), p. 15. By "standard methodology", Korea refers to the calculation of the constructed export price with the following adjustment:

> **Additional adjustments to constructed export price**
> For purposes of this section, the price used to establish constructed export price shall also be reduced by –
> (1) …
> (2) the cost of any further manufacture or assembly (including additional material and labor), except in circumstances described in subsection (e) of this section …[.]

(19 U.S.C. § 1677a, (Exhibit KOR-3), Section (d))
[207] Hyundai Steel exclusion request, (Exhibit KOR-7 (BCI)), pp. 15-16.
[208] CORE Section A questionnaire response, (Exhibit KOR-2 (BCI)), p. A-3.
[209] CORE initial questionnaire extension, (Exhibit USA-3), p. 2.
[210] USDOC teleconference with Hyundai Steel, (Exhibit KOR-9).
[211] USDOC teleconference with Hyundai Steel, (Exhibit KOR-9).
[212] USDOC additional guidance, (Exhibit USA-4), p. 3.
[213] CORE response to request for additional information, (Exhibit KOR-10 (BCI)).
[214] USDOC response to exclusion request, (Exhibit KOR-11), p. 1. See also CORE issues and decision memorandum, (Exhibit KOR-5), p. 9. Although arguing that "the application of the USDOC's standard

provide, *inter alia*, a Section E response.[215] The USDOC also asked Hyundai Steel to make any necessary revisions to its Sections C-D databases in accordance with its further manufactured products reporting[216], and to submit its responses by 29 October 2015.[217]

7.71. We disagree with Korea's argument that the USDOC "originally *determined*" that Hyundai Steel did not have to file a Section E response.[218] Rather, we note that the USDOC originally informed Hyundai Steel that such a determination would be made at a later stage, based upon Hyundai Steel's initial Section A response.[219] We also disagree with Korea that the USDOC acted inconsistently with paragraph 1 because "[t]his instruction came almost four months after initiation of the investigation".[220] Not only does the above sequence of events show that Hyundai Steel was aware from the outset that it could subsequently be asked to submit a Section E response, but it also indicates that the timing of the USDOC's decision to request a Section E response may have been influenced by Hyundai Steel's exemption request and the USDOC's consideration thereof. Thus, we reject Korea's argument that the USDOC acted inconsistently with paragraph 1 of Annex II because it failed to specify in detail the information required "as soon as possible after initiation".

7.72. We now turn to Korea's second argument that the USDOC acted inconsistently with paragraph 1 of Annex II because it failed to "specify in detail" the information required and the manner in which that information was to be structured. We recall that, a week after the USDOC's rejection of Hyundai Steel's exemption request, on 22 October 2015, Hyundai Steel requested guidance from the USDOC on how sales and related further manufacturing costs data should be reported[221], as well as a two-week extension from the time the USDOC provides such guidance.[222] Hyundai Steel explained that although it was "working diligently" to collect the requested data, due to the "complexities" of the products at issue, the USDOC's standard questionnaire does not address how Hyundai Steel should report sales of TWBs or after-service parts.[223] Hyundai Steel noted that the USDOC's "basic instructions for reporting sales and costs for further manufacturing" "presume that there is only one imported [control number (CONNUM)] in each U.S. further manufacture (i.e., finished good) sale" and thus "envision that the [USDOC] will start with the price of a finished good, subtract out the further manufacturing and other expenses, and derive a net price for the imported CONNUM". Hyundai Steel argued that its "situation does not fit this paradigm"[224]:

> TWBs are manufactured by welding together flat-rolled sheets or blanks of different thicknesses, grades, and coatings into various shaped forms. In Hyundai Steel's case, the TWBs manufactured from subject merchandise will consist of two CORE components, generally with different CONNUMs. In order for the [USDOC] to employ its standard margin calculation methodology, it must segregate each transaction into two components in order to calculate a net price for each imported CONNUM.
>
> In addition, the further manufacturing costs (which are calculated by finished good) must also be allocated between the two imported components. Moreover, the value added for any given component necessarily includes the second imported component required to manufacture the finished TWB. That is, in these circumstances, each component of the TWB is both further processed subject merchandise and simultaneously part of the value added. After-service auto parts are still more complex containing more CONNUMs (although the number of CONNUMs will vary from part to part), as well as non-subject merchandise. For all practical purposes, these parts are

methodology in the CORE investigation to Hyundai Steel's further-manufactured sales was virtually impossible", Korea does not directly challenge the USDOC's decision to reject Hyundai Steel's exemption request and apply the "standard methodology". (Korea's response to Panel question No. 1(a)).

[215] USDOC response to exclusion request, (Exhibit KOR-11), pp. 1-2.
[216] USDOC response to exclusion request, (Exhibit KOR-11), p. 2.
[217] USDOC response to exclusion request, (Exhibit KOR-11), p. 2.
[218] Korea's first written submission, para. 151. (emphasis added)
[219] The USDOC stated that Hyundai Steel was "not currently required to respond to section E", and added that "[h]owever, we may request a response to this section *if we determine*, based on your response to section A, that we require the information to account for further-processing expenses incurred in the United States". (CORE anti-dumping questionnaire to Hyundai Steel, (Exhibit KOR-6), p. 2 (emphasis added)).
[220] Korea's first written submission, para. 151.
[221] Hyundai Steel request for extension and additional guidance, (Exhibit KOR-13), p. 2.
[222] Hyundai Steel request for extension and additional guidance, (Exhibit KOR-13), p. 2.
[223] Hyundai Steel request for extension and additional guidance, (Exhibit KOR-13), p. 1.
[224] Hyundai Steel request for extension and additional guidance, (Exhibit KOR-13), p. 2.

> only slightly less complex than the automobiles produced by Hyundai Steel's U.S. affiliates.[225]

Because of these complexities, Hyundai Steel sought "guidance and additional clarifications" from the USDOC in its preparation of the revised sales data and further manufacturing data.[226]

7.73. On 27 October 2015, representatives of Hyundai Steel met with USDOC officials "to discuss issues related" to Hyundai Steel's request of 22 October 2015.[227] The memorandum for the meeting does not indicate whether the USDOC provided any "guidance" to Hyundai Steel. However, other record evidence suggests that in response to Hyundai Steel's requests, the USDOC granted an extension of two "business days" and indicated that Hyundai Steel "should do its best to adapt the reporting requirements to the complex factual pattern presented here".[228]

7.74. On 2 November 2015, Hyundai Steel submitted its first response to the USDOC's request for a Section E questionnaire and certain additional information, wherein it reiterated the complexity of the information requested with respect to after-service auto parts, providing specific examples, and continued to maintain that this situation qualified for the "special rule" for an alternative calculation methodology.[229] Hyundai Steel also explained that it "has been unable to eliminate those products that did not contain Hyundai Steel-manufactured subject merchandise, but has conservatively reported all transactions that theoretically could contain subject merchandise".[230] It further noted that it had been unable to identify the specific steel components contained in the finished product, and therefore conservatively assumed that each product contained four CONNUMs.[231]

7.75. Paragraph 1 of Annex II requires, *inter alia*, that an investigating authority must "*specify in detail* the information required from any interested party, and the manner in which that information should be structured by the interested party in its response".[232] Although Article 6.8 and paragraph 1 of Annex II do not provide any guidance as to how an investigating authority is to "specify in detail" the information it requires[233], we note that the general evidentiary rule contained in Article 6.1 of the Anti-Dumping Agreement requires that "[a]ll interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require". In contrast to Article 6.1, paragraph 1 of Annex II is more "specific and detailed" and requires more than mere "notice" being given to the interested parties.[234] The context provided by paragraphs 5 and 7 of Annex II, as well as Article 6.13, suggests that "'cooperation' is, indeed, a two-way process involving joint effort" and, "[i]f the investigating authorities fail to 'take due account' of genuine 'difficulties' experienced by interested parties, and made known to the investigating authorities, they cannot … fault the interested parties concerned for a lack of cooperation".[235]

7.76. Further, an assessment of whether an investigating authority acted consistently with paragraph 1 of Annex II must be made in light of the specific facts and circumstances of the investigation at issue. In light of the applicable standard of review, an investigating authority would act consistently with paragraph 1 of Annex II if the record of the investigation shows that the investigating authority took all reasonable steps that might be expected from an *objective and unbiased* authority to specify in detail the information requested, and the manner in which it is to be structured, as soon as possible after initiation.[236]

7.77. In the case at hand, the United States acknowledges that, until the USDOC's decision dated 15 October 2015, the USDOC was focused on the exemption request and did not provide guidance

[225] Hyundai Steel request for extension and additional guidance, (Exhibit KOR-13), pp. 2-3.
[226] Hyundai Steel request for extension and additional guidance, (Exhibit KOR-13), p. 3.
[227] Meeting with counsel to Hyundai Steel (27 October 2015), (Exhibit KOR-14).
[228] CORE Section E questionnaire response, (Exhibit KOR-15 (BCI)), p. 6.
[229] CORE Section E questionnaire response, (Exhibit KOR-15 (BCI)), pp. 4-5.
[230] CORE Section E questionnaire response, (Exhibit KOR-15 (BCI)), p. 6.
[231] CORE Section E questionnaire response, (Exhibit KOR-15 (BCI)), p. 7.
[232] Emphasis added.
[233] Panel Report, *China – Autos (US)*, para. 7.129.
[234] Panel Report, *China – Autos (US)*, para. 7.122 and fn 213.
[235] Appellate Body Report, *US – Hot-Rolled Steel*, para. 104.
[236] Panel Report, *China – Autos (US)*, para. 7.130.

to Hyundai Steel on how to complete a Section E questionnaire.[237] Indeed, there is nothing in the record to indicate that the USDOC addressed or engaged with the reporting difficulties that were identified by Hyundai Steel prior to its rejection of Hyundai Steel's exemption request on 15 October 2015.[238]

7.78. Following the USDOC's 15 October 2015 decision to deny Hyundai Steel's exemption request and seek a Section E response, Hyundai Steel, on 22 October 2015, reiterated its previously identified reporting difficulties and expressly sought additional guidance from the USDOC. A meeting was held between USDOC officials and Hyundai Steel on 27 October 2015, but the record indicates that the USDOC merely suggested that Hyundai Steel "should do its best to adapt the reporting requirements to the complex factual pattern presented here".[239]

7.79. Although the United States points out the limited purpose that meeting memoranda serve under US domestic law[240], it is unable to point to any other evidence demonstrating that the USDOC did, in fact, provide additional guidance to Hyundai Steel during their meeting on 27 October 2015.[241] Furthermore, we note the USDOC's explanation – as part of its final determination – that "it is not within the purview of the [USDOC] to tell Hyundai [Steel] how its accounting system and overall management system works, and it lies clearly with Hyundai [Steel] how best to report its further manufactured sales within the [USDOC]'s required format".[242] Based on the above, we find that the USDOC did not provide any additional guidance to Hyundai Steel during their meeting on 27 October 2015.

7.80. According to the United States, additional "guidance" was provided by the USDOC as part of its supplemental questionnaires. Specifically, the United States submits that the USDOC issued three supplemental questionnaires that provided "specific guidance to Hyundai Steel by identifying deficiencies with Hyundai Steel's responses and providing questions to help Hyundai Steel correct or clarify its responses".[243] Identifying deficiencies in an interested party' response may not be the same as providing guidance at the time the information was originally requested. In the specific circumstances of this case, identifying deficiencies in Hyundai Steel's responses is distinct from specifying in detail the information that was required and the manner in which it should be structured "as soon as possible after the initiation of the investigation". For this reason, even if we find that the three supplemental questionnaires issued by the USDOC identified deficiencies in Hyundai Steel's responses, this does not, without more, establish compliance with paragraph 1 of Annex II in a situation where Hyundai Steel had clearly identified certain reporting difficulties from the outset and repeatedly requested additional guidance.

7.81. Finally, we note the United States' argument that the USDOC rejected Hyundai Steel's claims of difficulty[244], finding that Hyundai Steel "made claims of difficulty in gathering data which were inaccurate".[245] As the United States points out, the USDOC reached this finding in its final

[237] United States' response to Panel question No. 59, para. 37 (noting that, in the period prior to 15 October 2015, "the focus of [the USDOC's] work was on helping Hyundai [Steel] provide a complete and accurate request for exemption and *not on providing guidance to Hyundai [Steel] on how to complete a Section E response*" (emphasis added)).

[238] We disagree with the United States that Hyundai Steel's "claimed difficulties were not known" to the USDOC prior to Hyundai Steel's letter dated 22 October 2015. (United States' response to Panel question No. 59, para. 38). The reporting difficulties identified in Hyundai Steel's request for additional guidance on 22 October 2015 were also flagged and discussed in Hyundai Steel's earlier communication with the USDOC concerning its exemption request on 17 August 2015. Hyundai Steel also raised these issues as part of its initial Section A questionnaire response (4 September 2015), as well as its response to the USDOC's request for additional information concerning the exemption request. (Hyundai Steel exclusion request, (Exhibit KOR-7 (BCI)), p. 13; CORE Section A questionnaire response, (Exhibit KOR-2 (BCI)), pp. A-42-A-43; and CORE response to request for additional information, (Exhibit KOR-10 (BCI)), pp. 3-6).

[239] CORE Section E questionnaire response, (Exhibit KOR-15 (BCI)), p. 6.

[240] United States' second written submission, paras. 27-28; response to Panel question No. 58, paras. 27-28.

[241] More detailed summary is provided in the memoranda for other meetings. See, e.g. Meeting with counsel to Hyundai Steel (27 November 2015), (Exhibit KOR-16); see also USDOC teleconference with Hyundai Steel, (Exhibit KOR-9).

[242] CORE issues and decision memorandum, (Exhibit KOR-5), p. 16.

[243] United States' second written submission, para. 29; response to Panel question No. 58, para. 32.

[244] United States' second written submission, para. 39 (quoting CORE issues and decision memorandum, (Exhibit KOR-5), pp. 16, 30, and 41).

[245] CORE issues and decision memorandum, (Exhibit KOR-5), p. 41.

determination on the basis that "Hyundai Steel initially reported that providing [the] USDOC with requested information would be too complicated, too burdensome, or not possible, but subsequently … was able to provide the requested information".[246]

7.82. The fact that an interested party is ultimately able to overcome some of the difficulties that it initially identified does not necessarily detract from the genuineness of those difficulties from the outset. We note that, as part of its first supplemental Section E response, Hyundai Steel submitted that, although it had been able to collect additional information and refine its reporting, "these additional data should not be interpreted as a sign that Hyundai Steel has been 'holding back' or that the reporting difficulties described to date have been over emphasized. Rather, Hyundai Steel and its affiliates have worked tirelessly to collect and prepare the sales data provided herein".[247] We note that before Hyundai Steel was able to respond to the first supplemental Section E questionnaire, the USDOC had already stated that Hyundai Steel had "numerous opportunities to present this necessary information" concerning "further manufactured sales in the United States", noting that "this information was explicitly requested in the original questionnaire", but, even "at this late date Hyundai [Steel] has not produced a usable database".[248] Given that Hyundai Steel was given *one* opportunity to respond to the USDOC's request for a Section E response dated 15 October 2015 – and it had not yet submitted its response to the first supplemental questionnaire – we do not consider that Hyundai Steel had already been provided "numerous opportunities" to present this information. Furthermore, the USDOC's comment that this information was explicitly requested in the original questionnaire and even at this "late date" Hyundai Steel had not provided a useful information, must be seen in light of the fact that the USDOC did not determine that Hyundai Steel was required to submit a Section E response until 15 October 2015. In these circumstances, we do not consider that the USDOC's finding in its final determination that Hyundai Steel was able to overcome some of its initially reported difficulties would suggest to an impartial and objective investigating authority that those difficulties were not genuine at the time Hyundai Steel was first asked to submit a Section E response.

7.83. Based on the above, we find that the USDOC failed to engage with, and address, the reporting difficulties that had repeatedly been raised by Hyundai Steel and thus did not provide any meaningful guidance at the time it requested a Section E response. In these circumstances, we find that the USDOC did not take all reasonable steps that would be expected from an objective and unbiased authority to "specify in detail" the information requested and "the manner in which that information should be structured" within the meaning of paragraph 1 of Annex II to the Anti-Dumping Agreement. We therefore find that the USDOC acted inconsistently with paragraph 1 of Annex II to the Anti-Dumping Agreement.[249] Given that paragraph 1 of Annex II serves as a precondition for an investigating authority's proper resort to facts available under Article 6.8 of the Anti-Dumping Agreement[250], we find that the USDOC also acted inconsistently with that provision in resorting to facts available with respect to Hyundai Steel's reporting of information concerning further manufactured sales. In light of our findings of WTO-inconsistency, we do not consider it necessary to rule upon Korea's claims under paragraphs 3, 5, and 6 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us.[251]

7.3.1.4.2 The USDOC's selection of the replacement facts

7.84. We have already found that the USDOC erred in resorting to facts available with respect to Hyundai Steel's reporting of information concerning further manufactured sales. In these circumstances, we do not consider that making further findings on Korea's claims concerning the USDOC's selection of the replacement facts on the basis of the record used for the

[246] United States' second written submission, para. 39; response to Panel question No. 2(b), paras. 17-21. See also CORE issues and decision memorandum, (Exhibit KOR-5), pp. 40-41.
[247] CORE first supplemental Section E questionnaire response, (Exhibit KOR-18 (BCI)), p. S-1.
[248] Meeting with counsel to Hyundai Steel (27 November 2015), (Exhibit KOR-16).
[249] In light of our finding, we do not consider it necessary to address Korea's argument that the USDOC acted inconsistently with paragraph 1 of Annex II by failing to provide a reasonable period of time for Hyundai Steel to furnish the requested information.
[250] Panel Report, *China – GOES*, paras. 7.384-7.385. See also paras. 7.26-7.27 above.
[251] See, e.g. Panel Reports, *EC – Salmon (Norway)*, para. 7.387; and *Morocco – Hot-Rolled Steel (Turkey)*, paras. 7.105-7.106.

USDOC's WTO-inconsistent findings would assist in providing a positive solution to the dispute before us.[252]

7.3.1.5 Korea's claims under Articles 1, 9.3, and 18.1 of the Anti-Dumping Agreement

7.85. Korea further claims that the USDOC's use of facts available inconsistently with Article 6.8 and Annex II of the Anti-Dumping Agreement "led to an anti-dumping duty that was imposed and collected in excess of the margin of dumping in violation of Articles 1, 9.3, and 18.1 of the Anti-Dumping Agreement".[253] According to Korea, because the margin of dumping was determined based on facts available in a manner inconsistent with Article 6.8 and Annex II, "the imposition of duties at the level of the margin of dumping automatically violated Article 9.3".[254] Moreover, Korea asserts that the violation of Article 6.8 and Annex II also "automatically leads" to a violation of Articles 1 and 18.1 of the Anti-Dumping Agreement, as "this USDOC investigation and the measure taken were not in accordance with the Anti-Dumping Agreement".[255]

7.86. The United States responds that Korea's claims under Articles 1, 9.3, and 18.1 are "entirely consequential" and "Korea offers no argument or evidence to support any independent breach of those provisions".[256] According to the United States, were the Panel to uphold Korea's claims under Article 6.8 and Annex II, "there would be no basis to decide Korea's consequential claims".[257] First, the United States "does not concede that such breaches are 'automatic'".[258] Second, the United States submits that deciding such claims would be serve "no useful purpose" and would provide no "additional guidance that would be useful regarding implementation of any recommendations adopted by the DSB".[259]

7.87. Korea does not present any independent bases for the alleged breaches of Articles 1, 9.3, and 18.1 of the Anti-Dumping Agreement; instead, its claims under these provisions are dependent entirely upon a finding that the United States acted inconsistently with Article 6.8 and Annex II of the Anti-Dumping Agreement.[260] In these circumstances – and having already found that the United States acted inconsistently with Article 6.8 and paragraph 1 of Annex II – we do not consider it necessary to rule upon Korea's claims under Articles 1, 9.3, and 18.1 of the Anti-Dumping Agreement in order to resolve the dispute before us.[261]

7.3.2 Anti-dumping duties on certain cold-rolled steel flat products from Korea (USDOC investigation number A-580-881)

7.3.2.1 Introduction

7.88. Korea claims that the United States acted inconsistently with Article 6.8 and Annex II to the Anti-Dumping Agreement in the investigation concerning certain cold-rolled steel (CRS) flat products from Korea ("CRS AD investigation").[262] Specifically, Korea challenges the USDOC's use of facts available in respect of two issues: the alleged failure of Hyundai Steel to demonstrate the

[252] We recall that Articles 3.4 and 3.7 of the DSU provide that that the aim of WTO dispute settlement is to secure a positive solution to a dispute and achieve a satisfactory settlement of the matter. The Appellate Body has explained that the principle of judicial economy "allows a panel to refrain from making multiple findings that the same measure is inconsistent with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute". (Appellate Body Reports, *Argentina – Import Measures*, para. 5.190 (referring to Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133)). Past panels have also found that, where an investigating authority errs in its resort to facts available, it is not necessary to address claims concerning the selection of replacement facts in order to provide a positive resolve the dispute. (See, e.g. Panel Reports, *Egypt – Steel Rebar*, para. 7.310; and *Mexico – Anti-Dumping Measures on Rice*, para. 7.200. See also Panel Report, *China – Broiler Products*, para. 7.555).

[253] Korea's first written submission, para. 206.

[254] Korea's first written submission, paras. 203-204.

[255] Korea's first written submission, para. 205.

[256] United States' first written submission, para. 356.

[257] United States' first written submission, para. 358.

[258] United States' first written submission, para. 358.

[259] United States' first written submission, paras. 358-359.

[260] Korea's first written submission, paras. 204-205.

[261] See, e.g. Panel Reports, *US – Differential Pricing Methodology*, paras. 7.114-7.115; *Argentina – Poultry Anti-Dumping Duties*, para. 7.369; *US – Steel Plate*, para. 7.103; and *EU – Footwear (China)*, para. 7.935.

[262] Korea's first written submission, para. 207.

arm's-length nature of certain services provided by its affiliate [[***]] ("affiliated party transactions"); and the alleged misreporting of some products under the relevant control numbers (CONNUMs) for certain home-market and US sales.[263]

7.89. We first examine the issue of Hyundai Steel's affiliated party transactions. We begin by setting out the relevant factual background of the underlying investigation. Subsequently, we summarize the parties' arguments before examining Korea's claims of WTO-inconsistency in respect of the USDOC's resort to facts available and its selection of the replacement facts. We then follow the same order of analysis for the second issue raised by Korea concerning the alleged misreporting of certain CONNUMs.

7.3.2.2 Affiliated party transactions

7.3.2.2.1 Factual background

7.90. In response to Section A of the USDOC's initial questionnaire[264], Hyundai Steel identified [[***]] as its affiliate and reported that Hyundai Steel and [[***]] were members of the Hyundai Motor Group, and that they were under "common control".[265] In its response to Section B of the initial questionnaire (dedicated to sales in the home market or in a third country), Hyundai Steel stated that it used only its affiliate, [[***]], to transport merchandise to the customer[266], and provided [[***]] financial statements in order to demonstrate that Hyundai Steel's transactions with its affiliate for inland freight were made for profit and, therefore, were on an arm's-length basis.[267] In its Section C response (dedicated to sales to the United States), Hyundai Steel stated that during the period of investigation (POI), the inland freight to port of exportation was handled by [[***]], and referred to its Section B response that the transactions were at arm's length since [[***]] earned a profit during the POI.[268] For international freight, Hyundai Steel stated that during the POI, [[***]] provided all shipping services to the United States[269] and provided an international freight contract it had with [[***]], as well as an international freight contract between [[***]] and one of its unaffiliated subcontractors.[270]

7.91. The USDOC subsequently issued a supplemental Sections B-C questionnaire, noting that in its initial questionnaire response, Hyundai Steel "never explained why the transactions between Hyundai Steel and [[***]] for inland freight and warehousing are at arm's length".[271] The USDOC thus requested "all [] contracts with [[***]] and all unaffiliated freight providers that cover the full POI [*sic*]".[272] Furthermore, the USDOC identified certain deficiencies with [[***]] financial statements submitted by Hyundai Steel in its initial response.[273] Hyundai Steel responded that [[***]] maintained subcontracts with over 30 subcontractors, and provided a sample contract of [[***]] with its one of its unaffiliated subcontractors, namely, [[***]], which, in comparison to the contract between Hyundai Steel and [[***]], allegedly demonstrated that [[***]] charged Hyundai Steel a price higher than what [[***]] paid to its subcontractor.[274]

7.92. Regarding inland freight for US sales, the USDOC's supplemental questionnaire requested "copies of all freight contracts with [[***]] and all unaffiliated freight providers that cover the full POI".[275] The USDOC also requested Hyundai Steel to provide "[[***]] inland freight prices to its other customers, unaffiliated to Hyundai Steel" along with "supporting evidence [of] how th[ese] prices are comparable to the services provided to Hyundai Steel".[276] Hyundai Steel provided

[263] Korea's first written submission, para. 219.
[264] CRS initial questionnaire, (Exhibit KOR-33), p. 1.
[265] CRS Section A questionnaire response, (Exhibit KOR-28 (BCI)), pp. A-10-A-12 and exhibit A-6.
[266] CRS Section B questionnaire response, (Exhibit KOR-36 (BCI)), pp. B-30-B-31.
[267] CRS Section B questionnaire response, (Exhibit KOR-36 (BCI)), p. B-31 and exhibit B-15.
[268] CRS Section C questionnaire response, (Exhibit KOR-51 (BCI)), p. C-27.
[269] CRS Section C questionnaire response, (Exhibit KOR-51 (BCI)), p. C-29 and exhibit C-10.
[270] CRS Section C questionnaire response, (Exhibit KOR-51 (BCI)), pp. C-29-C-30 and exhibit C-10.
[271] CRS supplemental Sections B-C questionnaire, (Exhibit USA-72 (BCI)), p. 3.
[272] CRS supplemental Sections B-C questionnaire, (Exhibit USA-72 (BCI)), pp. 3-4.
[273] CRS supplemental Sections B-C questionnaire, (Exhibit USA-72 (BCI)), pp. 6-7.
[274] CRS supplemental Sections B-C questionnaire response, (Exhibit KOR-34 (BCI)), pp. 6-11 and exhibits S-6 and S-7.
[275] CRS supplemental Sections B-C questionnaire, (Exhibit USA-72 (BCI)), p. 8.
[276] CRS supplemental Sections B-C questionnaire, (Exhibit USA-72 (BCI)), p. 8.

contracts of [[***]] with its one of its unaffiliated subcontractors, [[***]][277], and stated that [[***]] did not provide comparable services to unaffiliated customers.[278] For international freight, the USDOC requested "copies of all international freight contracts between [[***]] and its unaffiliated customers".[279] Additionally, the USDOC requested "[i]f [at] all possible, [] a price quote from [[***]] sub-contractor to another customer showing the arm's-length transaction comparisons between Hyundai Steel and [[***]], and [[***]] and its sub-contractor".[280] Hyundai Steel responded that [[***]] did not maintain any contracts with unaffiliated customers for shipments to the United States, and that while "[[***]] does provide shipping services to unaffiliated customers for shipments to third countries, [[***]] has declined Hyundai Steel's request to provide its contracts with unaffiliated third parties citing the proprietary and confidential nature of its transactions with other parties".[281] In respect of the USDOC's second request, Hyundai Steel responded that since [[***]] subcontractor is not affiliated with Hyundai Steel or [[***]], Hyundai Steel was not in a position to "compel" the subcontractor to provide its price quotes to another customer.[282]

7.93. The USDOC followed up with a second supplemental Sections B-C questionnaire to Hyundai Steel, wherein it requested for inland freight services "copies of all contracts that [[***]] has with all unaffiliated parties for similar services that covers the POI".[283] Hyundai Steel responded that for inland freight services to warehouse, [[***]] did not offer similar services to unaffiliated parties, so it was unable to provide such contracts.[284] Furthermore, the USDOC asked for [[***]] additional sample contracts between [[***]] and its subcontractors for both warehousing and inland freight.[285] Hyundai Steel provided the [[***]] contracts with different subcontractors, clarifying that there were no separate contracts for warehousing.[286] Finally, during verification, in relation to international and inland freight, the USDOC requested "all copies of contracts that [[***]] has with all unaffiliated parties for similar services that cover the POI, regardless of the unaffiliated parties' location".[287] Hyundai Steel responded that it could not obtain the requested information due to the absence of direct ownership of [[***]].[288]

7.94. In its verification report, the USDOC explained Hyundai Steel's relationship with [[***]] and why Hyundai Steel should have been able to obtain the requested contracts between [[***]] and unaffiliated parties.[289] Specifically, the USDOC indicated that, given Hyundai Steel's inability to obtain the requested information, the USDOC sought a list of [[***]] shareholders.[290] In examining this list, the USDOC observed, – and Hyundai Steel confirmed – that [[***]], listed as the majority holder of [[***]], was the same person as Hyundai Steel's Vice Chairman, spelled [[***]] in the initial response.[291] Similarly, a major shareholder of [[***]], [[***]], was again confirmed by Hyundai Steel as referring to the person spelled as [[***]] in the initial response, who was also confirmed to be the father of [[***]].[292] On this basis, the USDOC reiterated its request for the aforementioned documents, and asked "how, given the fact that [[***]], along with his father [[***]], possessed the largest ownership shares in [[***]] at the same time [[***]] was Vice Chairman of Hyundai Steel, and while his father [[***]] was both a direct and indirect owner of Hyundai Steel, could Hyundai Steel not obtain the requested information from [[***]]".[293] Hyundai Steel again responded that it did not have direct control over [[***]].[294]

7.95. In its final determination, the USDOC noted that when it "specifically requested that Hyundai Steel obtain certain freight information between its affiliate and other unaffiliated parties,

[277] CRS supplemental Sections B-C questionnaire response, (Exhibit KOR-34 (BCI)), pp. 20-21.
[278] CRS supplemental Sections B-C questionnaire response, (Exhibit KOR-34 (BCI)), p. 21.
[279] CRS supplemental Sections B-C questionnaire, (Exhibit USA-72 (BCI)), p. 9.
[280] CRS supplemental Sections B-C questionnaire, (Exhibit USA-72 (BCI)), p. 9.
[281] CRS supplemental Sections B-C questionnaire response, (Exhibit KOR-34 (BCI)), p. 24.
[282] CRS supplemental Sections B-C questionnaire response, (Exhibit KOR-34 (BCI)), p. 24.
[283] CRS supplemental Sections B-C questionnaire, (Exhibit USA-15 (BCI)), question 3.
[284] CRS second supplemental Sections B-C questionnaire response, (Exhibit KOR-37 (BCI)), p. 2.
[285] CRS supplemental Sections B-C questionnaire, (Exhibit USA-15 (BCI)), question 5(B).
[286] CRS second supplemental Sections B-C questionnaire response, (Exhibit KOR-37 (BCI)), p. 5 and exhibits 8 and 9.
[287] CRS CEP verification report, (Exhibit KOR-47 (BCI)), p. 42.
[288] CRS CEP verification report, (Exhibit KOR-47 (BCI)), p. 43.
[289] CRS CEP verification report, (Exhibit KOR-47 (BCI)), p. 43.
[290] CRS CEP verification report, (Exhibit KOR-47 (BCI)), p. 43.
[291] CRS CEP verification report, (Exhibit KOR-47 (BCI)), p. 43.
[292] CRS CEP verification report, (Exhibit KOR-47 (BCI)), p. 43.
[293] CRS CEP verification report, (Exhibit KOR-47 (BCI)), p. 44.
[294] CRS CEP verification report, (Exhibit KOR-47 (BCI)), p. 44.

Hyundai Steel stated that its affiliated company *refused* to provide the data".[295] The USDOC stated that it was able to confirm that one of Hyundai Steel's affiliated freight providers [i.e. [[***]] two largest shareholders is also a part owner of Hyundai Steel and that the other large shareholder is the Vice Chairman of Hyundai Steel.[296] The USDOC also noted these two individuals to be father and son, respectively.[297] The USDOC thus confirmed that Hyundai Steel and [[***]] were held and commonly controlled by the same family members during the POI.[298] Next, the USDOC found that "Hyundai Steel failed to demonstrate the arm's-length nature of these services provided by the affiliated company [i.e. [[***]] and its U.S. subsidiaries" and it was thus unable to determine the arm's-length nature of the transactions between Hyundai Steel and [[***]].[299] For these reasons, the USDOC stated that it was "relying on facts otherwise available".[300] Furthermore, "because Hyundai Steel failed to provide the requested information or fully cooperate with the request for this information", the USDOC decided to apply an "adverse inference".[301]

7.96. The USDOC applied "adverse facts available" to Hyundai Steel's "home market inland freight, home market warehousing expenses, international freight, and U.S. inland freight".[302] For home market inland freight and warehousing, the USDOC selected "Hyundai Steel's lowest reported value for its home inland freight and warehousing fields".[303] For international freight and US inland freight, the USDOC selected "the highest reported values by destination for Hyundai Steel's international freight and U.S. inland freight".[304] For home market inland freight for US sales, the USDOC "selected second-highest transaction-specific value as AFA".[305]

7.3.2.2.2 Main arguments of the parties

7.97. Korea claims that the USDOC resorted to the use of facts available inconsistently with Article 6.8 of the Anti-Dumping Agreement because no "necessary" information was missing[306] and because Hyundai Steel did not "significantly impede[]" the investigation.[307] Korea asserts that the USDOC improperly resorted to facts available because Hyundai Steel provided specific information demonstrating that [[***]] made a reasonable profit in the services it provided to Hyundai Steel, passing the full cost incurred by its subcontractors to Hyundai Steel, plus an amount covering its expenses and profit.[308] The fact that the USDOC may have requested "additional information" (i.e. [[***]] contracts with unaffiliated customers) in order to confirm the arm's-length nature of transactions does not render this information "necessary".[309] Stressing that [[***]] did not maintain unaffiliated third-party contracts for US-destined international freight – which were among the information requested – Korea argues that information that is requested but does not exist cannot logically constitute "necessary" information.[310] Korea also submits that Hyundai Steel did not "refuse[] access" to this information within the meaning of Article 6.8 as it attempted to obtain [[***]] prices to its unaffiliated customers, but [[***]] declined this request "citing the proprietary and confidential nature of its transactions with other parties".[311] Korea argues that the

[295] CRS issues and decision memorandum, (Exhibit KOR-41), p. 73. (fn omitted; emphasis added)
[296] CRS issues and decision memorandum, (Exhibit KOR-41), pp. 73-74.
[297] CRS issues and decision memorandum, (Exhibit KOR-41), p. 74.
[298] CRS issues and decision memorandum, (Exhibit KOR-41), p. 74.
[299] CRS issues and decision memorandum, (Exhibit KOR-41), p. 74.
[300] CRS issues and decision memorandum, (Exhibit KOR-41), p. 74.
[301] CRS issues and decision memorandum, (Exhibit KOR-41), p. 74.
[302] CRS issues and decision memorandum, (Exhibit KOR-41), p. 74.
[303] CRS issues and decision memorandum, (Exhibit KOR-41), p. 74.
[304] CRS issues and decision memorandum, (Exhibit KOR-41), p. 74.
[305] CRS issues and decision memorandum, (Exhibit KOR-41), p. 74.
[306] Korea's first written submission, para. 258.
[307] Korea's first written submission, para. 269.
[308] According to Korea, the information provided by Hyundai Steel demonstrated that (a) "[[***]] made a reasonable profit on the services it provided to Hyundai Steel"; and (b) "when [[***]] subcontracted an unaffiliated party for the services, it paid and passed the full cost incurred by the unaffiliated-service-provider to Hyundai Steel, plus an amount to cover its expenses and profit".
(Korea's first written submission, paras. 223 and 258).
[309] Korea's first written submission, paras. 262-263.
[310] Korea's first written submission, para. 264.
[311] Korea's second written submission, para. 72 (quoting CRS supplemental Sections B-C questionnaire response, (Exhibit KOR-34 (BCI)), p. 24; and referring to CRS verification report, (Exhibit KOR-35 (BCI)), pp. 43-44); first written submission, para. 223. Korea explains that Hyundai Steel was not in a position to compel [[***]] to provide this information as a consequence of these entities being "legally separate", and because the management of [[***]] has a number of fiduciary duties under Korean law not to disclose

USDOC's focus on the affiliation between Hyundai Steel and [[***]] is "misplaced", since it was fully identified and explained in the questionnaire responses.[312]

7.98. Korea further claims that the USDOC acted inconsistently with paragraph 1 of Annex II because it failed to specify in detail the required information as soon as possible after the initiation of the investigation.[313] Korea contends that the USDOC expressly requested for the first time during verification "all copies of contracts that [[***]] has with all unaffiliated parties for similar services that cover the POI, regardless of the unaffiliated parties' location".[314] Korea claims that the USDOC also acted inconsistently with paragraph 6 of Annex II because it did not explain why the other information submitted by Hyundai Steel was rejected and because it did not provide a reasonable time to Hyundai Steel to submit further explanations after seeking the aforementioned contracts at verification.[315] Korea also claims that the United States acted inconsistently with paragraphs 3 and 5 of Annex II because the USDOC disregarded information that, even if not ideal in all aspects, was not only verifiable but also verified and was submitted appropriately, and in a timely fashion.[316] According to Korea, the USDOC rejected the submitted information "in favor of an unsubstantiated assumption contradicted by other evidence".[317]

7.99. As to the selection of the replacement facts, Korea claims that the USDOC acted inconsistently with Article 6.8 and paragraph 7 of Annex II of the Anti-Dumping Agreement because there was no process of reasoning and evaluation by the USDOC as to how or why the facts employed by the USDOC were reasonable replacements for the missing information.[318] Korea contends that, instead of selecting a reasonable replacement for the missing information[319], the USDOC rejected all information submitted by Hyundai Steel and "asymmetrically applied AFA", with no supporting explanation and irrespective of Hyundai Steel's actual circumstances, in order to increase the normal value by using the lowest reported expense values to the entire home-market database and decrease the export price by using the highest reported values to the US database.[320] Korea argues that the USDOC's selection of facts was punitive in nature[321], and "based on nothing but non-factual assumptions and speculation".[322] Korea contends that the USDOC could have adjusted the transaction values found not to be at arm's length based on Hyundai Steel's verified service expenses (that were verified and found to be arm's-length transactions in the preliminary determination).[323] However, the USDOC used aberrational data that did not relate to the factual circumstances of all of Hyundai Steel's sales.[324] Korea also argues that the USDOC did not exercise special circumspection.[325]

7.100. The United States responds that Korea has not demonstrated that the information at issue was not "necessary" and highlights that the determination of whether certain information is "necessary" lies solely with the investigating authority.[326] According to the United States, the USDOC reasonably determined that it "did not have enough information on the record to establish" the arm's-length nature of the transactions at stake.[327] Given Hyundai Steel's response that it had not

confidential information. (Korea's second written submission, para. 82. See also Korea's response to Panel question No. 15).

[312] Korea's first written submission, para. 260.

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

[314] Korea's first written submission, para. 265 (referring to CRS verification report, (Exhibit KOR-35 (BCI)), p. 42). See also CRS supplemental Sections B-C questionnaire, (Exhibit USA-15 (BCI)), question 3. Korea clarifies that although the USDOC had posed a general request for this information before verification, it had previously not indicated that the copies of these contracts with third parties, even for sales to countries other than the United States, constituted "necessary" information. (Korea's first written submission, paras. 266 and 271; response to Panel question No. 10(b)).

[315] Korea's first written submission, para. 271.

[316] Korea's first written submission, paras. 285-287.

[317] Korea's first written submission, para. 294.

[318] Korea's first written submission, paras. 310 and 312. See also second written submission, para. 74.

[319] Korea's second written submission, paras. 106-107.

[320] Korea's first written submission, paras. 310 and 316.

[321] Korea's first written submission, para. 313.

[322] Korea's first written submission, para. 294.

[323] Korea's first written submission, para. 313.

[324] Korea's first written submission, para. 317. See also Korea's second written submission, paras. 108-109.

[325] Korea's first written submission, para. 318.

[326] United States' second written submission, para. 54.

[327] United States' first written submission, para. 150.

engaged in transactions with unaffiliated providers during the POI, the contracts between [[***]] and its unaffiliated customers were the only information capable of demonstrating the arm's-length nature of the transactions.[328] The United States explains that copies of [[***]] contracts with unaffiliated purchasers, irrespective of their location, were necessary for the USDOC's determination because the prices presented in those contracts would likely represent market prices and, by comparison, it could be determined whether the services provided to Hyundai Steel were at arm's length.[329]

7.101. As to Korea's argument that Hyundai Steel did not have access to the requested information, the United States responds that the "legal separation" between Hyundai Steel and [[***]] is not the issue, but, instead, the issue is whether "the two legally distinct companies are affiliated".[330] The United States submits that [[***]], like Hyundai Steel, is a member of the "Hyundai Motor Group", which has the ability to "directly or indirectly control" its group members, and thus Hyundai Steel should have been able to respond fully to the USDOC's requests for information and to provide the affiliate's contracts and transaction details.[331] The United States further argues that Korea makes a *post hoc* argument when suggesting that Hyundai Steel could not gain access to the requested documents due to confidentiality and fiduciary concerns and [[***]] obligations under Korean law, an argument that was never made by Hyundai Steel before the USDOC.[332]

7.102. Further, the United States responds that the USDOC indicated early on in the investigation that information relating to the transactions between Hyundai Steel and its affiliates would be required.[333] The number of times Hyundai Steel was asked to provide information relating to the transactions with its affiliates "belies" its claims that it was not allowed a reasonable period of time to provide the information, and that it was not asked for such information as soon as possible after initiation.[334] The United States rejects Korea's characterization of the USDOC's request as "expansive" or "sudden", on the basis that the USDOC had clarified in its verification outline that it may ask questions relating to any part of Hyundai Steel's responses, including those relating to the affiliated service provider, in order to bolster the accuracy of its calculations.[335] The United States submits that Korea has thus failed to demonstrate that the USDOC acted inconsistently with paragraphs 1 and 6 of Annex II.

7.103. With respect to Korea's claim under paragraph 3 of Annex II, the United States responds that in the absence of the requested documents, the USDOC did not have the opportunity to examine the accuracy and reliability of the information submitted, and to verify whether the affiliated parties' transactions were at arm's length.[336] In addition, the United States argues that since the information submitted by Hyundai Steel did not satisfy the conditions of paragraph 3, it falls outside the ambit of paragraph 5, but even if the Panel were to conduct an assessment under paragraph 5, Hyundai Steel did not act to the best of its ability by failing to submit the requested information, despite multiple opportunities.[337]

7.104. According to the United States, the record shows the USDOC engaged in a careful assessment of the missing necessary information and reasonably decided to rely on Hyundai Steel's own reported data.[338] The United States highlights that Korea has not explained why the USDOC's process for selecting the replacement facts is inconsistent with any specific provision of the Anti-Dumping Agreement, apart from its dissatisfaction with the data selected.[339] The United States explains that the USDOC did not reject all of Hyundai Steel's expense data – as argued by Korea – but disregarded only certain information relating to Hyundai Steel's affiliated service providers and replaced those missing values with other expense values reported by Hyundai Steel.[340]

[328] United States' second written submission, para. 49.
[329] United States' response to Panel question No. 14, para. 59.
[330] United States first written submission, para. 156.
[331] United States' first written submission, paras. 156-157 (quoting CRS issues and decision memorandum, (Exhibit KOR-41), p. 74).
[332] United States' second written submission, paras. 57-58.
[333] United States' first written submission, para. 153.
[334] United States' first written submission, para. 155.
[335] United States' first written submission, paras. 158-160.
[336] United States' first written submission, para. 172.
[337] United States' first written submission, para. 176.
[338] United States' first written submission, para. 183.
[339] United States' first written submission, para. 184.
[340] United States' first written submission, para. 187.

Korea's characterization of the replacements as arbitrary and punitive is, according to the United States, "meritless".[341] Finally, the United States asserts that Korea's claim that that the USDOC did not use special circumspection fails, as Korea does not explain its arguments.[342]

7.3.2.2.3 Evaluation by the Panel

7.3.2.2.3.1 The USDOC's resort to facts available

7.105. Korea claims that the USDOC acted inconsistently with Article 6.8 and paragraphs 1, 3, 5, and 6 of Annex II of the Anti-Dumping Agreement in resorting to the use of facts available in respect of Hyundai Steel's reporting of affiliated party transactions.

7.106. Noting the "important distinction between requested information and necessary information", Korea submits that the information ultimately "requested" by the USDOC in the case at hand (i.e. contracts of [[***]] with unaffiliated providers) was not "necessary" within the meaning of Article 6.8.[343] Specifically, Korea explains that "[t]he relevant U.S. law, as corroborated by relevant practice, imposes an obligation on the USDOC to ensure that the cost of various expenses used in the margin calculation, such as transportation expenses, reflect market value".[344] Korea contends that the USDOC's questionnaire reflects a clear "order of preference for the requested information concerning the respondent's affiliated-company transactions".[345] According to Korea:

> [T]he USDOC's questionnaire directed Hyundai Steel to (i) calculate market value by using purchases of the inputs or services in question from unaffiliated parties during the same period; and *if there are no such purchases* but the affiliated supplier sells the identical input to unaffiliated customers in the relevant market, (ii) provide the average price paid for the input or service by the unaffiliated purchasers. *If Hyundai Steel is unable to obtain* a market value for the input, the questionnaire instructed to provide (iii) the "product-specific" unit cost of production to demonstrate the arm's-length nature of the transactions.[346]

7.107. For Korea, "[i]t is thus difficult to understand how Hyundai Steel's reporting of its affiliated-company transactions in accordance with the order provided by the questionnaire can somehow circle back to constitute a total failure to provide the requested information".[347] In other words, because the USDOC's questionnaire itself envisages reliance on different kinds of information to demonstrate the arm's-length nature of affiliate-party transactions, Korea argues that a respondent's inability to provide any one of the three kinds of information cannot *ipso facto* constitute a failure to provide "necessary" information within the meaning of Article 6.8.

7.108. The United States acknowledges that the USDOC's "Section D questionnaire provided Hyundai Steel with three alternatives for providing necessary information relating to Hyundai Steel's purchases of 'major inputs'".[348] However, according to the United States, the USDOC's "three-part methodology" in its Section D questionnaire for "major inputs" was "not applicable to the inputs at issue such as freight and warehousing services" as they are "not major inputs".[349] Rather, for these transactions, the inquiry involved "a comparison between the transfer price between the purchaser (respondent) and its affiliates supplier with a market price for the input".[350] The United States submits that, "[i]n this case, the respondent did not provide the data needed to test whether the transactions were made at arm's length", and "[a]ccordingly … necessary information for conducting the analysis" was "not on the record".[351]

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[341] United States' first written submission, para. 190.
[342] United States' first written submission, para. 191.
[343] Korea's first written submission, para. 263.
[344] Korea's first written submission, para. 222.
[345] Korea's first written submission, para. 261.
[346] Korea's first written submission, para. 222 (emphasis added). See also Korea's comments on United States' response to Panel question No. 66(a), pp. 40-41.
[347] Korea's first written submission, para. 261.
[348] United States' response to Panel question No. 66(a), para. 69.
[349] United States' response to Panel question No. 66(b), para. 73.
[350] United States' response to Panel question No. 66(b), para. 73.
[351] United States' response to Panel question No. 66(b), para. 73.

7.109. The USDOC in its initial questionnaire requested Hyundai Steel to "[p]repare only a single response for [itself and its] *affiliates* involved with the production or sale of the products under investigation during the *period of investigation* (POI) in the foreign market or the United States".[352] The initial questionnaire comprised of five sections, labelled A through E. Under Section D – entitled "[c]ost of [p]roduction and [c]onstructed [v]alue" – the USDOC requested Hyundai Steel to "identify", among other items, those inputs that it received from affiliated parties and indicate "whether the transfer price of the good or service [i.e. the inputs] reflects the market price of the item, in the market under consideration".[353]

7.110. With respect to "*major inputs* purchased from affiliated parties that are used to produce the merchandise under consideration", the USDOC requested Hyundai Steel to provide "the average unit market value per unaffiliated supplier(s)".[354] "If there are no such purchases" but an "affiliated supplier sells the identical input to unaffiliated customers in the market under consideration", the USDOC asked for the "average price paid for the input by the unaffiliated purchasers".[355] Finally, in cases that Hyundai Steel is "unable to obtain a market value for the input", the USDOC asked for "the product specific per-unit cost of production incurred by *each* affiliated supplier producing the major input".[356]

7.111. While we agree with Korea that this set of questions contemplates an "order of preference" for different kinds of information requested by the USDOC depending upon the circumstances, we note that these questions are posed expressly with respect to "major inputs". Nowhere in its Section D response does Hyundai Steel identify the inputs supplied by its affiliate [[***]] that are at issue in these panel proceedings as "major inputs". Instead, based upon "a summary of its purchases of all inputs from affiliated suppliers" – including [[***]] – Hyundai Steel stated that "all inputs sourced from affiliated parties constitute a tiny portion of the cost of manufacturing".[357] We therefore agree with the United States that the "order of preference" or the "three-part methodology" reflected in the USDOC's Section D questionnaire for "major inputs" is of limited relevance for "the inputs at issue such as freight and warehousing services" as they are "not major inputs".[358] Accordingly, we reject Korea's argument that the "requested" information was not "necessary" within the meaning of Article 6.8 as the USDOC's own questionnaire contemplated an "order of preference".

7.112. Having determined that the Section D questionnaire contemplated an "order of preference" only for "major inputs", we turn to examine the USDOC's questions posed specifically in respect of the inputs that were, in fact, supplied by Hyundai Steel's affiliate [[***]] and form the basis for Korea's claims under paragraphs 1, 3, 5, and 6 of Annex II.

7.113. In Section A of its initial questionnaire – entitled "[o]rganization, [a]ccounting [p]ractices, [m]arkets and [m]erchandise" – the USDOC inquired about the corporate and legal structure of Hyundai Steel and asked it to identify "all other persons affiliated with [the] company and provide a description of all such persons".[359] In response, Hyundai Steel identified [[***]] as its affiliate and reported that [[***]].[360] As to the "operational relationship" that Hyundai Steel had with other members of the Hyundai Motor Group, Hyundai Steel explained "that there is common control of the

[352] CRS initial questionnaire, (Exhibit KOR-33), p. G-10. (emphasis original)
[353] CRS initial questionnaire, (Exhibit KOR-33), pp. D-3-D-4.
[354] CRS initial questionnaire, (Exhibit KOR-33), p. D-4. (emphasis added)
[355] CRS initial questionnaire, (Exhibit KOR-33), p. D-4.
[356] CRS initial questionnaire, (Exhibit KOR-33), p. D-5. (emphasis original; fn omitted)
[357] CRS part I of Section D questionnaire response, (Exhibit USA-14 (BCI)), p. D-7.
[358] United States' response to Panel question No. 66(b), para. 73.
[359] CRS initial questionnaire, (Exhibit KOR-33), p. A-4. The USDOC's questionnaire provides the following definition of "affiliated persons":

> The term affiliated persons (affiliates) includes: (1) members of a family; (2) an officer or director of an organization and that organization; (3) partners; (4) employers and employees; (5) any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and that organization; (6) two or more persons directly or indirectly controlling, controlled by, or under common control with, any person; and (7) any person who controls any other person and that other person. Control exists when a person is legally or operationally in a position to exercise restraint or direction over another person. A control relationship should also have the potential to affect decisions concerning the production, pricing, or cost of the merchandise under investigation or review.

(CRS initial questionnaire, (Exhibit KOR-33), p. I-1)
[360] CRS Section A questionnaire response, (Exhibit KOR-28 (BCI)), p. A-12.

Hyundai Motor Group through its chairman, [[***]]".[361] With respect to its affiliate [[***]], Hyundai Steel further explained that, "[d]uring the POI, [[***]]".[362] Hyundai Steel stated that it would "demonstrate in its forthcoming Sections B and C responses that transactions with affiliated service providers are at arm's length".[363]

7.114. Section B of the USDOC's questionnaire concerned "[s]ales in the [h]ome [m]arket or to a [t]hird [c]ountry"[364], while Section C required information concerning "[s]ales to the United States".[365] Under Section B – for home market sales – the USDOC asked Hyundai Steel to report certain "movement expenses", including those incurred for "inland freight" from "[p]lant to [d]istribution [w]arehouse"[366], "warehousing"[367], and "inland freight" from "[p]lant/[w]arehouse to [c]ustomer".[368] The USDOC's instructions required Hyundai Steel to also identify any "affiliations" with the service providers and to "describe the nature of the affiliation".[369] Hyundai Steel stated that, for inland freight from plant to warehouse, it "used an affiliated freight company, [[***]] to transport" "some finished coils to offsite warehouses prior to shipment to the customer".[370] Hyundai Steel stated that it would demonstrate that "the rates paid to this company represent arm's length prices" as part of its response concerning "inland freight to the customer".[371] In respect of warehousing expenses, Hyundai Steel responded that "in some instances" it "used offsite warehouse facilities close to its factory to temporarily store finished subject products prior to shipment to the final customer".[372] Providing "a list of the off-site warehousing locations", Hyundai Steel explained that:

> These warehousing locations are owned by unaffiliated parties, but the warehousing services at most of these facilities are provided by [[***]] and Hyundai Steel pays [[***]] for these warehousing services. [[***]] contracts with the unaffiliated warehouse providers and in turn pays them for warehousing. … With respect to one warehousing location, [[***]], this facility is managed by an unaffiliated provider and Hyundai Steel transacts directly with the unaffiliated company.
>
> …
>
> Hyundai Steel provides a copy of its warehousing contract with [[***]] in Exhibit B-12, along with the contract for the [[***]] location, which is managed by an unaffiliated company, [[***]].[373]

Hyundai Steel stated that it would demonstrate that the transactions with [[***]] reflect arm's-length prices as part of its response for inland freight to customer.[374]

7.115. Finally, for inland freight from plant/warehouse to customer, Hyundai Steel explained that it used its affiliate [[***]] to transport merchandise to the customer. As it did not use unaffiliated

[361] CRS Section A questionnaire response, (Exhibit KOR-28 (BCI)), p. A-11. We note in this regard that the USDOC's questionnaire defined "control" as existing "where a person is legally or operationally in a position to exercise restraint or direction over another person". (CRS initial questionnaire, (Exhibit KOR-33), p. A-5).
[362] CRS Section A questionnaire response, (Exhibit KOR-28 (BCI)), p. A-12.
[363] CRS Section A questionnaire response, (Exhibit KOR-28 (BCI)), p. A-13. The USDOC's questionnaire explains that arm's-length transactions are "those in which the selling price between the affiliated parties is comparable to the selling prices in transactions involving persons who are not affiliated. The [USDOC] takes into account terms of sale, conditions of delivery, and other circumstances related to the sales in deciding if the selling prices are comparable". (CRS initial questionnaire, (Exhibit KOR-33), p. I-2).
[364] CRS initial questionnaire, (Exhibit KOR-33), p. B-1.
[365] CRS initial questionnaire, (Exhibit KOR-33), p. C-1. The USDOC explained that it would use this information to "compare the prices at which this merchandise is sold in the United States with the prices at which the foreign like product is sold in the foreign market in order to determine whether the subject merchandise was sold at less than normal value in the United States during the [POI]". (CRS initial questionnaire, (Exhibit KOR-33), p. C-1 (emphasis omitted)).
[366] CRS initial questionnaire, (Exhibit KOR-33), p. B-22.
[367] CRS initial questionnaire, (Exhibit KOR-33), p. B-23.
[368] CRS initial questionnaire, (Exhibit KOR-33), p. B-23.
[369] CRS initial questionnaire, (Exhibit KOR-33), pp. B-22-B-23.
[370] CRS Section B questionnaire response, (Exhibit KOR-36 (BCI)), p. B-28.
[371] CRS Section B questionnaire response, (Exhibit KOR-36 (BCI)), p. B-28.
[372] CRS Section B questionnaire response, (Exhibit KOR-36 (BCI)), p. B-29.
[373] CRS Section B questionnaire response, (Exhibit KOR-36 (BCI)), p. B-29.
[374] CRS Section B questionnaire response, (Exhibit KOR-36 (BCI)), p. B-29.

freight companies for similar services, Hyundai Steel was "unable to provide comparable prices from unaffiliated vendors for comparison".[375] Thus, in order to establish the arm's-length nature of the transactions between Hyundai Steel and its affiliate [[***]], Hyundai Steel provided "calculations from the company's financial statements demonstrating that the company earned a profit during the POI".[376] "[B]ecause this company earned a profit during the POI", Hyundai Steel considered that "these transactions reflect arm's length prices".[377] In addition to the financial statements, Hyundai Steel also provided the contracts between "Hyundai Steel and the two providers" (i.e. its affiliate [[***]] and the unaffiliated provider [[***]]) "show[ing] that these transactions are at arm's length".[378]

7.116. For sales to the United States under Section C, Hyundai Steel reported that it "incurred inland freight expenses for transportation of the merchandise from the factory to the port" and "[d]uring the POI, Hyundai Steel transported merchandise by truck using an affiliated general logistics company, [[***]], which is the same company it used for domestic sales".[379] Hyundai Steel thus referred to its reporting under Section B for inland freight expenses as establishing that [[***]] "provided such services at arm's length".[380] Additionally, Hyundai Steel also reported international freight expenses "from the port of exit in the country of manufacture to the U.S. port of entry" and stated that "[d]uring the POI, [[***]], an affiliate, provided all shipping services".[381] In addition to referring to its Section B response to demonstrate the arm's-length nature of the transactions, Hyundai Steel also provided copies of Hyundai Steel's international freight contract with [[***]], on the one hand, and [[***]] international freight contract with its subcontractors, on the other hand, to demonstrate this point.[382] Specifically, Hyundai Steel provided copies of [[***]] international freight contracts with two subcontractors, namely, [[***]] and [[***]].[383]

7.117. In summary, with respect to the reporting of movement expenses under Sections B and C of the USDOC's questionnaire, Hyundai Steel noted that many of the services at issue were provided by its affiliate [[***]] and offered several pieces of information to demonstrate the arm's-length nature of the transactions with its affiliate [[***]]. First, Hyundai Steel provided "financial statements" from [[***]] "demonstrating that the company earned a profit during the POI"[384], and that therefore "these transactions reflect arm's length prices".[385] Second, besides its contract with [[***]], which provided warehousing services for home market sales at most of its facilities, Hyundai Steel submitted a contract with an unaffiliated provider [[***]], which provided warehousing service at one warehousing location ([[***]]). According to Hyundai Steel, its contracts with these "two providers" "show that these transactions are at 'arm's length'".[386] Finally, with respect to international freight for sales to the United States, Hyundai Steel provided copies of Hyundai Steel's international freight contract with [[***]], on the one hand, and [[***]] international freight contract with two subcontractors ([[***]] and [[***]][387]), on the other hand, to demonstrate that transactions with [[***]] were on an arm's-length basis.[388]

7.118. The USDOC subsequently issued a supplemental Sections B-C questionnaire, observing that, in its initial Section B response, Hyundai Steel "never explained why the transactions between Hyundai Steel and [[***]] for inland freight and warehousing are at arm's-length".[389] The USDOC thus requested "all freight contracts with [[***]] and all unaffiliated freight providers that cover the full POI [*sic*]".[390] Furthermore, the USDOC noted that the "net profit information" provided for

[375] CRS Section B questionnaire response, (Exhibit KOR-36 (BCI)), p. B-30.
[376] CRS Section B questionnaire response, (Exhibit KOR-36 (BCI)), pp. B-30-B-31.
[377] CRS Section B questionnaire response, (Exhibit KOR-36 (BCI)), p. B-31.
[378] CRS Section B questionnaire response, (Exhibit KOR-36 (BCI)), p. B-31.
[379] CRS Section C questionnaire response, (Exhibit KOR-51 (BCI)), p. C-27. Hyundai Steel explained that it "did not utilize outside warehouses for its sales to the United States" either in the home country or in the United States and that it "did not incur any U.S. inland freight expenses during the POI for its [export price] sales". (CRS Section C questionnaire response, (Exhibit KOR-51 (BCI)), pp. C-25-C-26 and C-30-C-32).
[380] CRS Section C questionnaire response, (Exhibit KOR-51 (BCI)), p. C-27.
[381] CRS Section C questionnaire response, (Exhibit KOR-51 (BCI)), p. C-29.
[382] CRS Section C questionnaire response, (Exhibit KOR-51 (BCI)), p. C-30.
[383] CRS Section C questionnaire response, (Exhibit KOR-51 (BCI)), exhibit C-10.
[384] CRS Section B questionnaire response, (Exhibit KOR-36 (BCI)), pp. B-30-B-31.
[385] CRS Section B questionnaire response, (Exhibit KOR-36 (BCI)), p. B-31.
[386] CRS Section B questionnaire response, (Exhibit KOR-36 (BCI)), p. B-31.
[387] CRS Section C questionnaire response, (Exhibit KOR-51 (BCI)), exhibit C-10.
[388] CRS Section C questionnaire response, (Exhibit KOR-51 (BCI)), p. C-30.
[389] CRS supplemental Sections B-C questionnaire, (Exhibit USA-72 (BCI)), p. 3.
[390] CRS supplemental Sections B-C questionnaire, (Exhibit USA-72 (BCI)), pp. 3-4.

[[***]] does not show that it [[***]].[391] The USDOC thus requested Hyundai Steel to demonstrate why these transactions with its affiliate [[***]] should be considered to be at arm's length.[392] Regarding inland freight from factory to the port for US sales, the USDOC noted Hyundai Steel's reliance on [[***]] profit margins in its initial Section C response, but requested "copies of all freight contracts with [[***]] and all unaffiliated freight providers that cover the full POI [*sic*]"[393], as well as "[[***]] inland freight prices to its other customers, unaffiliated to Hyundai Steel".[394] Finally, with respect to Hyundai Steel's reporting of its international freight expenses for US sales, the USDOC requested "copies of all international freight contracts between [[***]] and its unaffiliated customers".[395] Additionally, for international freight, the USDOC requested "[i]f [at] all possible, [] a price quote from [[***]] sub-contractor to another customer showing the arm's-length transaction comparisons between Hyundai Steel and [[***]], and [[***]] and its sub-contractor".[396]

7.119. In response to the USDOC's supplemental queries, Hyundai Steel explained that, for inland freight and warehousing for home market sales, [[***]] maintained subcontracts with over 30 subcontractors, and provided a sample contract of [[***]] with one such unaffiliated subcontractor, namely, [[***]][397], which, in comparison with the contract between Hyundai Steel and [[***]], allegedly demonstrated that [[***]] charged Hyundai Steel a "higher fees than it pays to the sub-contractor".[398] In relation to inland freight for products destined for the United States, Hyundai Steel responded that [[***]] had contracts with over 40 subcontractors and provided as a "representative sample" contracts between [[***]] and one unaffiliated subcontractor ([[***]]), explaining that these "contracts cover multiple services, such as inland freight and warehousing".[399] Hyundai Steel also stated that [[***]] did not provide comparable services to unaffiliated customers.[400]

7.120. Finally, regarding international freight expenses for US sales, Hyundai Steel responded that [[***]] did not maintain any contracts with unaffiliated customers for shipments to the United States, and that while "[[***]] does provide shipping services to unaffiliated customers for shipments to third countries, [[***]] ha[d] declined Hyundai Steel's request to provide its contracts with unaffiliated third parties citing the proprietary and confidential nature of its transactions with other parties".[401] In response to the USDOC's request for "a price quote from [[***]] sub-contractor to another customer", "[i]f [at] all possible", Hyundai Steel responded that since [[***]] subcontractor is not affiliated with Hyundai Steel or [[***]], Hyundai Steel was not in a position to "compel" the subcontractor to provide its "price quotes to another customer".[402]

7.121. We note that, as part of its initial Section B response for inland freight for home market sales, Hyundai Steel had already indicated that it did "not use unaffiliated freight companies for similar services" and was therefore "unable to provide comparable prices from unaffiliated vendors for comparison".[403] Therefore, the USDOC's request in its supplemental questionnaire for "all freight contracts with [[***]] *and all unaffiliated freight providers* that cover the full POI [*sic*]"[404] appears to overlook Hyundai Steel's initial explanation. In any event, for both home market and US sales, Hyundai Steel provided sample inland freight and warehousing contracts of [[***]] with one unaffiliated subcontractor, namely, [[***]][405], in addition to the information that was supplied as part of its initial response.

7.122. We agree with the United States that, as part of its supplemental questionnaire, the USDOC took into account the [[***]] financial statements provided by Hyundai Steel in its initial response,

[391] CRS supplemental Sections B-C questionnaire, (Exhibit USA-72 (BCI)), pp. 3-4.
[392] CRS supplemental Sections B-C questionnaire, (Exhibit USA-72 (BCI)), pp. 3-4.
[393] CRS supplemental Sections B-C questionnaire, (Exhibit USA-72 (BCI)), p. 8.
[394] CRS supplemental Sections B-C questionnaire, (Exhibit USA-72 (BCI)), p. 8.
[395] CRS supplemental Sections B-C questionnaire, (Exhibit USA-72 (BCI)), p. 9.
[396] CRS supplemental Sections B-C questionnaire, (Exhibit USA-72 (BCI)), p. 9.
[397] CRS supplemental Sections B-C questionnaire response, (Exhibit KOR-34 (BCI)), pp. 7 and 9-11 and exhibits S-6 and S-7.
[398] CRS supplemental Sections B-C questionnaire response, (Exhibit KOR-34 (BCI)), pp. 8 and 10.
[399] CRS supplemental Sections B-C questionnaire response, (Exhibit KOR-34 (BCI)), pp. 20-21.
[400] CRS supplemental Sections B-C questionnaire response, (Exhibit KOR-34 (BCI)), p. 21.
[401] CRS supplemental Sections B-C questionnaire response, (Exhibit KOR-34 (BCI)), p. 24.
[402] CRS supplemental Sections B-C questionnaire response, (Exhibit KOR-34 (BCI)), p. 24.
[403] CRS Section B questionnaire response, (Exhibit KOR-36 (BCI)), p. B-30.
[404] CRS supplemental Sections B-C questionnaire, (Exhibit USA-72 (BCI)), pp. 3-4. (emphasis added)
[405] CRS supplemental Sections B-C questionnaire response, (Exhibit KOR-34 (BCI)), pp. 7 and 9.

but found that they failed to establish that the transactions between [[***]] and Hyundai Steel were at arm's length because they did not show that [[***]] "[[***]]".[406] In other words, the USDOC found the financial statements to be deficient for purposes of its analysis and properly informed Hyundai Steel of the reasons for such deficiency through its supplemental questionnaire.

7.123. Crucially, however, although the USDOC addressed the deficiencies in [[***]] financial statements, it did not address the other information that was submitted by Hyundai Steel as part of its initial response to establish the arm's-length nature of the transactions between Hyundai Steel and [[***]]. Unlike its discussion of the financial statements, there is nothing in the supplementary questionnaires to indicate that the USDOC took into account or otherwise addressed Hyundai Steel's contract with an unaffiliated provider [[***]] that provided warehousing service at one warehousing location ([[***]]), which allegedly showed that these transactions are at "arm's length".[407] Nor do the supplementary questionnaires show that the USDOC took into account "Hyundai Steel's international freight contract with [[***]]", on the one hand, and [[***]] international freight contracts with its subcontractors ([[***]] and [[***]][408]), on the other hand. All of this information was submitted as part of Hyundai Steel's initial response to show that these transactions were at "arm's length".[409]

7.124. We disagree with the United States that the "record shows that Hyundai Steel never presented the contract between Hyundai Steel and [[***]] to [USDOC] for the purpose of demonstrating that [[***]] warehousing services were provided at arm's length".[410] In its initial Section B response, Hyundai Steel provided a "copy of its warehousing contract with [[***]] … along with the contract for the [[***]] location, which is managed by an unaffiliated company, [[***]]" and clearly explained that the "contract materials between Hyundai Steel and the two providers ([[***]] and the unaffiliated provider) show that these transactions are at arm's length".[411] In response to questioning by the Panel, the United States also submits that, in any event, "based on what Hyundai [Steel] reports, the costs associated with the [[***]] contract appear not to be comparable with the costs associated with the warehouses serviced by [[***]]".[412] Even if the contracts were not "comparable" – as now suggested by the United States – what is important is that the USDOC did not provide any such reasoning or explanation as part of its analysis.

7.125. We therefore find it difficult to accept in its entirety the United States' argument that the USDOC, after "reviewing" Hyundai Steel's Sections B and C initial responses, "found that the information Hyundai Steel submitted failed to establish that the transactions between [[***]] and Hyundai Steel were at arm's length".[413] Although the supplementary Sections B-C questionnaire indicates that the USDOC reviewed one of the several pieces of information provided by Hyundai Steel in its initial response (i.e. [[***]] financial statements) and found it to be deficient, there is no indication that the USDOC took into account or otherwise addressed or reviewed Hyundai Steel's contract with an unaffiliated supplier for warehousing services as well as [[***]] international freight contracts with two of its subcontractors that were provided as part of its initial Sections B and C responses.

7.126. The USDOC followed up with a second supplemental Sections B-C questionnaire to Hyundai Steel, wherein, for inland freight to warehouse for home market sales, it requested "copies of all contracts that [[***]] has with all unaffiliated parties for similar services that covers the POI".[414] Additionally, the USDOC asked for a list of all subcontractors that provided warehousing and inland freight services for [[***]] during the POI and also sought [[***]] additional sample contracts

[406] CRS supplemental Sections B-C questionnaire, (Exhibit USA-72 (BCI)), pp. 3-4.
[407] CRS Section B questionnaire response, (Exhibit KOR-36 (BCI)), p. B-29.
[408] CRS Section C questionnaire response, (Exhibit KOR-51 (BCI)), exhibit C-10.
[409] CRS Section C questionnaire response, (Exhibit KOR-51 (BCI)), p. C-30.
[410] United States' response to Panel question No. 67, para. 77.
[411] CRS Section B questionnaire response, (Exhibit KOR-36 (BCI)), pp. B-29 and B-31.
[412] The United States explains that:

> Specifically, Hyundai [Steel] reports that for the warehouse serviced by [[***]], Hyundai Steel pays [[***]] [[***]] for warehousing, and [[***]] pays [[***]]. By comparison, the contract between Hyundai [Steel] and [[***]] for the [[***]] warehouse indicates that Hyundai [Steel] pays [[***]] just [[***]]. Similarly based on Hyundai Steel's reported average costs for warehousing, the average cost for warehousing at [[***]] during the [POI] was [[***]], while Hyundai Steel's average cost for all warehouses was [[***]].

(United States' response to Panel question No. 67, para. 80 (fns omitted))
[413] United States' response to Panel question No. 66(d), para. 75.
[414] CRS supplemental Sections B-C questionnaire, (Exhibit USA-15 (BCI)), question 3.

between [[***]] and its subcontractors for both *warehousing* and *inland freight* services "to show that these transactions were at arms-length".[415]

7.127. Hyundai Steel responded that for inland freight services to warehouse for home market sales, [[***]] did not offer similar services to other unaffiliated parties, and it was therefore unable to provide such contracts as they did not exist.[416] As to the USDOC's request for a list of all of [[***]] subcontractors, Hyundai Steel clarified that "while [[***]] maintained over 30 subcontractors for various logistics services both in Dangjin and Suncheon, [[***]] used only 4 subcontractors for warehousing the subject merchandise during the POI".[417] Hyundai Steel provided a list of "these subcontractors for both freight and warehousing".[418] In accordance with the USDOC's request, Hyundai Steel also provided [[***]] additional sample contracts with its subcontractors [[***]]. Hyundai Steel pointed out that these contracts covered both warehousing and inland freight services.[419]

7.128. We find two aspects of the USDOC's second supplemental questionnaire noteworthy. First, there is nothing in the USDOC's second supplemental questionnaire suggesting that the USDOC found any deficiencies in the other information that was previously submitted by Hyundai Steel as part of its first two responses. Second, the USDOC's express request in its supplemental questionnaire for [[***]] additional sample contracts between [[***]] and its unaffiliated subcontractors for *warehousing* and *inland freight* services shows that it considered such contracts to be relevant for the determination of the arm's-length nature of the transactions between Hyundai Steel and its affiliate.

7.129. Subsequently, at verification the USDOC asked for "complete copies of freight contracts between [[***]] and its unaffiliated freight providers that cover the full POI" and "all copies of contracts that [[***]] has with all unaffiliated parties for similar services that cover the POI, regardless of the unaffiliated parties' location". The USDOC also requested that "Hyundai Steel obtain the total actual costs incurred by [[***]]".[420]

7.130. The USDOC's verification report notes that Hyundai Steel officials provided "a chart comparing Hyundai Steel's freight costs with [[***]] total costs" and provided "examples of contracts between [[***]] and its subcontractor to show that [[***]] made a profit".[421] However, the USDOC observed that "Hyundai Steel did not provide any of the information requested above that was in the possession of [[***]], such as copies of all contracts that [[***]] has with all unaffiliated parties for similar services that cover the POI".[422] The reason provided by Hyundai Steel officials was that there was no "direct ownership" of [[***]] by Hyundai Steel.[423] The USDOC noted "the fact that [[***]], along with his father [[***]], possessed the largest ownership shares in [[***]] at the same time [[***]] was Vice Chairman of Hyundai Steel, and while his father [[***]] was both a direct and indirect owner of Hyundai Steel" and queried why, in light of these facts, Hyundai Steel could not obtain the requested information from [[***]].[424] In response, company officials "again stated that Hyundai Steel does not directly control [[***]]".[425] The USDOC "asked why [[***]] was willing to provide some information, i.e., the contracts with its subcontractor, but was unwilling to provide the additional documentation" requested. Company officials indicated that they "did not know, but that the subcontractor information was all that [[***]] was willing to provide".[426]

7.131. Thus, of the three pieces of information requested by the USDOC at verification, it appears that Hyundai Steel furnished two, namely, examples of contracts between [[***]] and its

[415] CRS supplemental Sections B-C questionnaire, (Exhibit USA-15 (BCI)), question 5(B).
[416] CRS second supplemental Sections B-C questionnaire response, (Exhibit KOR-37 (BCI)), p. 2.
[417] CRS second supplemental Sections B-C questionnaire response, (Exhibit KOR-37 (BCI)), p. 4 and exhibit 7.
[418] CRS second supplemental Sections B-C questionnaire response, (Exhibit KOR-37 (BCI)), p. 4 and exhibit 7.
[419] CRS second supplemental Sections B-C questionnaire response, (Exhibit KOR-37 (BCI)), p. 5.
[420] CRS CEP verification report, (Exhibit KOR-47 (BCI)), p. 42.
[421] CRS CEP verification report, (Exhibit KOR-47 (BCI)), p. 42.
[422] CRS CEP verification report, (Exhibit KOR-47 (BCI)), p. 43.
[423] CRS CEP verification report, (Exhibit KOR-47 (BCI)), p. 43.
[424] CRS CEP verification report, (Exhibit KOR-47 (BCI)), p. 44.
[425] CRS CEP verification report, (Exhibit KOR-47 (BCI)), p. 44.
[426] CRS CEP verification report, (Exhibit KOR-47 (BCI)), p. 44. (emphasis original)

subcontractors allegedly showing that [[***]] made a profit, as well as information regarding [[***]] total costs. Moreover, there is nothing in the verification report suggesting that the information regarding the subcontractors and the costs incurred by [[***]] was somehow deficient; rather, it appears that the USDOC, in fact, verified such information without any concerns.[427]

7.132. In response to the USDOC's request for "all copies of contracts that [[***]] has with all unaffiliated parties for similar services that cover the POI, regardless of the unaffiliated parties' location", Hyundai Steel stated that it was unable to comply and its officials explained at verification that Hyundai Steel does not "directly control" [[***]].[428] We recall that in its first supplemental questionnaire, the USDOC had also made a similar request for "copies of all international freight contracts between [[***]] and its unaffiliated customers".[429] In response, Hyundai Steel stated that [[***]] did not maintain any contracts with unaffiliated customers for shipments to the United States, and that while "[[***]] does provide shipping services to unaffiliated customers for shipments to third countries, [[***]] ha[d] declined Hyundai Steel's request to provide its contracts with unaffiliated third parties *citing the proprietary and confidential nature of its transactions with other parties*".[430] The USDOC at verification did not express any concerns with respect to Hyundai Steel's previous response.

7.133. In its final determination, the USDOC acknowledged that Hyundai Steel "provided in its initial questionnaire response contracts its affiliated company maintained with its sub-contractors demonstrating that the affiliated company passed on its full costs plus an amount to cover the affiliated company's expenses and profit".[431] The USDOC also noted that Hyundai Steel "was able to obtain this supplier's cost of acquiring the service in question – on a transaction specific basis – and so provided an analysis showing that its affiliated company's charges well exceeded the cost of acquiring the transportation services in amounts that covered all operating costs and provided a profit to the company".[432] However, besides noting that Hyundai Steel provided this information, the USDOC's final determination contains no explanation as to how it took this information into account before resorting to the use of facts available. Rather, the USDOC's subsequent analysis focuses exclusively on the issue of affiliation between Hyundai Steel and [[***]], and the information that Hyundai Steel claimed it was unable to provide.

7.134. The USDOC noted that when it "specifically requested that Hyundai Steel obtain certain freight information between its affiliate and other unaffiliated parties, Hyundai Steel stated that its affiliated company *refused* to provide the data".[433] The USDOC stated that it was able to confirm that one of the two largest shareholders of Hyundai Steel's affiliated freight provider (i.e. [[***]]) is also a part owner of Hyundai Steel, and that the other large shareholder is the Vice Chairman of Hyundai Steel, and that the two are related.[434] The USDOC thus confirmed that Hyundai Steel and [[***]] were "held and commonly controlled by the same family members during the POI".[435] Immediately thereafter, the USDOC found that "Hyundai Steel failed to demonstrate the arm's-length nature of the services provided by the affiliated company [i.e. [[***]] and its U.S. subsidiaries" and it was thus unable to determine the arm's-length nature of the transactions between Hyundai Steel and [[***]].[436] For these reasons, the USDOC stated that it was "relying on facts otherwise available", with an "adverse inference".[437]

7.135. Thus, the USDOC's resort to facts available in its final determination was based upon Hyundai Steel's refusal at verification to provide "all copies of contracts that [[***]] has with all unaffiliated parties for similar services that cover the POI, regardless of the unaffiliated parties' location". The USDOC resorted to facts available because it "found" that Hyundai Steel and [[***]] were "commonly controlled" and that therefore Hyundai Steel should have been able to

[427] CRS CEP verification report, (Exhibit KOR-47 (BCI)), p. 42.
[428] CRS CEP verification report, (Exhibit KOR-47 (BCI)), p. 44.
[429] CRS supplemental Sections B-C questionnaire, (Exhibit USA-72 (BCI)), p. 9.
[430] CRS supplemental Sections B-C questionnaire response, (Exhibit KOR-34 (BCI)), p. 24. (emphasis added)
[431] CRS issues and decision memorandum, (Exhibit KOR-41), p. 71.
[432] CRS issues and decision memorandum, (Exhibit KOR-41), p. 71.
[433] CRS issues and decision memorandum, (Exhibit KOR-41), p. 73. (fn omitted; emphasis added)
[434] CRS issues and decision memorandum, (Exhibit KOR-41), pp. 73-74. The USDOC noted these two individuals to be father and son, respectively.
[435] CRS issues and decision memorandum, (Exhibit KOR-41), p. 74.
[436] CRS issues and decision memorandum, (Exhibit KOR-41), p. 74.
[437] CRS issues and decision memorandum, (Exhibit KOR-41), p. 74.

provide the requested information. However, this issue of "common control" was addressed and disclosed by Hyundai Steel from the very outset, as part of its initial Section A response.[438] In fact, this is confirmed by the USDOC in its final determination, when it notes that "*Hyundai Steel defined* the companies that are members of the Hyundai Motor Group and/or held by the [[***]] family as being affiliated parties via control by a 'group,' which has the ability to directly or indirectly control its group members, and are expected to cooperate with the [USDOC]'s antidumping investigation".[439]

7.136. Furthermore, we recall that the USDOC in its supplemental questionnaire had already made a request similar to the one made at verification by requesting "copies of all international freight contracts between [[***]] and its unaffiliated customers".[440] In response, Hyundai Steel stated that [[***]] did not maintain any contracts with unaffiliated customers for shipments to the United States, and that while "[[***]] does provide shipping services to unaffiliated customers for shipments to third countries, [[***]] ha[d] declined Hyundai Steel's request to provide its contracts with unaffiliated third parties citing the *proprietary and confidential nature of its transactions with other parties*".[441] The final determination does not address the explanation provided by Hyundai Steel and notes, instead, that "[w]hen the [USDOC] raised these overlapping roles/ownership positions in Hyundai Steel and the affiliated company, Hyundai Steel officials continued to indicate that they could not obtain the affiliated company's information requested by the [USDOC]".[442]

7.137. The above discussion reveals that Hyundai Steel submitted a variety of information to demonstrate the arm's-length nature of its transactions with its affiliate [[***]] throughout the course of the investigation. As part of its initial questionnaire responses, Hyundai Steel submitted (a) [[***]] financial statements demonstrating that the affiliate earned a profit; (b) warehousing contract with [[***]] and a contract with an unaffiliated provider [[***]] that provided warehousing service at one warehousing location ([[***]]); and (c) copies of international freight contract with [[***]], on the one hand, and [[***]] international freight contract with two of its subcontractors ([[***]] and [[***]]), on the other hand. In its first supplemental response, Hyundai Steel further provided sample inland freight and warehousing contracts between [[***]] and one unaffiliated subcontractor, namely, [[***]].[443] In response to a specific request by the USDOC in its second supplemental questionnaire, Hyundai Steel provided [[***]] additional inland freight and warehousing contracts with its subcontractors [[***]].[444] Finally, at verification, Hyundai Steel submitted "a chart comparing Hyundai Steel's freight costs with [[***]] total costs".[445] Of all of these pieces of information – some of which were supplied in direct response to a specific request by the USDOC – the USDOC reviewed and found deficient only [[***]] financial statements. The United States is unable to point to anything in the Panel record indicating that the USDOC took into account or otherwise reviewed and found deficient any of the other information that was supplied by Hyundai Steel to establish the arm's-length nature of its transactions with its affiliate [[***]].[446]

7.138. Turning now to the substantive provisions of Annex II to the Anti-Dumping Agreement, paragraph 3 requires, in relevant part, that:

> All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion,

[438] See para. 7.90 above.
[439] CRS issues and decision memorandum, (Exhibit KOR-41), p. 74. (emphasis added)
[440] CRS supplemental Sections B-C questionnaire, (Exhibit USA-72 (BCI)), p. 9.
[441] CRS supplemental Sections B-C questionnaire response, (Exhibit KOR-34 (BCI)), p. 24. (emphasis added)
[442] CRS issues and decision memorandum, (Exhibit KOR-41), p. 74.
[443] CRS supplemental Sections B-C questionnaire response, (Exhibit KOR-34 (BCI)), pp. 7 and 9.
[444] CRS second supplemental Sections B-C questionnaire response, (Exhibit KOR-37 (BCI)), p. 5.
[445] CRS CEP verification report, (Exhibit KOR-47 (BCI)), p. 42.
[446] United States' responses to Panel question Nos. 12 and 67. The United States offers some reasons in its submissions to the Panel as to why some of this information may not be relevant. (See, e.g. United States' response to Panel question No. 67, para. 80; and response to Panel question No. 12, para. 50). However, as explained in para. 7.123 above, what is important is that the USDOC did not provide any such reasoning or explanation.

> and, where applicable, which is supplied in a medium or computer language requested by the authorities, *should be taken into account* when determinations are made.[447]

Paragraph 3 provides key elements of the "substantive basis" for an investigating authority to determine whether it can justify rejecting respondents' information and resorting to facts available in respect of some item, or items, of information, or whether instead it must rely on the information submitted by respondents "when determinations are made".[448] If, in direct response to a request by an investigating authority, a respondent provides information that satisfies the criteria under paragraph 3, the authority must take such information "into account" before resorting to facts available.[449] This is because a finding that information "necessary" for making a certain determination is "missing", or that an interested party significantly impeded the investigation, can only properly be made after "taking into account" all information that was, in fact, supplied by the interested party in response to an investigating authority's requests. An investigating authority's conclusion for purposes of Article 6.8 that "necessary" information is missing or that a respondent significantly impeded the investigation would be tainted if the information that meets the criteria of paragraph 3 and that was supplied by an interested party directly in response to an investigating authority's request is not taken into account by the authority before resorting to facts.

7.139. In our view, the information supplied by Hyundai Steel in response to the USDOC's queries satisfies the criteria under paragraph 3. All of the information identified above was provided either as part of Hyundai Steel's Sections B and C questionnaire responses that were submitted within the deadlines established by the USDOC, or upon the USDOC's request at verification. In the absence of any findings of delay by the USDOC, we agree with Korea that this information was supplied in a "timely fashion" for purposes of paragraph 3.[450] Moreover, there is nothing to suggest that the information was not verifiable. In fact, as Korea rightly points out, the USDOC appears to have successfully verified many pieces of the submitted information, including the total actual costs incurred by [[***]], as well as inland freight contracts between [[***]] and its unaffiliated subcontractor. Finally, the fact that some of this information – such as the [[***]] additional inland freight and warehousing contracts between [[***]] and its subcontractors – was provided in direct response to a specific request by the USDOC suggests that this information was considered relevant by the USDOC and – in the absence of any finding by the USDOC to the contrary – was appropriately submitted such that it could be used in the investigation without "undue difficulties".

7.140. For these reasons, we find that the USDOC acted inconsistently with the first sentence of paragraph 3 of Annex II to the Anti-Dumping Agreement by not "tak[ing] into account" the information concerning affiliated party transactions that was submitted by Hyundai Steel in accordance with that provision. Given that paragraph 3 of Annex II serves as a precondition for an investigating authority's proper resort to facts available under Article 6.8 of the Anti-Dumping Agreement[451], we find that the USDOC also acted inconsistently with that provision in resorting to facts available. In light of our findings of WTO-inconsistency, we do not consider it necessary to rule upon Korea's claims under paragraphs 1, 5, and 6 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us.[452]

7.3.2.2.3.2 The USDOC's selection of the replacement facts

7.141. We have already found that the USDOC erred in resorting to facts available with respect to the information concerning affiliated party transactions that was submitted by Hyundai Steel. In these circumstances, we do not consider that making further findings on Korea's claims concerning the USDOC's selection of the replacement facts on the basis of the record used for the USDOC's WTO-inconsistent findings would assist in providing a positive solution to the dispute before us.[453]

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[447] Emphasis added.
[448] Panel Report, *Egypt – Steel Rebar*, para. 7.159.
[449] Panel Report, *Egypt – Steel Rebar*, para. 7.159.
[450] Korea's first written submission, para. 293.
[451] Panel Reports, *China – GOES*, para. 7.385; *US – Steel Plate*, paras. 7.55-7.56 and 7.79.
[452] See, e.g. Panel Report, *EC – Salmon (Norway)*, para. 7.387; and Panel Report, *Morocco – Hot-Rolled Steel (Turkey)*, paras. 7.105-7.106.
[453] See, e.g. Panel Reports, *Egypt – Steel Rebar*, para. 7.310; and *Mexico – Anti-Dumping Measures on Rice*, para. 7.200. See also Panel Report, *China – Broiler Products*, para. 7.555.

7.3.2.3 Alleged misreporting of control numbers (CONNUMs)

7.3.2.3.1 Factual background

7.142. The USDOC requested Hyundai Steel to provide information about further-manufacturing expenses of CRS in the United States.[454] In response, Hyundai Steel submitted a revised US sales database reporting the adjusted unit and total costs and, as a result, recalculated the indirect selling expenses of HSA.[455] In its preliminary determination, the USDOC found that "Hyundai Steel cooperated with the [USDOC] in this proceeding and provided sufficient information to allow the [USDOC] to calculate a margin", thus rejecting the petitioners' suggestion to apply "total AFA".[456] The USDOC calculated a preliminary dumping margin of 2.17% based on the data submitted by Hyundai Steel.[457]

7.143. During verification of Hyundai Steel's export sales, the USDOC raised certain inconsistencies in the reporting of the quality codes for Spec C products. Specifically, the USDOC noted that for one sale (surprise US sale 3) Hyundai Steel had reported the product code (field PRODCOD2U) as [[***]], indicating that this was an ultra-high-strength steel (UHSS) or advanced high-strength steel (AHSS) merchandise, which warranted a quality reporting code (field QUALITYH/U) of "20".[458] However, Hyundai Steel reported a quality code of "25" ("high-strength low alloy" quality).[459] Hyundai Steel commented that this inconsistency resulted from a "linking problem" between HSA's purchases from Hyundai Steel and its sales.[460] The USDOC chose not to review this issue during Hyundai Steel's verification[461], but further considered it during HSA's verification:

> For certain sale observations, including one of the surprise sale trace observations first examined during the verification of Hyundai Steel in Korea, the company official explained why the reported "specification" (intended to reflect the specification/grade of the source Hyundai Steel coil, which the company official had indicated was used for reporting information in the product characteristic fields, SPECGRADEH/U and QUALITYH/U) was inconsistent with the reported product code (PRODCOD2U) (which the company official indicated was the specification/grade of the product sold by HSA, according to HSA's records). However, the company official did not identify additional sale observations in the U.S. sales database with such inconsistencies.[462]

7.144. Regarding this sale, Hyundai Steel provided additional details to explain why it had identified the CONNUM as [[***]], even though the reported product code was [[***]]:

> The company official stated this sale observation meets the description of the "type 2b" transactions referenced in the Sales Reconciliation section above, such that it could link the merchandise sold by HSA to the original Hyundai Steel coil but not to an HSA production order, and in this instance, the original Hyundai Steel coil was cold-rolled and classified as specification [[***]] (see page 62). The company official identified for us additional sale observations, which it called "type 3" transactions, for which it could identify the HSA production order, and which it could link to an original Hyundai Steel coil that was a cold-rolled coil, but where the original Hyundai Steel cold-rolled coil was of a different specification than that identified for the HSA sale (see page 61). For example, the first Hyundai Steel in the "type 3" section of page 61, [[***]], was identified by the Hyundai Steel information as specification [[***]], but many of the sale observations linked to that coil were reported with a different specification ([[***]]).[463]

7.145. Furthermore, the USDOC conducted a "completeness test" with respect to certain sales that presented this inconsistency. In particular, the USDOC reviewed certain sales that presented

[454] CRS supplemental Sections A-C questionnaire response, (Exhibit KOR-42 (BCI)), pp. 1-3.
[455] CRS supplemental Sections A-C questionnaire response, (Exhibit KOR-42 (BCI)), pp. 1-3.
[456] CRS decision memorandum for preliminary determination, (Exhibit KOR-43), p. 3.
[457] CRS preliminary determination, (Exhibit KOR-44).
[458] CRS CEP verification report, (Exhibit KOR-47 (BCI)), pp. 19 and 41.
[459] CRS CEP verification report, (Exhibit KOR-47 (BCI)), pp. 19 and 41.
[460] CRS CEP verification report, (Exhibit KOR-47 (BCI)), p. 41.
[461] CRS CEP verification report, (Exhibit KOR-47 (BCI)), p. 41.
[462] CRS HSA sales verification report, (Exhibit KOR-46 (BCI)), p. 2.
[463] CRS HSA sales verification report, (Exhibit KOR-46 (BCI)), p. 13.

discrepancies between the reported PRODCOD2U and QUALITYU fields, noting that rather than reporting the field QUALITYU so as to reflect with the [[***]] categorization of Spec C products, the reported QUALITYU was equal to [[***]] (representing [[***]]) or [[***]] (representing [[***]]).[464]

7.146. In its case brief, Hyundai Steel addressed the issue regarding the "type 2b" sale and explained that even though the reported informational product code (PRODCOD2U) for this sale was [[***]], the "actual product produced and sold was a [[***]] product", for which the corresponding quality code was "25".[465] Hyundai Steel noted that it correctly reported the product characteristic information on the basis of the product as produced and sold, and therefore no revision was necessary.[466] Finally, Hyundai Steel stressed that this issue was minor since it concerned a single sale in the database.[467] In its rebuttal brief, Hyundai Steel addressed the alleged misreporting of Spec C sales ("type 3") as quality [[***]] or [[***]].[468] Hyundai Steel explained that the informational product code (PRODCOD2U) was identified based on HSA's records, however, in a few instances this field did not match the CONNUM as sold (the actual product).[469] According to Hyundai Steel, such an inconsistency may occur when HSA's inventory records do not perfectly trace the product information back to the imported coil, or when HSA sold a higher or comparable grade product as a substitute for another product.[470] For Hyundai Steel, the issue was precisely the replacement of orders of a commercial quality steel (quality code [[***]]) with higher quality steel (quality code [[***]] or [[***]]), which demonstrated that there was no flaw in its reporting.[471] Finally, Hyundai Steel noted that, although its reporting was not erroneous, the allegedly misreported Spec C sales as quality [[***]] or [[***]] represented only [[***]]% of all Spec C sales and [[***]]% of all US sales, and therefore had no meaningful impact on the USDOC's analysis.[472]

7.147. In addition to the issue in the export sales, during verification of home market sales, the USDOC questioned the product quality reporting for three product categories, Specs D, E, and H. With respect to Spec D, the USDOC noted that products with the designation [[***]] were identified as *commercial quality* (QUALITYH/U="35").[473] The USDOC noted that according to the company's internal product guidelines, the mechanical and chemical requirements of this specification code were consistent with the description of *drawing quality* products.[474] In its case brief, Hyundai Steel responded that the "QUALITY classification of this product as a commercial steel quality product as opposed to a drawing steel quality product was reasonable even if the mechanical and physical requirements of the product are consistent with other products classified as drawing steel products".[475] However, Hyundai Steel emphasized the fact that [[***]] products were not commonly sold by Hyundai Steel, and noted that the sales of this product in the home market were limited to [[***]] out of a total of [[***]] reported home market sales observations.[476] For this reason, Hyundai Steel argued that "the QUALITY classification of this product has no meaningful impact on the [USDOC]'s analysis in light of the insignificant quantity of merchandise at issue".[477]

7.148. Regarding Spec E sales, the USDOC asked why there were no yield strength measurements for [[***]] spec code products, and Hyundai Steel responded that these products were not "prime"

[464] CRS HSA sales verification report, (Exhibit KOR-46 (BCI)), pp. 10-11.
[465] CRS case brief, (Exhibit KOR-48 (BCI)), p. 11.
[466] CRS case brief, (Exhibit KOR-48 (BCI)), p. 11.
[467] CRS case brief, (Exhibit KOR-48 (BCI)), pp. 11-12.
[468] CRS rebuttal brief, (Exhibit KOR-29 (BCI)), pp. 12-15. The alleged misreporting concerned the "type 3" transactions identified by Hyundai Steel at verification, and certain additional transactions that were not reported. Hyundai Steel explained that the table it prepared for verification (SVE 17, page 61) was only for "type 3" sales, and not any instances of mismatching between PRODCOD2U and QUALITYU corresponded to this type of sales.
[469] CRS rebuttal brief, (Exhibit KOR-29 (BCI)), p. 13.
[470] CRS rebuttal brief, (Exhibit KOR-29 (BCI)), p. 13.
[471] CRS rebuttal brief, (Exhibit KOR-29 (BCI)), p. 14.
[472] CRS rebuttal brief, (Exhibit KOR-29 (BCI)), p. 15.
[473] CRS CEP verification report, (Exhibit KOR-47 (BCI)), pp. 2 and 21.
[474] CRS CEP verification report, (Exhibit KOR-47 (BCI)), pp. 2 and 21. The USDOC came to this conclusion by observing the internal production guideline of Hyundai Steel for this product, which identified certain mechanical and chemical requirements (maximum manganese content, maximum phosphorus content and minimum tensile strength) which were consistent with [[***]], rather than [[***]].
[475] CRS case brief, (Exhibit KOR-48 (BCI)), p. 12.
[476] CRS case brief, (Exhibit KOR-48 (BCI)), p. 12.
[477] CRS case brief, (Exhibit KOR-48 (BCI)), p. 12. See also CRS rebuttal brief, (Exhibit KOR-29 (BCI)), p. 16.

and that it did not record yield strength information for non-prime merchandise.[478] However, the USDOC identified [[***]] sale observations of this product in the home market which had been reported as "prime" products and noted that, in the sales documentation covering the sale of this product, the "packing list" contained a yield strength box.[479] Hyundai Steel did not comment on this issue in its case brief. In its rebuttal brief, Hyundai Steel argued that the "sales documentation for these products do not contain specification yield strength information confirming that no yield strength was required and thus it is entirely reasonable for there not to be any yield strength documentation".[480] Hyundai Steel clarified that additional review of these sales had shown that these sales were prime sales, but, nonetheless, this product did not require yield strength measurement.[481] Hyundai Steel further noted that this product was not sold in the US market, and in the home market it represented only [[***]] out of the [[***]] sales observations.[482]

7.149. Finally, with respect to Spec H sales, the USDOC noted that it could not find in the information supplied any reference to the [[***]] spec code product.[483] The USDOC referred to [[***]] home market sale observations identified as this product, each with the QUALITYH code "20", which was applicable to UHSS or AHSS merchandise; accordingly, it noted that there was no indication that this product met the company's characterizations of UHSS or AHSS merchandise.[484] Hyundai Steel in its case brief explained that the classification of this product as an UHSS quality product was justified by its classification in Hyundai Steel's product coding system in the normal course of business.[485] Hyundai Steel also argued that the appropriate coding of this product had no measurable impact on the USDOC's analysis due to its insignificant home market sales (only [[***]] transactions), and also because there were no such sales in the United States during the POI.[486] In its rebuttal brief, Hyundai Steel also asserted that, "for the few products the [USDOC] flagged for further consideration, these products [were] either demonstrably coded correctly, sold in insignificant volumes, or both", and that "Hyundai Steel's reporting [was] accurate and no adjustment [was] required, let alone an AFA or total AFA adjustment".[487]

7.150. In its final determination, the USDOC applied facts available with an adverse inference to the information associated with the inconsistencies in reporting Specs C, D, E, and H sales.[488] The USDOC applied facts available because the missing information was "necessary" and Hyundai Steel "withheld the requested information, [thus] significantly imped[ing] the proceeding … and the [USDOC] was therefore unable to verify the missing information".[489] The USDOC also determined that the application of an adverse inference was warranted due to Hyundai Steel's failure to cooperate by not acting to the best of its ability, given that "the information was never provided, and was instead discovered by the [USDOC] at verification".[490]

7.151. Specifically, with respect to Spec C sales (those identified during verification and those later referenced to by the USDOC), the USDOC found an inconsistency between the reported CONNUM information and the reported product code in the field PRODCOD2U due to the different qualities corresponding to each specification.[491] Regarding Spec D, the USDOC determined that the proper

[478] CRS CEP verification report, (Exhibit KOR-47 (BCI)), p. 21.
[479] CRS CEP verification report, (Exhibit KOR-47 (BCI)), p. 22.
[480] CRS rebuttal brief, (Exhibit KOR-29 (BCI)), p. 17.
[481] CRS rebuttal brief, (Exhibit KOR-29 (BCI)), fn 26.
[482] CRS rebuttal brief, (Exhibit KOR-29 (BCI)), p. 17.
[483] CRS CEP verification report, (Exhibit KOR-47 (BCI)), p. 21.
[484] CRS CEP verification report, (Exhibit KOR-47 (BCI)), p. 21. In detail, the USDOC noted that this product was not included in the list initially submitted as representing the products considered UHSS or AHSS merchandise, nor in the AHSS grouping of products subsequently provided upon discussion of the topic of UHSS and AHSS merchandise.
[485] CRS case brief, (Exhibit KOR-48 (BCI)), pp. 12-13.
[486] CRS case brief, (Exhibit KOR-48 (BCI)), p. 12; See also CRS rebuttal brief, (Exhibit KOR-29 (BCI)), pp. 16-17.
[487] CRS rebuttal brief, (Exhibit KOR-29 (BCI)), p. 47.
[488] CRS issues and decision memorandum, (Exhibit KOR-41), pp. 59-60.
[489] CRS issues and decision memorandum, (Exhibit KOR-41), p. 60.
[490] CRS issues and decision memorandum, (Exhibit KOR-41), p. 60.
[491] The USDOC stated that:

> More fundamentally, during the Hyundai Steel sales verification the company had stated that "HSA did not intentionally alter or revise the specification and grade designations from those of the original coil it purchased from Hyundai Steel." Given that explanation, as well as the lack of information on the record to support the respondent's belated assertions regarding products

characterization of the products at issue was of "drawing quality" and not of "commercial quality".[492] With respect to Spec E, the USDOC found that there was no basis for not reporting the yield strength field.[493] Finally, regarding Spec H, the USDOC was not convinced that Hyundai Steel properly classified those products as AHSS/UHSS quality.[494]

7.152. Overall, the USDOC found that "Hyundai Steel had no plausible explanation either at verification or in its case and rebuttal briefs for misidentifying these sales" and thus it did not cooperate at the best of its ability, rendering the application of an adverse inference necessary.[495] To sales associated with the Spec C issue, the USDOC assigned the highest calculated margin for any other reported US sale of Hyundai Steel, [[***]]%.[496] For home market sales under Specs D, E, and H, the USDOC revised the "incorrect product characteristics" as described above, and as a

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meeting multiple specifications, we find that the sales in question (i.e. those referenced in the second grouping at the bottom of page 61 of the HSA sales verification exhibit 17, and those identified within the last two paragraphs on page 10 of the HSA sales verification report) are considered unverified. Those sale observations were not shown to be linked to the products as imported into the United States, and no adequate explanation has been provided by the respondent for those mismatches between the alleged Hyundai Steel input coils and the products sold by HSA to its unaffiliated U.S. customers. These mismatches were not identified by the respondent prior to verification.

(CRS issues and decision memorandum, (Exhibit KOR-41), p. 62)

[492] The USDOC stated that:

As noted in the [USDOC]'s Hyundai Sales verification report, the products have properties associated with the former [drawing] quality. Furthermore, *the Spec D is even identified in a way that is very obviously characteristic of drawing quality rather than commercial quality*, given Hyundai Steel's product coding designations, which were examined in detail during the verification of Hyundai Steel. Therefore, the [USDOC] is revising the reporting of that product characteristic for the sales in question.

(CRS issues and decision memorandum, (Exhibit KOR-41), p. 60 (emphasis added; fns omitted))

[493] The USDOC stated that:

Regarding Spec E products, Hyundai Steel identified a minimum specified yield strength for the products in question. Hyundai Steel's reporting of the minimum yield strength code for products classified under this specification (code "1") was consistent with the identified minimum specified yield strength. However, at verification it was determined that there was no basis for the minimum specified yield strength that Hyundai Steel identified. Documentation examined at verification indicated there was no minimum specified yield strength required for the specification. Further examination at verification also revealed the absence of evidence of any actual yield strength measurements for the products in question, which Hyundai Steel initially opined was due to the merchandise being classified as non-prime merchandise. However, *the [USDOC] concluded that the merchandise had been properly reported by Hyundai Steel as prime merchandise, not non-prime merchandise*. During the discussions of this specification, therefore, Hyundai Steel provided no information indicating how it had devised the minimum yield strength value it had identified as the basis for reporting the minimum specified yield strength field. The *minimum specified yield strength identified by Hyundai Steel for Spec E, therefore, is unsupported by the record*. The record indicates, however, that the minimum specified yield strength for the galvanized steel products made from Spec E is a level that would fall in reporting code "4" for the minimum specified yield strength characteristic. Accordingly, under section 776(a) of the Act, as facts otherwise available, the [USDOC] is reclassifying the products under Spec E with the minimum specified yield strength reporting code of "4".

(CRS issues and decision memorandum, (Exhibit KOR-41), p. 61 (emphasis added; fns omitted))

[494] The USDOC stated that:

As the [USDOC] has noted, the product-specific documentation provided by the respondent at verification that utilizes AHSS/UHSS terminology does not reference Spec H products. During discussions of this product at verification, Hyundai Steel provided technical information supporting its reporting of the products in question as AHSS/UHSS quality. In addition, although Spec H products have some basic strength requirements, they do not possess any chemical requirements, so they may contain little or no amount of alloying elements associated with AHSS/UHSS (or high-strength low-alloy products). *The properties of the merchandise are not consistent with AHSS/UHSS merchandise, based both on Hyundai Steel's representations of such products and upon information about such products elsewhere on the record. Thus, there was no basis for Hyundai Steel to report the products as AHSS/UHSS quality*; based on the information available, the [USDOC] concludes it is best characterized for this investigation as structural quality (QUALITY reporting code 30) and is revising the sales as such.

(CRS issues and decision memorandum, (Exhibit KOR-41), pp. 60-61 (emphasis added; fns omitted))

[495] CRS issues and decision memorandum, (Exhibit KOR-41), p. 63.

[496] CRS issues and decision memorandum, (Exhibit KOR-41), p. 63; CRS final calculation memo, (Exhibit KOR-49 (BCI)), p. 6.

result the CONNUMs for the associated sales were also revised to reflect the change in the product characteristics.[497] The USDOC assigned to the appropriate CONNUMs:

> The highest total cost of manufacturing (AVGTCOM) from amongst the affected CONNUMs (i.e., the reported CONNUMs for the sales in question plus the CONNUMs into which such sales were reclassified as a result of the correction of the product characteristic in question), along with the corresponding variable cost of manufacturing (AVGVCOM) for the CONNUM with the highest reported AVGTCOM, was applied to all of the affected CONNUMs, with one exception, as discussed below.
>
> For one of the miscoded CONNUMs ([[***]]), the volume of reported sales equaled the volume of sales for that CONNUM across both the home market and U.S. sales databases, and that volume also equaled the volume of production quantity for the CONNUM in question. When the incorrectly reported product characteristic for that CONNUM were corrected, the revised CONNUM ([[***]]) was one which already exists, and for which no product coding issues were identified. We recalculated the AVGTCOM and AVGVCOM for that revised CONNUM so that they are based on the weight-averaged (by PRODQTY) values of the AVGTCOMs and AVGVCOMs of the original and the revised CONNUMs.[498]

7.3.2.3.2 Main arguments of the parties

7.153. Korea claims that the USDOC acted inconsistently with Article 6.8 of the Anti-Dumping Agreement in resorting to facts available because the information allegedly missing was not "necessary"[499] and because Hyundai Steel did not "significantly impede[]" the investigation.[500] Korea contends that this is not a situation where information was missing, but instead a situation of alleged misreporting of information.[501] Korea asserts that the information at issue was not "necessary" to complete the determination, and that the USDOC never explained how the allegedly minuscule errors could possibly amount to withholding "necessary information".[502] With respect to Spec C sales, Korea argues that these sales represented only [[***]]% of total SPCC sales, and [[***]]% of total US sales in the POI. As to home market sales (Specs D, E, and H), Korea argues that these transactions represented only [[***]]% of total transactions or [[***]]% of the total MT weight of all home market sales.[503] In addition, there were no such sales in the US market during the POI.[504]

7.154. Korea asserts that the methodology used by Hyundai Steel in reporting these products was reasonable and supported by sufficient explanation and further evidence provided at verification.[505] Korea describes the inconsistencies at issue as a "technical issue" that arose during verification because of the fact that the records kept in the ordinary course of business did not necessarily correspond with the CONNUMs imposed by the USDOC for purposes of its investigation.[506] The mismatches were the result of the complex nature of combining internal product codes and CONNUMs in situations where the products are further processed.[507] Specifically for the Spec C US sales, Korea asserts that regardless of the field PRODCOD2U, which was provided for informational purposes and not used in the USDOC's calculations, Hyundai Steel correctly reported the CONNUM data on the basis of the product as produced and imported.[508]

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[497] CRS issues and decision memorandum, (Exhibit KOR-41), p. 63.
[498] CRS final calculation memo, (Exhibit KOR-49 (BCI)), p. 5.
[499] Korea's first written submission, para. 274.
[500] Korea's first written submission, para. 280.
[501] Korea's response to Panel question No. 16(a).
[502] Korea's response to Panel question No. 16(c). Korea's contends that the transactions at issue were insignificant, and therefore not "necessary" to complete the determination. (Korea's first written submission, para. 276).
[503] Korea's first written submission, para. 275.
[504] Korea's first written submission, para. 243.
[505] Korea's first written submission, para. 277.
[506] Korea's first written submission, para. 279.
[507] Korea's first written submission, para. 279.
[508] There were limited instances, according to Korea, where Hyundai Steel's reported CONNUM information (the product produced and imported) did not match the field PRODCOD2U (including informational

7.155. Korea further claims that the USDOC acted inconsistently with paragraph 6 of Annex II, as it did not offer to the respondent an opportunity to provide further explanations after the alleged misreporting had been identified, with the "dialogue" effectively ending after verification.[509] Moreover, the USDOC in its final determination did not address Hyundai Steel's arguments regarding the "miniscule volume" of the sales in question, and did not explain its rejection of the explanations provided by Hyundai Steel.[510]

7.156. Finally, Korea claims that the USDOC acted inconsistently with paragraphs 3 and 5 of Annex II by disregarding information that had already been verified as accurate.[511] Korea notes that the USDOC applied facts available not only with respect to the problematic sales, but also with respect to the whole CONNUMs into which sales were reclassified.[512] According to Korea, the USDOC unduly replaced verified sales information and costs with assumptions based on adverse inferences.[513] Korea claims that "Hyundai Steel fully explained the reasonableness of its coding scheme and provided supporting materials at verification", and that "[n]othing on the record suggests that any of these alleged minor reporting inaccuracies constituted an attempt by Hyundai Steel to report intentionally incorrect data or a failure to exert its best efforts to comply with the USDOC's information requests".[514]

7.157. As to the USDOC's selection of the replacement facts, Korea claims that the USDOC acted inconsistently with paragraph 7 of Annex II and Article 6.8.[515] Korea contends that the USDOC assigned the highest reported total cost of manufacturing for the home market sales, and the highest calculated dumping margin for US sales, without engaging in a process of reasoning and evaluation as to how these facts were reasonable replacements for the allegedly missing information.[516] According to Korea, the selection of the replacement facts was punitive in nature and the USDOC deliberately selected adverse information to penalise Hyundai Steel.[517] Korea contends that the facts were chosen for the sole reason that they were the highest reported costs or dumping margin, and were not related to the issue of the correct CONNUM determination.[518] Finally, Korea argues that the USDOC did not consider the aberrational nature of the replacement facts.[519]

7.158. The United States responds that Hyundai Steel failed to provide requested "necessary" information and identifies the missing information as "the cost of manufacturing associated with certain products where product specifications were unverified".[520] The United States asserts that the "proper reporting of the CONNUMs assigned to each product" is crucially important for the calculation of the dumping margin since "[m]isreporting products sold has the effect of distorting the calculated margin, because certain costs that should be associated with a given CONNUM are instead associated with a different CONNUM, which can significantly affect the price comparison between the home market and U.S. sales and ultimately the dumping margin".[521] The United States asserts that, because of this misreporting, the USDOC could not rely on the reported information for those classes of products.[522] According to the United States, "the magnitude of the erroneously reported information is not the standard against which information is judged for its necessity; instead, it is whether the information is 'required to complete a determination'".[523] The United States argues that, contrary to Korea's assertions, Hyundai Steel had provided no plausible explanation for its

product quality code) based on HSA's records for CEP sales. In other words, in certain instances HSA imported steel of one specification to make a further manufactured product and sold the finished product under a different specification. (Korea's first written submission, paras. 243 and 275; response to Panel question No. 16(a)).

[509] Korea's first written submission, para. 282.
[510] Korea's first written submission, paras. 277 and 282.
[511] Korea's first written submission, paras. 296 and 305.
[512] Korea's first written submission, paras. 302 and 305.
[513] Korea's first written submission, paras. 306-307.
[514] Korea's first written submission, paras. 299-300.
[515] Korea's first written submission, para. 321.
[516] Korea's first written submission, para. 322. See also Korea's second written submission, para. 77.
[517] Korea's first written submission, para. 325.
[518] Korea's first written submission, para. 326.
[519] Korea's first written submission, paras. 327-329. See also Korea's second written submission, paras. 124-126 and 128-130.
[520] United States' response to Panel question No. 16(a), para. 64.
[521] United States' first written submission, para. 133.
[522] United States' first written submission, para. 134.
[523] United States' first written submission, para. 166. See also United States' response to Panel question No. 16(b).

misreporting.[524] The United States further argues that Hyundai Steel failed to substantiate certain instances of its misreporting, and when it did, the USDOC "took great pains to explain exactly why each of [Hyundai Steel's] explanations was not sufficient", thus acting consistently with its obligations under paragraph 6 of Annex II.[525]

7.159. With respect to Korea's claims under paragraphs 3 and 5 of Annex II, the United States argues that the USDOC applied facts available only to issues for which the respondent was unable to substantiate its product reporting.[526] According to the United States, Korea fails to demonstrate that the USDOC did not take into account all verifiable and substantiated facts.[527] Regarding the use of facts available for the affected CONNUMs in their entirety, the United States responds that the CONNUMs into which the sales in question were reclassified "were no longer accurate and required revision".[528] Finally, the United States argues that Hyundai Steel had not acted to the best of its ability and for this reason the USDOC was not bound by paragraphs 3 and 5 of Annex II.[529]

7.160. In relation to the USDOC's selection of the replacement facts, the United States responds that Korea has failed to established any breach of the Anti-Dumping Agreement.[530] According to the United States, Korea does not provide an explanation for why the USDOC's process for selecting the values is inconsistent with any specific provision of the Anti-Dumping Agreement.[531]

7.3.2.3.3 Evaluation by the Panel

7.3.2.3.3.1 The USDOC's resort to facts available

7.161. Korea claims that the USDOC acted inconsistently with Article 6.8 and paragraphs 3, 5, and 6 of Annex II of the Anti-Dumping Agreement in resorting to the use of facts available in respect of Hyundai Steel's reporting of certain CONNUMs.

7.162. In its final determination, the USDOC explained that it resorted to "partial AFA where data do not exist on the record to fully correct the problems in question".[532] The "problems in question" related to separate reporting issues affecting certain home market sales and US sales. We will first examine the issues pertaining the home market sales – concerning Specs D, E, and H – before examining the US market sales concerning Spec C.

Specs D, E, and H sales

7.163. The USDOC found discrepancies between product characteristics for certain Specs D, E, and H sales observed in the product database at verification, on the one hand, and the specifications originally reported by Hyundai Steel, on the other hand.[533] For Spec D sales, the USDOC explained that "the products in question are properly characterized as drawing quality products rather than commercial quality products", as reported by Hyundai Steel, and that it was therefore "revising the reporting of that product characteristic for the sales in question".[534]

7.164. Regarding Spec E, the USDOC explained that Hyundai Steel's initial "reporting of the minimum yield strength code for products classified under this specification (code '1') was consistent with the identified minimum specified yield strength". However, at verification, the USDOC found the "minimum specified yield strength identified by Hyundai Steel for Spec E" to be "unsupported by the record". Instead, the USDOC found the record to indicate that "the minimum specified yield strength for the galvanized steel products made from Spec E is a level that would fall in reporting code '4' for the minimum specified yield strength characteristic" and, therefore, "under

[524] United States' first written submission, para. 166.
[525] United States' first written submission, para. 168.
[526] United States' first written submission, para. 180.
[527] United States' first written submission, para. 180.
[528] United States' response to Panel question No. 16(d), para. 76.
[529] United States' first written submission, para. 181.
[530] United States' first written submission, para. 194.
[531] United States' first written submission, para. 195.
[532] CRS issues and decision memorandum, (Exhibit KOR-41), p. 59.
[533] CRS HSA sales verification report, (Exhibit KOR-46 (BCI)), p. 2. See also United States' first written submission, para. 130.
[534] CRS issues and decision memorandum, (Exhibit KOR-41), p. 60.

section 776(a) of the Act, as facts otherwise available", the USDOC "reclassif[ied] the products under Spec E with the minimum specified yield strength reporting code of '4'".[535]

7.165. For Spec H, the USDOC observed that Hyundai Steel had classified these products as "AHSS/UHSS". However, "based both on Hyundai Steel's representations of such products and upon information about such products elsewhere on the record", the USDOC concluded that the product "is best characterized for this investigation as structural quality (QUALITY reporting code 30)" and thus "revis[ed] the sales as such".[536] Thus, for the affected Specs D, E, and H sales, the USDOC corrected and revised the misreported product characteristics by using "facts otherwise available".

7.166. In its final calculation memorandum, the USDOC explained that:

> The incorrect product characteristics in question were corrected for those sales, and the CONNUMs for those sales revised accordingly. The reported CONNUMs for these home market sale observations were identified, and the incorrect product characteristics for them were corrected. The CONNUMs for those sales were also revised to reflect the change in the product characteristic in question. The highest total cost of manufacturing (AVGTCOM) from amongst the affected CONNUMs (i.e., the reported CONNUMs for the sales in question plus the CONNUMs into which such sales were reclassified as a result of the correction of the product characteristic in question), along with the corresponding variable cost of manufacturing (AVGVCOM) for the CONNUM with the highest reported AVGTCOM, was applied to all of the affected CONNUMs[.][537]

7.167. Referring to the above excerpt from the final calculation memorandum, the United States explains that, "[p]ut another way, [the] USDOC considered that the CONNUMs into which the sales in question were reclassified were *no longer accurate* and required revision".[538] In support of this assertion, the United States refers the panel to a specific part of the final determination. However, we do not find any explanation in this part of the Final Determination as to why the CONNUMs into which the corrected sales were classified into were "no longer accurate and required revision". Rather, in the part of the final determination that the United States refers to, the USDOC simply stated that:

> We find that the errors and inconsistencies associated with the aforementioned analyses of Spec D, Spec H, and Spec E sales, and of certain Spec C sales, are such that the [USDOC] should apply AFA *to this information*.[539]

7.168. Moreover, the United States explains that the "necessary" information that was missing due to Hyundai Steel's misreporting was "the cost of manufacturing associated with certain products where product specifications were unverified".[540] Consistent with the United States' position, we note that, in its final calculation memorandum, the USDOC applied, as AFA, the "highest total cost of manufacturing (AVGTCOM) from amongst the affected CONNUMs … along with the corresponding variable cost of manufacturing … for the CONNUM with the highest reported AVGTCOM … to all of the affected CONNUMs".[541]

7.169. After finding that Hyundai Steel had misreported product characteristics for certain Specs D, E, and H sales, the USDOC revised the incorrect product characteristics using "facts otherwise available".[542] Once the misreporting for product characteristics for certain sales was corrected – and the CONNUMs were revised accordingly – the USDOC provided no further explanation as to how this misreporting resulted in the absence of information concerning the cost of manufacturing for the sales in the affected CONNUMs.

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[535] CRS issues and decision memorandum, (Exhibit KOR-41), p. 61.
[536] CRS issues and decision memorandum, (Exhibit KOR-41), pp. 60-61.
[537] CRS final calculation memo, (Exhibit KOR-49 (BCI)), p. 5.
[538] United States' response to Panel question No. 16(d), para. 76 (referring to CRS issues and decision memorandum, (Exhibit KOR-41), p. 63 (emphasis added)).
[539] CRS issues and decision memorandum, (Exhibit KOR-41), p. 63. (emphasis added)
[540] United States' response to Panel question No. 16(a), para. 64 (referring to CRS issues and decision memorandum, (Exhibit KOR-41), pp. 58-63; and CRS final calculation memo, (Exhibit KOR-49 (BCI)), pp. 5-6).
[541] CRS final calculation memo, (Exhibit KOR-49 (BCI)), p. 5.
[542] CRS issues and decision memorandum, (Exhibit KOR-41), pp. 60-61.

7.170. Article 6.8 is "not directed at mitigating the absence of 'any' or 'unnecessary' information, but is rather concerned with overcoming the absence of information required to complete a determination".[543] Under Article 6.8, "there has to be a connection between the 'necessary information' that is missing and the particular 'facts available' on which a determination … is based".[544] In the case at hand, the misreported information concerned product characteristics for certain sales, but the USDOC resorted to the use of "facts available" not just for correcting this information for these sales, but also for determining the total cost of manufacturing for all other sales that were a part of the affected CONNUMs.[545] Prior to resorting to the use of facts available with respect to the cost of manufacturing for all the affected CONNUMs, the USDOC did not explain why it considered that the cost of manufacturing for the CONNUMs into which the sales at issue were reclassified was no longer accurate.

7.171. With respect to the Specs D, E, and H home market sales, we therefore find that the USDOC acted inconsistently with Article 6.8 of the Anti-Dumping Agreement in resorting to facts available in respect of the cost of manufacturing for all the affected CONNUMs. In light of our findings of WTO-inconsistency, we do not consider it necessary to rule upon Korea's claims under paragraphs 3, 5, and 6 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us.[546]

Spec C sales

7.172. In relation to US sales, the USDOC found inconsistencies in the reporting of certain Spec C sales during verification. Unlike the Specs D, E, and H home market sales, for US sales under Spec C the USDOC did not "correct" any "misreporting" by Hyundai Steel. Rather, the USDOC found these sales to be "unverified".[547]

7.173. Korea argues that the Spec C sales identified by the USDOC were "insignificant" in comparison to the total number of transactions as they "represented only [[***]]% of total SPCC sales, or [[***]]% of total U.S. sales in the POI".[548] On this basis, Korea asserts that this "information was not such that it could not be 'dispensed with or done without'" and was therefore not "necessary" for the USDOC's margin calculation.[549] We note, however, that, unlike home market sales where the USDOC assigned to all the affected CONNUMs the highest total cost of manufacturing for the CONNUMs in question, the USDOC resort to facts available in this instance was limited to the "the U.S. sales associated with the Spec C issue (which are limited to a small volume of U.S. sales of products classified under that specification and under the two other specifications with comparable linking problems)".[550] Given the limited "gap" sought to be filled by the USDOC, we agree with the United States that "Korea's characterization of the magnitude of the erroneously reported information does not bear upon the necessity of the information".[551] Besides the allegedly "insignificant" number of the transactions at issue, Korea does not offer any other reason as to why the information missing was not "necessary" for purposes of the USDOC's determination within the meaning of Article 6.8. We therefore find that Korea has failed to establish that the USDOC acted inconsistently with Article 6.8 of the Anti-Dumping Agreement because the Spec C sales at issue were "insignificant" in comparison to the total number of transactions.

7.174. We now turn to address Korea's claims under paragraphs 3, 5, and 6 of Annex II. Korea asserts that "Hyundai Steel explained from the outset of the investigation its reporting methodology and explained that there could be certain instances where the requested CONNUM data and the internal company product codes for CEP sales might be different".[552] According to Korea, Hyundai Steel was given "no opportunity to provide the information after the issue had been

[543] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416. See also para. 7.28 above.
[544] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416.
[545] CRS issues and decision memorandum, (Exhibit KOR-41), p. 63.
[546] See, e.g. Panel Reports, *EC – Salmon (Norway)*, para. 7.387; and *Morocco – Hot-Rolled Steel (Turkey)*, paras. 7.105-7.106.
[547] CRS issues and decision memorandum, (Exhibit KOR-41), p. 62.
[548] Korea's first written submission, paras. 275-276.
[549] Korea's first written submission, para. 276.
[550] CRS issues and decision memorandum, (Exhibit KOR-41), p. 63.
[551] United States' response to Panel question No. 16(b), para. 72.
[552] Korea's first written submission, para. 297.

identified by the USDOC and all of the explanations that were provided in the case briefs were effectively ignored".[553]

7.175. Following the USDOC's discovery of certain inconsistencies in the reporting of Spec C sales at verification, Hyundai Steel consistently asserted that it had correctly reported the quality of the products. Hyundai Steel explained that regarding the "type 2b" transaction, it had properly reported the characteristic of the product as produced and imported.[554] Regarding the "type 3" transactions, Hyundai Steel explained that there was no flaw in its reporting; rather, the inconsistency in the reported quality occurred because, in certain instances, HSA had actually sold a coil product of higher quality rather than the one ordered and imported for this order.[555] Hyundai Steel further stated that while the "type 3" transactions concern instances where "a single coil was sold as multiple products", there might be other instances as well where the PRODCOD2U did not match the QUALITYU, such as the imported coil being processed and sold under a different specification. According to Hyundai Steel, none of these instances would result in an error of the quality reporting, which was always based on the imported coil.[556]

7.176. Contrary to Korea's assertion that the USDOC "effectively ignored" the explanations provided by Hyundai Steel in its case and rebuttal briefs, the USDOC expressly considered Hyundai Steel's explanation and found it to be lacking:

> Hyundai Steel argues this variation is not due to some type of classification error, but, rather, that it is due to certain products being sold to the final customer as specifications requiring less stringent requirements than the specifications to which the products were actually made. *It is not evident from the record which, if any, of the Hyundai Steel specifications in question are more or less stringent than the others, with respect to requirements.*[557]

7.177. Although the explanations provided by Hyundai Steel during and after verification may have helped explain why the reporting inconsistencies identified by the USDOC could exist, e.g. in light of the alleged "linking" problem, Korea does not identify any evidence or explanations provided by Hyundai Steel in order to establish that, despite these inconsistencies, it, in fact, "correctly reported the product characteristics based on the Hyundai Steel imported coil (i.e., the actual physical characteristics of the steel)" for all the sales at issue.[558] Thus, even in light of the explanation offered by Hyundai Steel for the identified inconsistencies, there was no way for the USDOC to confirm the accuracy of the product characteristics that were actually reported by Hyundai Steel.

7.178. Furthermore, in addressing Hyundai Steel's explanations, the USDOC in its final determination also observed that during "the Hyundai Steel sales verification the company had stated that 'HSA did not intentionally alter or revise the specification and grade designations from those of the original coil it purchased from Hyundai Steel'".[559] Korea does not take issue with this observation. In light of these facts, we find that the USDOC reasonably concluded that it could not verify the accuracy of information for the sales at issue.[560]

7.179. As we have explained above[561], paragraph 3 of Annex II constitutes the "substantive basis" for an investigating authority's rejection of information provided by a respondent and its resort to

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[553] Korea's first written submission, para. 282.
[554] CRS case brief, (Exhibit KOR-48 (BCI)), p. 11.
[555] CRS rebuttal brief, (Exhibit KOR-29 (BCI)), p. 13.
[556] CRS rebuttal brief, (Exhibit KOR-29 (BCI)), p. 14.
[557] CRS issues and decision memorandum, (Exhibit KOR-41), p. 62. (emphasis added)
[558] CRS Rebuttal brief, (Exhibit KOR-29 (BCI)), p. 13. For one sale examined during verification (surprise US sale 3) the USDOC verification report states that HSA provided "additional detail to explain why" it identified the sale with a different product code. The verification report states that HSA was able to link the merchandise it sold to the "original Hyundai Steel coil but not to an HSA production order, *and in this instance*, the original Hyundai Steel coil was cold rolled" and classified with the relevant production code. (CRS HSA sales verification report, (Exhibit KOR-46 (BCI)), p. 13 (emphasis added)). In our view, even if this explanation provided by HSA supported Korea's assertion that the USDOC "effectively ignored" the explanations provided by Hyundai Steel in its case and rebuttal briefs, it does not remedy the deficiency identified by the USDOC, namely that it was not able to verify the accuracy of the product characteristics reported by Hyundai Steel.
[559] CRS issues and decision memorandum, (Exhibit KOR-41), p. 62.
[560] CRS issues and decision memorandum, (Exhibit KOR-41), p. 62.
[561] See paras. 7.138-7.139 above.

facts available.[562] Under paragraph 3, an investigating authority shall take into account information submitted by an interested party when it is verifiable, appropriately submitted so it can be used without undue difficulties, and furnished in a timely fashion. For the reasons set out above, we find that the USDOC properly concluded that the information at issue was not verifiable and could not be used for its determination. We therefore find that Korea has failed to establish that the USDOC acted inconsistently with paragraph 3 of Annex II to the Anti-Dumping Agreement in resorting to facts available with respect to the Spec C sales at issue.

7.180. Korea also claims that the USDOC acted inconsistently with paragraph 5 of Annex II, which provides that:

> Even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability.

Taken together, paragraphs 3 and 5 establish an obligation for an investigating authority to ensure that information that is "not ideal in all respects" must not be considered unverifiable because of its flaws, so long as the interested party submitting it has acted to the "best of its ability".[563] However, this does not mean that information that is not verifiable (or does not meet the other criteria in paragraph 3) must nonetheless be used by an investigating authority if the interested party acted to the best of its ability.[564] In this regard, we agree with the panel in *US – Steel Plate* that "it [is] difficult to conclude that an investigating authority must use information which is, for example, not verifiable, or not submitted in a timely fashion, or regardless of the difficulties incumbent upon its use, merely because the party supplying it has acted to the best of its ability".[565] Having already found that the USDOC properly concluded that the information at issue was not verifiable – and even if Hyundai Steel is seen as having acted to the best of its ability – the USDOC was not required by paragraph 5 to use that information. Accordingly, in the circumstances of this case, we find that Korea has failed to establish that the USDOC acted inconsistently with paragraph 5 of Annex II in resorting to the use of facts available with respect to the Spec C sales at issue.

7.181. As discussed above, Hyundai Steel provided explanations to the USDOC on this issue during verification, as well as part of its case and rebuttal briefs.[566] The record indicates that the USDOC properly engaged with these explanations, but found them to be insufficient for purposes of verifying the accuracy of the reported information. We therefore find that Korea has not established that the USDOC acted inconsistently with paragraph 6 of Annex II to the Anti-Dumping Agreement in resorting to facts available with respect to the Spec C sales at issue.

7.3.2.3.3.2 The USDOC's selection of the replacement facts

7.182. We have already found that the USDOC erred in resorting to facts available with respect to Specs D, E, and H home market sales. In these circumstances, we do not consider that making further findings on Korea's claims concerning the USDOC's selection of the replacement facts on the basis of the record used for the USDOC's WTO-inconsistent findings would assist in providing a positive solution to the dispute before us.[567] However, given our findings that Korea has failed to establish that the USDOC erred in resorting to facts available with respect to the information concerning Spec C sales, it is necessary for us to address Korea's claims aimed at the USDOC's selection of the replacement facts in relation to these sales.

7.183. Korea argues that there is no evidence that the USDOC engaged in *any* "process" in selecting the replacement information.[568] According to Korea, there were many different kinds of data available to the USDOC to use rather than the highest calculated dumping margin for US sales.[569]

[562] Panel Report, *Egypt – Steel Rebar*, para. 7.159.
[563] See for example, Panel Report, *Egypt – Steel Rebar*, para. 7.161.
[564] Panel Report, *US – Steel Plate*, para. 7.65.
[565] See Panel Report, *US – Steel Plate*, para. 7.64.
[566] See paras. 7.144-7.146 above.
[567] See, e.g. Panel Reports, *Egypt – Steel Rebar*, para. 7.310; *Mexico – Anti-Dumping Measures on Rice*, para. 7.200. See also Panel Report, *China – Broiler Products*, para. 7.555.
[568] Korea's first written submission, para. 322.
[569] Korea's response to Panel question No. 16(f), p. 17.

Korea also argues that the selected information was chosen for the sole reason that it was the highest calculated margin for any US sale, irrespective of its aberrational nature.[570]

7.184. As discussed above, Article 6.8 requires investigating authorities to select reasonable replacements for the missing "necessary" information.[571] In selecting such reasonable replacements, an investigating authority must take into account all the facts that are properly available to it. Whether the sales used to generate the highest margin were, as a matter of fact, aberrational, is a subsidiary issue to whether the USDOC considered *all* information on the record. For US sales associated with the Spec C issue, the USDOC assigned the highest calculated margin for any other reported US sale of Hyundai Steel, [[***]]%.[572] This margin was one of many resulting from a multitude of US sales.[573] When faced with such a range of margins, an objective and unbiased investigating authority is required to explain why the *highest* margin was a reasonable replacement for the missing necessary information. The USDOC's issues and decision memorandum does not contain any evidence of a process of reasoning and evaluation indicating that it took into account the various margins that were available to it. The USDOC found:

> These are problems involving products analyzed during verification, and for which Hyundai Steel had no plausible explanation either at verification or in its case and rebuttal briefs for misidentifying these sales, as discussed above. Accordingly, the [USDOC] finds that under section 776(b) of the Act, Hyundai [Steel] did not cooperate to the best of its ability with regard to this information, and finds it necessary to apply an adverse inference.[574]

7.185. The *only* explanation offered by the USDOC was that an adverse inference was warranted in light of Hyundai Steel's non-cooperation. The USDOC provided no other evidentiary basis in support of its selection of the replacement facts with respect the Spec C sales. In the circumstances of this case, we consider that Hyundai Steel's non-cooperation cannot alone constitute the sole basis for the selection of the replacement facts.[575]

7.186. We therefore find that the USDOC acted inconsistently with Article 6.8 of the Anti-Dumping Agreement in selecting the replacement facts for the Spec C sales at issue by failing to take into account all the information that was properly before it. In light of our finding of WTO-inconsistency, we do not consider it necessary to rule upon Korea's claim under paragraph 7 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us.

7.3.2.4 Korea's claims under Articles 1, 9.3, and 18.1 of the Anti-Dumping Agreement

7.187. Korea further claims that the USDOC's use of facts available inconsistently with Article 6.8 and Annex II of the Anti-Dumping Agreement "led to an anti-dumping duty that was imposed and collected in excess of the margins of dumping in violation of Articles 1, 9.3, and 18.1 of the Anti-Dumping Agreement".[576] According to Korea, because the margin of dumping was determined based on facts available in a manner inconsistent with Article 6.8 and Annex II, "the imposition of duties at the level of the margin of dumping automatically violated Article 9.3".[577] Moreover, Korea asserts that the violation of Article 6.8 and Annex II also "automatically leads" to a violation of Articles 1 and 18.1 of the Anti-Dumping Agreement, as "this USDOC investigation and the measure taken were not in accordance with the Anti-Dumping Agreement".[578]

7.188. The United States responds that Korea's claims under Articles 1, 9.3, and 18.1 are "entirely consequential" and "Korea offers no argument or evidence to support any independent breach of

[570] Korea's first written submission, para. 326.
[571] See para. 7.36 above.
[572] CRS issues and decision memorandum, (Exhibit KOR-41), p. 63; CRS final calculation memo, (Exhibit KOR-49 (BCI)), p. 6.
[573] Korea's response to Panel question No. 16(f), p. 19 (referring to CRS final redetermination, (Exhibit KOR-227 (BCI)), pp. 6-7).
[574] CRS issues and decision memorandum, (Exhibit KOR-41), p. 63.
[575] See para. 7.35 above. See also Panel Report, *China – GOES*, para. 7.302.
[576] Korea's first written submission, para. 334.
[577] Korea's first written submission, paras. 331-332.
[578] Korea's first written submission, para. 333.

those provisions".[579] According to the United States, were the Panel to uphold Korea's claims under Article 6.8 and Annex II, "there would be no basis to decide Korea's consequential claims".[580] First, the United States "does not concede that such breaches are 'automatic'".[581] Second, the United States submits that deciding such claims would be serve "no useful purpose" and would provide no "additional guidance that would be useful regarding implementation of any recommendations adopted by the DSB".[582]

7.189. Korea does not present any independent bases for the alleged breaches of Articles 1, 9.3, and 18.1 of the Anti-Dumping Agreement; instead, its claims under these provisions are dependent entirely upon a finding that the United States acted inconsistently with Article 6.8 and Annex II of the Anti-Dumping Agreement.[583] In these circumstances – and having already found that the United States acted inconsistently with Article 6.8 and paragraph 3 of Annex II – we do not consider it necessary to rule upon Korea's claims under Articles 1, 9.3, and 18.1 of the Anti-Dumping Agreement in order to resolve the dispute before us.[584]

7.3.3 Anti-dumping duties on certain hot-rolled steel flat products from Korea (USDOC investigation number A-580-883)

7.3.3.1 Introduction

7.190. Korea claims that the United States acted inconsistently with Article 6.8 and Annex II to the Anti-Dumping Agreement in the investigation concerning certain hot-rolled steel (HRS) flat products from Korea (the "HRS AD investigation").[585] Similar to its claims concerning affiliated party transactions in the CRS AD investigation, Korea challenges the USDOC's use of facts available due to the alleged failure of Hyundai Steel to demonstrate the arm's-length nature of certain services provided by its affiliates [[***]] and [[***]].[586] Korea asserts that the USDOC's improper use of "partial AFA" resulted in a dumping margin in the final determination, which was more than double the dumping margin in the preliminary determination – an increase from 3.97% to 9.49% – and demonstrates the "punitive" nature of the USDOC's selection of the replacement facts.[587]

7.191. We begin by setting out the relevant factual background of the underlying investigation. Subsequently, we summarize the parties' arguments before examining Korea's claims of WTO-inconsistency in respect of the USDOC's resort to and selection of the replacement facts.

7.3.3.2 Factual background

7.192. The USDOC in its initial questionnaire requested Hyundai Steel to "[p]repare only a single response for [itself and its] *affiliates* involved with the production or sale of the products under investigation during the *period of investigation (POI)* in the foreign market or the United States".[588] In response, Hyundai Steel responded that it was affiliated to [[***]], based on their common membership of the Hyundai Motor Group.[589] Hyundai Steel also identified [[***]], as a company "[[***]]".[590]

7.193. In response to Section B of the initial questionnaire, Hyundai Steel reported certain movement expenses for its home market sales. With respect to inland freight to warehouse, Hyundai Steel stated that during the POI it used [[***]] for these services, and provided a sample calculation worksheet for the reported costs.[591] Regarding warehousing services, Hyundai Steel noted that it

[579] United States' first written submission, para. 356.
[580] United States' first written submission, para. 358.
[581] United States' first written submission, para. 358.
[582] United States' first written submission, paras. 358-359.
[583] Korea's first written submission, paras. 332-333.
[584] See, e.g. Panel Reports, *US – Differential Pricing Methodology*, paras. 7.114-7.115; *Argentina – Poultry Anti-Dumping Duties*, para. 7.369; *US – Steel Plate*, para. 7.103; and *EU – Footwear (China)*, para. 7.935.
[585] Korea's first written submission, para. 458.
[586] Korea's first written submission, paras. 467-469.
[587] Korea's first written submission, para. 517.
[588] HRS initial questionnaire, (Exhibit KOR-58 (BCI)), p. G-10. (emphasis original)
[589] HRS Section A questionnaire response, (Exhibit KOR-55 (BCI)), p. A-11.
[590] HRS Section A questionnaire response, (Exhibit KOR-55 (BCI)), p. A-14.
[591] HRS Sections B-C questionnaire response, (Exhibit KOR-56 (BCI)), p. B-29.

received services mostly from its affiliate [[***]], except for certain HRS products ("PO products"), for which it also transacted with an unaffiliated supplier ([[***]]).[592] Hyundai Steel submitted copies of contracts with this unaffiliated supplier and with its affiliated supplier, alleging that warehousing transactions with [[***]] were at arm's length.[593] With respect to inland freight to customer, Hyundai Steel stated that it does not use unaffiliated freight companies for similar services, and was therefore unable to provide comparable prices from unaffiliated vendors "for comparison".[594] Hyundai Steel provided a calculation of its expenses and a copy of its freight contract with [[***]] supporting the per unit expense amount[595], along with an excerpt from [[***]] financial statement, allegedly demonstrating that [[***]] earned profit during the POI, and therefore that it engaged in arm's-length transactions with Hyundai Steel.[596]

7.194. In response to Section C of the initial questionnaire concerning sales to the United States, Hyundai Steel stated that [[***]] also provided domestic freight services from plant/warehouse to port.[597] Hyundai Steel explained that these transactions were at arm's length due to [[***]] operating profits for inland freight services that were discussed under its Section B response.[598] With respect to international freight, Hyundai Steel stated that "[d]uring the POI, [[***]] provided all shipping services for subject merchandise".[599] Regarding marine insurance, it submitted a sample calculation worksheet for the related costs, along with certain invoices.[600]

7.195. In its supplemental questionnaire dated 23 December 2015, the USDOC noted that the net profit information provided for [[***]] in the initial response did not show that [[***]] earned a profit from its freight and warehousing services, or from non-operating income, and asked Hyundai Steel to demonstrate that the freight and warehousing rates charged by [[***]] were at arm's length.[601] Hyundai Steel provided a "representative sample" of [[***]] freight contracts with one of its unaffiliated subcontractors, [[***]][602], which also included warehousing services.[603] For Hyundai Steel, a comparison between the [[***]]-[[***]] contract and the Hyundai Steel-[[***]] contract[604] demonstrated that [[***]] charged Hyundai Steel higher prices than the amount [[***]] paid to its subcontractor, thus indicating that these services were negotiated at an arm's-length basis.[605] Regarding international freight expenses for US sales, the USDOC requested Hyundai Steel to provide "copies of: (a) the ocean freight contract between Hyundai Steel and [[***]], and (b) international freight contracts between [[***]] and the provider of the ocean freight services".[606] Hyundai Steel submitted its contract with [[***]] and a contract between [[***]] and its subcontractor [[***]], allegedly demonstrating that [[***]] made a profit on the services it provided to Hyundai Steel.[607]

7.196. At verification, as part of its "completeness test"[608], the USDOC requested comparative inland and ocean freight charge information between [[***]] and other unaffiliated parties in order to verify the arm's-length nature of transactions between the two affiliated companies. The USDOC recalled that "[[***]]'s two largest shareholders are [[***]], and are also the part owner and

[592] HRS Sections B-C questionnaire response, (Exhibit KOR-56 (BCI)), p. B-30.
[593] HRS Sections B-C questionnaire response, (Exhibit KOR-56 (BCI)), p. B-30 and exhibit B-14.
[594] HRS Sections B-C questionnaire response, (Exhibit KOR-56 (BCI)), p. B-31.
[595] HRS Sections B-C questionnaire response, (Exhibit KOR-56 (BCI)), exhibits B-14 and B-16.
[596] HRS Sections B-C questionnaire response, (Exhibit KOR-56 (BCI)), pp. B-28-B-31 and exhibit B-17.
[597] HRS Sections B-C questionnaire response, (Exhibit KOR-56 (BCI)), p. C-28.
[598] HRS Sections B-C questionnaire response, (Exhibit KOR-56 (BCI)), p. C-28.
[599] HRS Sections B-C questionnaire response, (Exhibit KOR-56 (BCI)), p. C-30.
[600] HRS Sections B-C questionnaire response, (Exhibit KOR-56 (BCI)), p. C-30 and exhibit C-14.
[601] HRS supplemental Sections A-C questionnaire, (Exhibit USA-20 (BCI)), pp. 16-17.
[602] HRS supplemental Sections A-C questionnaire response, (Exhibit KOR-59 (BCI)), pp. 31, 33, and 45 and exhibit S-38.
[603] HRS supplemental Sections A-C questionnaire response, (Exhibit KOR-59 (BCI)), p. 32.
[604] HRS Sections B-C questionnaire response, (Exhibit KOR-56 (BCI)), exhibit B-16.
[605] HRS supplemental Sections A-C questionnaire response, (Exhibit KOR-59 (BCI)), pp. 31-33 and 46 and exhibit S-38.
[606] HRS supplemental Sections A-C questionnaire, (Exhibit USA-20 (BCI)), p. 25.
[607] HRS supplemental Sections A-C questionnaire response, (Exhibit KOR-59 (BCI)), p. 48 and exhibits S-59-S-60.
[608] The USDOC describes "completeness" as "the process which confirms the accuracy and thoroughness of reported sales and expenses", and among the sales items selected were the ocean freight for US sales and the inland freight for home market sales performed by [[***]], and the marine insurance services provided by [[***]]. (HRS verification report, (Exhibit KOR-57 (BCI)), pp. 14-15).

Vice Chairman of Hyundai Steel, respectively".[609] Hyundai Steel maintained that it could not "compel" [[***]] to provide this data "despite the ownership, managerial, and familial affiliations between the two companies".[610] Hyundai Steel provided a similar response to the USDOC's request for comparative marine insurance rates between its affiliate, [[***]], and other unaffiliated parties.[611] Hyundai Steel provided instead an invoice from an unaffiliated marine insurance supplier, [[***]], arguing that the rate charged by the unaffiliated supplier was lower than that of [[***]].[612]

7.197. The USDOC issued its final determination on 12 August 2016[613], wherein it focused on the issue of the affiliation between Hyundai Steel and the two companies and found that Hyundai Steel and the two companies were "held and commonly controlled by the same family members during the POI".[614] It also found that "Hyundai Steel failed the completeness portion at verification with regard to this issue, i.e., failed to demonstrate the arm's-length nature of these services provided by the affiliated companies". The USDOC thus considered information concerning these transactions as "necessary information" that was "not on the record due to Hyundai Steel's failure to provide it", and on this basis decided to rely on facts available.[615] The USDOC also decided to apply facts available with an "adverse inference" due to Hyundai Steel's failure to cooperate by not acting to the best of its ability.[616] For its final determination, the USDOC selected replacement facts for home market inland freight and warehousing by applying the lowest reported values, and for marine insurance, international freight, and inland freight for US sales by applying the highest reported values.[617]

7.3.3.3 Main arguments of the parties

7.198. Korea claims that the USDOC resorted to the use of facts available inconsistently with Article 6.8 of the Anti-Dumping Agreement because there was no "necessary" information that was missing[618], and because Hyundai Steel did not "significantly impede[]" the investigation.[619] Korea argues that no "necessary" information was missing as Hyundai Steel provided all requested sales and cost information about its affiliated service providers in an accurate and timely manner, and that the USDOC did not find any deficiencies with respect to this information during verification.[620] Korea contends that the USDOC, in Section D of its initial questionnaire, directed Hyundai Steel to demonstrate the arm's-length nature of its affiliated transactions based on three types of information, requested in the alternative, and that Hyundai Steel responded in light of these instructions.[621] Korea argues that the information regarding sales of Hyundai Steel's affiliates to unaffiliated customers was not "necessary" and was never requested prior to verification.[622] Korea also notes that, prior to verification, the USDOC focused properly on the nature of the actual transactions between Hyundai Steel and its affiliates.[623] Korea argues that Hyundai Steel did not "significantly impede" the investigation as the USDOC's request for information was "unreasonable" and was tantamount to a surprise and extensive request for information at the last minute.[624] Korea states that Hyundai Steel could not have been held responsible for not providing information that

[609] HRS verification report, (Exhibit KOR-57 (BCI)), p. 14.
[610] HRS verification report, (Exhibit KOR-57 (BCI)), p. 14.
[611] HRS verification report, (Exhibit KOR-57 (BCI)), p. 15.
[612] HRS verification report, (Exhibit KOR-57 (BCI)), pp. 14-15 and exhibit HS-36. See also HRS case brief, (Exhibit KOR-65 (BCI)), pp. 9-10.
[613] HRS AD final determination, (Exhibit KOR-53). The underlying issues and decision memorandum was issued on 4 August 2016. (HRS issues and decision memorandum, (Exhibit KOR-67)).
[614] HRS issues and decision memorandum, (Exhibit KOR-67), p. 19.
[615] HRS issues and decision memorandum, (Exhibit KOR-67), p. 19.
[616] HRS issues and decision memorandum, (Exhibit KOR-67), p. 19.
[617] HRS issues and decision memorandum, (Exhibit KOR-67), pp. 19-20.
[618] Korea's first written submission, para. 487.
[619] Korea's first written submission, para. 491.
[620] Korea's first written submission, paras. 487-488. Specifically, Korea asserts that it provided the following information to demonstrate the arm's-length nature of transactions: (a) for inland freight and warehousing, it showed that [[***]] passed on the full costs, plus an amount to cover expenses and profit, to Hyundai Steel; (b) for ocean freight, it demonstrated that the charges by [[***]] were comparable to those charged by an unaffiliated carrier; and (c) for marine insurance, it offered evidence indicating that the premium rate charged by [[***]] was higher than the rate charged by an unaffiliated provider. (Ibid. para. 487).
[621] Korea's first written submission, paras. 470-471 and 480 (referring to HRS initial questionnaire, (Exhibit KOR-58 (BCI)), pp. D-4-D-5).
[622] Korea's first written submission, para. 489.
[623] Korea's first written submission, para. 489.
[624] Korea's first written submission, paras. 491-493.

was not within its control, and since the requested information was held by a legally separate – albeit affiliated – company, Hyundai Steel could not be considered to have significantly impeded the investigation.[625] Korea points out that, had Hyundai Steel's affiliates provided the requested information, they could have been exposed to various legal liabilities, such as those for breach of a duty of confidentiality.[626]

7.199. Korea further claims that the USDOC acted inconsistently with paragraph 1 of Annex II because it failed to specify in detail the required information as soon as possible after the initiation of the investigation.[627] Korea contends that, at verification, the USDOC "suddenly" requested certain information that was not within Hyundai Steel's control.[628] In addition, Korea claims that the USDOC acted inconsistently with paragraph 6 of Annex II because it rejected the information provided on the arm's-length nature of services without previously informing and giving Hyundai Steel an adequate opportunity to provide further explanations, and without subsequently setting out in its published determination the reasons of rejection of such information.[629]

7.200. Korea also claims that the USDOC acted inconsistently with paragraph 3 of Annex II because the USDOC rejected "all information previously submitted", even though such information was verifiable and substantiated, and was, in fact, actually verified by the USDOC.[630] Finally, Korea claims that the USDOC acted inconsistently with paragraph 5 of Annex II, as the information provided by Hyundai Steel, even if not ideal in all aspects, was provided by Hyundai Steel acting to the best of its ability.[631]

7.201. As to the selection of the replacement facts, Korea claims that the USDOC acted inconsistently with Article 6.8 and paragraph 7 of Annex II.[632] According to Korea, there was no process of reasoning and evaluation by the USDOC as to how or why the facts employed by the USDOC were reasonable replacements for the missing information.[633] Korea argues that the USDOC failed to exercise "the requisite caution" in selecting facts available.[634] Korea contends that the sole basis for the USDOC's selection of the replacement facts was to ensure "an adverse inference", and that the USDOC simply took the highest and lowest values to increase normal value and reduce the export price, thus ensuring that the dumping margin was the highest that it could be.[635] The selection of facts available was punitive in nature, and was even applied to transactions that the USDOC had verified as being at arm's length.[636] Korea contends that the USDOC failed to corroborate properly the selected information and thus failed to ensure that this information was a reasonable replacement.[637] Korea argues that the USDOC could have sought to fill any supposed gap with specific information, for example, by adjusting all allegedly problematic service values by applying a variance factor to inflate or deflate the transaction values to arm's-length levels.[638]

7.202. The United States responds that the USDOC reasonably determined that it was appropriate to resort to facts available due to Hyundai Steel's failure to provide necessary information despite the USDOC's numerous requests.[639] Acknowledging that Hyundai Steel had provided "some supporting documentation" to demonstrate that transactions with its affiliates were at arm's length[640], the United States argues that the USDOC nonetheless "did not have enough information on the record to establish" the arm's-length nature of the transactions at stake and that Korea has not demonstrated that the requested (missing) information at issue was not "necessary".[641] In addition, the United States argues that Hyundai Steel did not explain its inability to obtain the information the USDOC needed to establish the nature of the transactions between

[625] Korea's second written submission, para. 205.
[626] Korea's second written submission, para. 207.
[627] Korea's first written submission, para. 494.
[628] Korea's first written submission, para. 496.
[629] Korea's first written submission, para. 497.
[630] Korea's first written submission, para. 502.
[631] Korea's first written submission, para. 503.
[632] Korea's first written submission, para. 507.
[633] Korea's first written submission, paras. 507 and 509.
[634] Korea's first written submission, paras. 510-512.
[635] Korea's first written submission, paras. 507 and 509.
[636] Korea's first written submission, paras. 513 and 516.
[637] Korea's first written submission, para. 515.
[638] Korea's first written submission, para. 516.
[639] United States' first written submission, para. 146.
[640] United States' first written submission, para. 139.
[641] United States' first written submission, para. 150.

Hyundai Steel and [[***]]. According to the United States, the issue is not the legal separation between the two companies, but rather the affiliation deriving from the close relationship between Hyundai Steel's management and [[***]] two largest shareholders, as well as the common membership in a "group".[642] According to the United States, Korea makes a *post hoc* argument when suggesting that Hyundai Steel could not gain access to the requested documents due to confidentiality and fiduciary concerns and [[***]] obligations under Korean law, an argument that was never made by Hyundai Steel before the USDOC.[643]

7.203. The United States further responds that Korea has not demonstrated that the USDOC's resort to facts available is inconsistent with paragraphs 1 and 6 of Annex II. According to the United States, the USDOC notified Hyundai Steel early on in the investigation that information relating to Hyundai Steel's transactions with its affiliates would be requested and made an additional request when it determined that it needed further information to evaluate the nature of these transactions.[644] The United States alleges that the number of times that Hyundai Steel was asked to provide information on its transactions with its affiliates is not compatible with Korea's claim that Hyundai Steel was not informed as soon as possible for the required information and was not allowed a reasonable period of time to respond to these requests.[645]

7.204. With respect to Korea's claim under paragraph 3 of Annex II, the United States responds that because Hyundai Steel failed to provide the requested documents, the USDOC did not have the opportunity to examine the accuracy and reliability of the information already submitted and verify whether the affiliated parties' transactions were at arm's length.[646] In addition, the United States argues that since the information submitted by Hyundai Steel did not satisfy the conditions of paragraph 3, it falls outside the ambit of paragraph 5, but, in any event, Hyundai Steel did not act to the best of its ability by failing to submit the requested information despite being afforded multiple opportunities.[647]

7.205. Regarding the selection of replacement facts, the United States responds that the USDOC engaged in a careful assessment of the missing necessary information and reasonably decided to rely on Hyundai Steel's own reported data.[648] According to the United States – besides expressing its dissatisfaction with the selected replacements – Korea has not explained why the USDOC's process for selecting the replacement facts is inconsistent with any specific provision of the Anti-Dumping Agreement.[649] The United States explains that the USDOC did not reject all of Hyundai Steel's expense data, but disregarded only certain information relating to Hyundai Steel's affiliated service providers and replaced those missing values with other expense values reported by Hyundai Steel.[650] Korea's characterization of the replacements as arbitrary and punitive is, according to the United States, "meritless".[651] Finally, the United States asserts that Korea's claim that the USDOC did not use special circumspection fails as it does not explain its argument.[652]

7.3.3.4 Evaluation by the Panel

7.3.3.4.1 The USDOC's resort to facts available

7.206. While many aspects of Korea's claims under Article 6.8 and paragraphs 1, 3, 5, and 6 of Annex II of the Anti-Dumping Agreement relating to this investigation are similar to its claims concerning the affiliated-party transactions issue in the CRS AD investigation, the two investigations also differ in important ways. Unlike the CRS AD investigation, where its findings concerned one affiliated company ([[***]]), the USDOC's findings in the HRS AD investigation concern that same company and one other affiliated company, namely, [[***]]. Furthermore, the specific information

[642] United States' first written submission, paras. 156-157.
[643] United States' second written submission, paras. 57-58.
[644] United States' first written submission, paras. 153-154 (referring to HRS supplemental Sections A-C questionnaire, (Exhibit USA-20 (BCI)), pp. 16-17).
[645] United States' first written submission, para. 155.
[646] United States' first written submission, para. 172.
[647] United States' first written submission, para. 176.
[648] United States' first written submission, para. 183.
[649] United States' first written submission, para. 184.
[650] United States' first written submission, para. 187.
[651] United States' first written submission, para. 190.
[652] United States' first written submission, para. 191.

requested by the USDOC, as well as the timing of the USDOC's requests, differ between the two investigations. In accordance with the proper standard of review, these differences require us to examine the WTO-consistency of the USDOC's conduct in light of the specific facts and circumstances of the HRS AD investigation.

7.207. Insofar as Korea alleges that the USDOC's Section D questionnaire provided three alternative ways of establishing the arm's-length nature of the transactions between Hyundai Steel and its affiliates[653], [[***]] and [[***]], the part of the Section D questionnaire that Korea relies upon is expressly limited to the reporting of "*major* inputs purchased from affiliated parties that are used to produce the merchandise under consideration".[654] Korea does not argue that the services supplied by [[***]] and [[***]] constituted "major inputs" for Hyundai Steel's production of HRS. In these circumstances, we find the "guidance"[655] provided by the USDOC as part of its Section D questionnaire to be of limited relevance for Hyundai Steel's reporting of the non-major inputs sourced from the affiliated parties at issue. Accordingly, we examine the questions that were, in fact, posed by the USDOC concerning the arm's-length nature of the services provided by Hyundai Steel's affiliates [[***]] and [[***]].

7.208. In Section A of its initial questionnaire, the USDOC inquired about the corporate and legal structure of "any parent companies and subsidiaries of [the] company and all other persons affiliated with [the] company and provide a description of all such persons".[656] Hyundai Steel in its response identified [[***]] as its affiliate, noting that their [[***]].[657] Hyundai Steel explained that [[***]] "transported finished hot-rolled steel from Hyundai Steel's facilities to domestic customers (for home market sales) and the port (for export sales), and also provided international shipping (including wharfage) for export sales".[658] Hyundai Steel further identified [[***]] as an affiliated provider of marine "[[***]]" "[[***]]".[659] Hyundai Steel described the operational relationship between the members of the Hyundai Motor Group as sharing a single director [[***]], as well as being "common[ly] control[led]" through the Hyundai Motor Group and its chairman, [[***]] (father of [[***]]).[660] [[***]] was also identified as the second largest stockholder of Hyundai Steel (of 11.84%).[661] Hyundai Steel stated that it would "demonstrate in its forthcoming Sections B-C responses that transactions with affiliated service providers are at arm's length".[662]

7.209. Section B of the USDOC's questionnaire concerned "[s]ales in the [h]ome [m]arket or to a [t]hird [c]ountry"[663], while Section C required information concerning "[s]ales to the United States".[664] Under Section B – for home market sales – the USDOC required Hyundai Steel to report certain "movement expenses", including those incurred for "inland freight" from "plant to distribution warehouse"[665], "warehousing"[666], and "inland freight" from "plant/warehouse to customer".[667] The USDOC's instructions required Hyundai Steel to also identify any "affiliations" with the service providers and to "describe the nature of the affiliation".[668]

7.210. Hyundai Steel responded that, for inland freight from plant to warehouse, it used [[***]] "to transport merchandise [i.e. finished coils] to offsite facilities" during the POI.[669] Hyundai Steel stated that it would demonstrate that "the rates paid to this company represent arm's length prices"

[653] Korea's first written submission, paras. 470-471.
[654] HRS initial questionnaire, (Exhibit KOR-58 (BCI)), p. D-4 (emphasis original). The USDOC's questionnaire defines a "major input" as "an essential component of the finished merchandise which accounts for a significant percentage of the total cost of manufacturing incurred to produce one unit of the merchandise under consideration". (Ibid.).
[655] Korea's first written submission, para. 471.
[656] HRS initial questionnaire, (Exhibit KOR-58 (BCI)), p. A-4.
[657] HRS Section A questionnaire response, (Exhibit KOR-55 (BCI)), p. A-11.
[658] HRS Section A questionnaire response, (Exhibit KOR-55 (BCI)), p. A-11. See also HRS Sections B-C questionnaire response, (Exhibit KOR-56 (BCI)), pp. B-29-B-30.
[659] HRS Section A questionnaire response, (Exhibit KOR-55 (BCI)), p. A-14.
[660] HRS Section A questionnaire response, (Exhibit KOR-55 (BCI)), p. A-10.
[661] HRS Section A questionnaire response, (Exhibit KOR-55 (BCI)), exhibit A-8.
[662] HRS Section A questionnaire response, (Exhibit KOR-55 (BCI)), p. A-11.
[663] HRS Sections B-C questionnaire response, (Exhibit KOR-56 (BCI)), Section B.
[664] HRS Sections B-C questionnaire response, (Exhibit KOR-56 (BCI)), Section C.
[665] HRS Sections B-C questionnaire response, (Exhibit KOR-56 (BCI)), p. B-28.
[666] HRS Sections B-C questionnaire response, (Exhibit KOR-56 (BCI)), p. B-29.
[667] HRS Sections B-C questionnaire response, (Exhibit KOR-56 (BCI)), p. B-30.
[668] HRS Sections B-C questionnaire response, (Exhibit KOR-56 (BCI)), pp. B-29-B-30.
[669] HRS Sections B-C questionnaire response, (Exhibit KOR-56 (BCI)), p. B-29.

as part of its response concerning "inland freight to the customer".[670] Hyundai Steel also provided a sample calculation worksheet for the reported costs.[671] Regarding warehousing services, Hyundai Steel responded that "in some instances" it "used offsite warehouse facilities close to its factory to temporarily store finished subject products prior to shipment to the final customer".[672] Hyundai Steel noted that the calculation worksheet submitted for inland freight to warehouse also showed the warehousing expenses calculation, since the two services were grouped in the same contract with [[***]].[673] Providing "a list of the off-site warehousing locations", Hyundai Steel explained:

> Hyundai Steel uses different warehousing services for PO products versus all other HR products. Hyundai Steel warehouses PO products at several warehouses, including a warehouse located in [[***]], which is managed by an unaffiliated provider, [[***]]. Hyundai Steel provides a copy of its contract with this unaffiliated provider in Exhibit B-14 Hyundai Steel directly transacts with the unaffiliated service provider for these services. For all other HR products, Hyundai Steel uses warehousing locations are owned by unaffiliated parties, but the warehousing services at most of these facilities are provided by [[***]] and Hyundai Steel pays [[***]] for these warehousing services. [[***]] contracts with the unaffiliated warehouse providers and in turn pays them for warehousing. As described below, Hyundai Steel believes its transactions with this company reflect arm's length prices.[674]

Hyundai Steel referred again to its response allegedly demonstrating that the "inland freight to the customer" prices paid to [[***]] were at arm's length, and submitted a copy of Hyundai Steel's warehousing contracts with affiliated and unaffiliated providers for HR products (including PO products).[675]

7.211. Finally, for inland freight from plant/warehouse to customer, Hyundai Steel explained that it used its affiliate [[***]] to transport merchandise to the customer.[676] Hyundai Steel provided "a sample calculation worksheet", and "a copy of its freight contract with [[***]] to support the per-unit expense amount associated with the shipment".[677] As it did not use unaffiliated freight companies for similar services, Hyundai Steel was "unable to provide comparable prices from unaffiliated vendors for comparison".[678] Thus, in order to establish the arm's-length nature of the transactions between Hyundai Steel and its affiliate [[***]], Hyundai Steel provided "an excerpt from the provider's financial statements demonstrating that the company earned a profit during the POI".[679] "[B]ecause this company earned a profit during the POI", Hyundai Steel considered that "these transactions reflect arm's length prices".[680]

7.212. Under Section C – for sales to the United States – the USDOC required Hyundai Steel to report the expenses incurred for inland freight for sales to the United States[681], international freight[682], and marine insurance.[683] For inland and international freight, the USDOC also asked Hyundai Steel to indicate and describe any affiliation.[684] In response, Hyundai Steel stated that for domestic freight to port for sales to the United States during the POI it "transported merchandise by truck using an affiliated general logistics company, [[***]], which is the same company it used for domestic sales".[685] Hyundai Steel submitted a sample calculation worksheet for these expenses and referred to its reporting under Section B for inland freight expenses as establishing that [[***]] "provided such services at arm's length".[686] Additionally, Hyundai Steel also reported international

[670] HRS Sections B-C questionnaire response, (Exhibit KOR-56 (BCI)), p. B-29.
[671] HRS Sections B-C questionnaire response, (Exhibit KOR-56 (BCI)), p. B-29.
[672] HRS Sections B-C questionnaire response, (Exhibit KOR-56 (BCI)), p. B-29.
[673] HRS Sections B-C questionnaire response, (Exhibit KOR-56 (BCI)), p. B-29.
[674] HRS Sections B-C questionnaire response, (Exhibit KOR-56 (BCI)), p. B-30.
[675] HRS Sections B-C questionnaire response, (Exhibit KOR-56 (BCI)), p. B-30 and exhibit B-14.
[676] HRS Sections B-C questionnaire response, (Exhibit KOR-56 (BCI)), p. B-31.
[677] HRS Sections B-C questionnaire response, (Exhibit KOR-56 (BCI)), p. B-31.
[678] HRS Sections B-C questionnaire response, (Exhibit KOR-56 (BCI)), p. B-31.
[679] HRS Sections B-C questionnaire response, (Exhibit KOR-56 (BCI)), p. B-31.
[680] HRS Sections B-C questionnaire response, (Exhibit KOR-56 (BCI)), p. B-31.
[681] HRS Sections B-C questionnaire response, (Exhibit KOR-56 (BCI)), p. C-28.
[682] HRS Sections B-C questionnaire response, (Exhibit KOR-56 (BCI)), p. C-30.
[683] HRS Sections B-C questionnaire response, (Exhibit KOR-56 (BCI)), p. C-30.
[684] HRS Sections B-C questionnaire response, (Exhibit KOR-56 (BCI)), pp. C-28 and C-30.
[685] HRS Sections B-C questionnaire response, (Exhibit KOR-56 (BCI)), p. C-28.
[686] HRS Sections B-C questionnaire response, (Exhibit KOR-56 (BCI)), p. C-28.

freight expenses "from the port of exit in Korea to the U.S. port of entry" and stated that "[d]uring the POI, [[***]] provided all shipping services for subject merchandise".[687] Hyundai Steel explained that freight fees were determined through negotiation with the shipping provider, and provided a sample cost calculation worksheet along with certain invoices.[688] Finally, regarding marine insurance, Hyundai Steel submitted a sample calculation worksheet for the related costs, along with certain invoices, without specifying whether it maintained other providers apart from [[***]].[689] Unlike the other expenses, for marine insurance, the USDOC did not request an indication of any affiliation, and Hyundai Steel did not address the nature of its affiliation.

7.213. In sum, the USDOC's initial Sections B-C questionnaire required Hyundai Steel to identify and describe its affiliations, but it did not seek any specific information concerning the arm's-length nature of the transactions. In response, Hyundai Steel provided several pieces of information concerning its transactions with [[***]]. First, Hyundai Steel stated that it did not engage in transactions with unaffiliated suppliers for these services, and thus was unable to provide comparative information of prices paid to such providers. Instead, it submitted excerpts from [[***]] financial statements, demonstrating that the company earned a profit during the POI. According to Hyundai Steel, this indicated that its transactions with [[***]] were at arm's length. Second, in addition to its contract with [[***]] that provided warehousing services for home market sales at most of its facilities, Hyundai Steel submitted a contract with an unaffiliated provider ([[***]]) that provided warehousing service at one warehousing location ([[***]]).

7.214. In its supplemental Sections A-C questionnaire, the USDOC observed that "[t]he net profit information provided for [[***]] does not show that [[***]] earned a profit from [these] services, or from non-operating income" and asked Hyundai Steel to demonstrate that its inland freight and its warehousing expenses were at arm's length.[690] For home market inland freight (to warehouse and to customer), warehousing and inland freight for US sales, the USDOC requested "copies of all [] contracts with [[***]] and all unaffiliated freight providers that cover the full POI".[691] For international freight, the USDOC stated that Hyundai Steel had not demonstrated that the related expenses were at arm's length, and thus requested "copies of: (1) the ocean freight contract between Hyundai Steel and [[***]], and (2) international freight contracts between [[***]] and the provider of the ocean freight services", and requested Hyundai Steel to "demonstrate that [[***]] direct costs, overhead, general, administrative and selling expenses and interest expenses are fully covered by the differential between the two contract values".[692] With respect to *marine insurance*, the USDOC does not appear to have questioned the arm's-length nature of transactions at this stage.[693]

7.215. Responding to the USDOC's supplemental queries, Hyundai Steel explained that, for inland freight and warehousing for home market sales, [[***]] maintained almost 40 contracts with its (unaffiliated) subcontractors, and provided – as a "representative sample" – [[***]] contracts with [[***]] covering all of these services.[694] Hyundai Steel argued that a comparison between the [[***]]-[[***]] contract and the Hyundai Steel-[[***]] contract submitted in its initial response[695] would demonstrate that [[***]] had charged Hyundai Steel higher fees than it paid to its unaffiliated subcontractor.[696] According to Hyundai Steel, these materials demonstrated that [[***]] earned a profit from the services provided to Hyundai Steel and thus these services were negotiated on an arm's-length basis.[697]

7.216. With respect to inland freight for products destined to the United States, Hyundai Steel noted that [[***]] maintained over 30 subcontractors, and referred to the home market inland freight

[687] HRS Sections B-C questionnaire response, (Exhibit KOR-56 (BCI)), p. C-30.
[688] HRS Sections B-C questionnaire response, (Exhibit KOR-56 (BCI)), p. C-30 and exhibit C-13.
[689] HRS Sections B-C questionnaire response, (Exhibit KOR-56 (BCI)), p. C-30 and exhibit C-14.
[690] HRS supplemental Sections A-C questionnaire, (Exhibit USA-20 (BCI)), pp. 16-17 and 24.
[691] HRS supplemental Sections A-C questionnaire, (Exhibit USA-20 (BCI)), pp. 16-17 and 23.
[692] HRS supplemental Sections A-C questionnaire, (Exhibit USA-20 (BCI)), p. 25.
[693] HRS supplemental Sections A-C questionnaire response, (Exhibit KOR-59 (BCI)), p. 48.
[694] HRS supplemental Sections A-C questionnaire response, (Exhibit KOR-59 (BCI)), p. 31.
[695] HRS Sections B-C questionnaire response, (Exhibit KOR-56 (BCI)), exhibit B-16.
[696] HRS supplemental Sections A-C questionnaire response, (Exhibit KOR-59 (BCI)), pp. 31-32 and exhibit S-38.
[697] HRS supplemental Sections A-C questionnaire response, (Exhibit KOR-59 (BCI)), pp. 32-33.

contracts with [[***]] as a representative sample.[698] Hyundai Steel asserted that these contracts, in conjunction with a "worksheet comparing the freight charged by [[***]] and the freight charged by [[***]] subcontractor, [[***]]", demonstrated that the delivery rates charged by [[***]] were arm's-length prices.[699] According to Hyundai Steel, "[[***]] profit rate in relation to the transportation of the subject merchandise was approximately [[***]] percent".[700] Finally, regarding international freight expenses for US sales, Hyundai Steel submitted its contract with [[***]] and a contract between [[***]] and its subcontractor [[***]], as well as invoices for the respective transactions, allegedly demonstrating that [[***]] made a profit on the services it provided to Hyundai Steel.[701]

7.217. Based on the USDOC's supplemental Sections A-C questionnaire and Hyundai Steel's response thereto, we observe, first, that the USDOC addressed the deficiencies in the financial statements of [[***]] that Hyundai Steel supplied as part of its initial Section B response for purposes of establishing the arm's-length nature of the transactions with its affiliate.[702] Having identified these deficiencies, the USDOC sought several other pieces of information from Hyundai Steel for ascertaining its relationship with [[***]]. Second, for international freight, the USDOC expressly requested copies of contracts between Hyundai Steel and [[***]], on the one hand, and between [[***]] and the "provider of the ocean freight services", i.e. [[***]]subcontractor[703], on the other hand, and required Hyundai Steel to demonstrate that [[***]] various costs were "fully covered by the differential between the two contract values".[704] In response, Hyundai Steel submitted its contract with [[***]] and a contract between [[***]] and its subcontractor [[***]].[705] The express request for [[***]] contracts with its subcontractors suggests that the USDOC considered such information to be germane to the issue of determining the arm's-length nature of the relationship between Hyundai Steel and [[***]]. Third, for inland freight, Hyundai Steel provided a worksheet comparing the inland freight charged by [[***]] and the freight charged by [[***]] subcontractor, [[***]], that, together with the contracts, allegedly demonstrated that that the rates charged by [[***]] represented arm's-length prices.[706]

7.218. The United States argues that the supplemental A-C questionnaire also marks the "first time" that the "USDOC … asked Hyundai Steel to submit copies of [[***]] contracts with unaffiliated customers … in … Question 83".[707] The relevant part of that question, however, requested Hyundai Steel to provide "copies of all freight contracts with [[***]] and *all unaffiliated freight providers* that cover the full POI".[708] Thus, the question was posed with respect to contracts between Hyundai Steel and "all" of its "unaffiliated freight providers".[709] Contrary to the argument of the United States, we find nothing in the USDOC's supplemental questionnaire suggesting that it sought [[***]] contracts with its "*unaffiliated customers*" at this stage.

7.219. The USDOC did not pose any further queries with respect to Hyundai Steel's responses until verification[710], when the USDOC undertook a "completeness test" for the arm's-length nature of the transactions between Hyundai Steel and its affiliates. To verify that the ocean and inland freight services were provided on arm's-length basis by [[***]], the USDOC requested "that Hyundai Steel

[698] HRS supplemental Sections A-C questionnaire response, (Exhibit KOR-59 (BCI)), p. 45 and exhibit S-38.
[699] HRS supplemental Sections A-C questionnaire response, (Exhibit KOR-59 (BCI)), p. 46 and exhibit S-56.
[700] HRS supplemental Sections A-C questionnaire response, (Exhibit KOR-59 (BCI)), p. 47 and exhibit S-56.
[701] HRS supplemental Sections A-C questionnaire response, (Exhibit KOR-59 (BCI)), p. 48 and exhibits S-59-S-60.
[702] HRS supplemental Sections A-C questionnaire, (Exhibit USA-20 (BCI)), pp. 16-17 and 24.
[703] HRS supplemental Sections A-C questionnaire, (Exhibit USA-20 (BCI)), p. 25.
[704] HRS supplemental Sections A-C questionnaire, (Exhibit USA-20 (BCI)), p. 25.
[705] HRS supplemental Sections A-C questionnaire response, (Exhibit KOR-59 (BCI)), p. 48 and exhibits S-59-S-60.
[706] HRS supplemental Sections A-C questionnaire response, (Exhibit KOR-59 (BCI)), p. 46 and exhibit S-56.
[707] United States' response to Panel question No. 17(b), para. 80.
[708] HRS supplemental Sections A-C questionnaire, (Exhibit USA-20 (BCI)), p. 16. (emphasis added)
[709] As noted above, Hyundai Steel had already clarified in its initial response that it did not maintain any freight contracts with unaffiliated providers during the POI.
[710] We recall that in the CRS AD investigation, the USDOC issued a second supplemental questionnaire in respect of these issues before its verification exercise, wherein it requested copies of [[***]] contracts with all unaffiliated parties for both international and inland freight.

obtain comparative freight charge information between its affiliate, [[***]], and other unaffiliated parties".[711] Officials of Hyundai Steel responded that "such information had been requested during the verification for the cold-rolled investigation, and that, as was the case then, Hyundai Steel could not obtain it".[712] Although it acknowledged the information that Hyundai Steel had already submitted as part of its responses to the first supplemental questionnaire[713], the USDOC did not identify any specific deficiencies in relation to that information, as it had done with the information submitted with the initial questionnaire responses. The USDOC focused instead on Hyundai Steel's failure to submit the specific information requested at verification:

> For inland freight, we observed that Hyundai Steel had previously provided, in Exhibit S-38 of its January 19, 2016, supplemental response, the contract between [[***]] and its freight subcontractor [[***]], and further had provided in Exhibit S-56 of the same submission a chart to show that [[***]] had earned a profit on the inland freight amount it charged Hyundai Steel. For ocean freight, we similarly noted that Hyundai Steel had provided in Exhibit S-59 of its January 19, 2016, supplemental response, the contract between [[***]] and its ocean freight subcontractor [[***]], and further had provided in Exhibit S-60 of the same submission sample invoices from [[***]] to [[***]], and from [[***]] to Hyundai Steel, to show that [[***]] had earned a profit. *However, Hyundai Steel was not able to provide the requested comparative freight charge information between [[***]] and unaffiliated parties.*[714]

7.220. Additionally, at verification, the USDOC requested Hyundai Steel to "obtain comparative marine insurance rate information between its affiliate, [[***]], and other unaffiliated parties".[715] Hyundai Steel responded similarly that it was unable to compel [[***]] to provide this information.[716] Instead, Hyundai Steel submitted its invoice from an unaffiliated marine insurance supplier, [[***]].[717] For Hyundai Steel, a comparison between the marine insurance expenses charged by [[***]] and the unaffiliated provider demonstrated that the transactions with [[***]] were at arm's length.[718]

7.221. Given our finding above that the USDOC did not seek copies of the contracts between [[***]] and unaffiliated customers as part of its initial questionnaire or its supplemental questionnaire, we find that verification marked the first instance when the USDOC specifically requested this information. In particular, for marine insurance, the United States acknowledges that the "first instance that [the] USDOC asked Hyundai Steel to submit copies of contracts that [[***]] had with all unaffiliated customers was during verification".[719]

7.222. Much of the USDOC's analysis of this issue in its final determination concerned why, in light of their affiliation and common control, Hyundai Steel should have been able to provide the contracts between its affiliates and their unaffiliated customers that were requested at verification.[720] The USDOC also found that "Hyundai Steel failed the completeness portion at verification with regard to this issue, i.e., failed to demonstrate the arm's-length nature of these services provided by the affiliated companies".[721] The USDOC thus considered that "necessary information" was "not on the record due to Hyundai Steel's failure to provide it", and on this basis decided to rely on facts available, "with an adverse inference" due to Hyundai Steel's failure to cooperate by not acting to the best of its ability.[722] For its final determination, the USDOC selected for home market inland

[711] HRS verification report, (Exhibit KOR-57 (BCI)), p. 14.
[712] HRS verification report, (Exhibit KOR-57 (BCI)), p. 14.
[713] The USDOC is referring to the responses to the first supplemental questionnaire. (HRS supplemental Sections A-C questionnaire response, (Exhibit KOR-59 (BCI)), p. 46 and exhibits S-38, S-56, and S-59-S-60).
[714] HRS verification report, (Exhibit KOR-57 (BCI)), pp. 14-15. (emphasis added)
[715] HRS verification report, (Exhibit KOR-57 (BCI)), p. 15.
[716] HRS verification report, (Exhibit KOR-57 (BCI)), p. 15.
[717] HRS verification report, (Exhibit KOR-57 (BCI)), pp. 14-15 and exhibit HS-36. See also HRS case brief, (Exhibit KOR-65 (BCI)), pp. 9-10.
[718] HRS verification report, (Exhibit KOR-57 (BCI)), p. 15.
[719] United States' response to Panel question No. 17(c), para. 81.
[720] HRS issues and decision memorandum, (Exhibit KOR-67), p. 19.
[721] HRS issues and decision memorandum, (Exhibit KOR-67), p. 19.
[722] HRS issues and decision memorandum, (Exhibit KOR-67), p. 19.

freight and warehousing the lowest reported values, and for marine insurance, international freight, and inland freight for US sales, the highest reported values.[723]

7.223. Although investigating authorities enjoy a certain discretion in identifying the information they consider "necessary" for purposes of making their determinations, they must, at all times, act consistently with the provisions of Article 6.8 and Annex II in their treatment of such information. In particular, paragraph 1 of Annex II requires investigating authorities to "specify in detail the information required from any interested party", "[a]s soon as possible after the initiation of the investigation". Investigating authorities must "also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available". Paragraph 1 of Annex II serves as an additional "precondition" for an investigating authority's valid resort to "facts available".[724] An investigating authority that does not request information in accordance with paragraph 1 of Annex II cannot fault an interested party for failing to provide "necessary" information for purposes of resorting to facts available.

7.224. Korea argues that "the USDOC *suddenly* requested the contract information *as if that information was essential* to the question of the arm's-length nature of the transactions when it had never been before", thus failing to specify in detail the information "it apparently considered necessary" as soon as possible after the initiation of the investigation, as required by paragraph 1 of Annex II.[725] The United States argues that "following Hyundai [Steel]'s initial response, [the] USDOC determined that it needed further information to evaluate nature of the transaction between Hyundai [Steel] and its affiliated service providers", and notes "[t]he number of times that Hyundai [Steel] was asked to provide information related to the transactions between Hyundai [Steel] and its affiliates".[726]

7.225. The "necessary" information that was found to be missing by the USDOC were copies of contracts between Hyundai Steel's affiliates ([[***]]) and their unaffiliated customers. As we have found above, although the USDOC sought several other pieces of information as part of its supplemental Sections A-C questionnaire, the information concerning the affiliates' contracts with their unaffiliated customers was not specifically requested by the USDOC at any point prior to its verification exercise.

7.226. In these circumstances, we find that the USDOC acted inconsistently with paragraph 1 of Annex II to the Anti-Dumping Agreement by not "specify[ing] in detail" the information concerning the affiliates' contracts with unaffiliated customers "[a]s soon as possible after the initiation". Given that paragraph 1 of Annex II serves as a precondition for an investigating authority's proper resort to facts available under Article 6.8 of the Anti-Dumping Agreement[727], we find that the USDOC also acted inconsistently with that provision in resorting to facts available with respect to Hyundai Steel's reporting of affiliated party transactions. In light of our findings of WTO-inconsistency, we do not consider it necessary to rule upon Korea's claims under paragraphs 3, 5, and 6 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us.[728]

7.3.3.4.2 The USDOC's selection of the replacement facts

7.227. We have already found that the USDOC erred in resorting to facts available with respect to information concerning Hyundai Steel's reporting of affiliated party transactions. In these circumstances, we do not consider that making further findings on Korea's claims concerning the USDOC's selection of the replacement facts on the basis of the record used for the USDOC's WTO-inconsistent findings would assist in providing a positive solution to the dispute before us.[729]

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[723] HRS issues and decision memorandum, (Exhibit KOR-67), pp. 19-20.
[724] Panel Report, *China – GOES*, para. 7.385.
[725] Korea's first written submission, paras. 494-495. (emphasis added)
[726] United States' first written submission, paras. 154-155.
[727] Panel Reports, *China – GOES*, paras. 7.384-7.385 and 7.393-7.394; *US – Steel Plate*, paras. 7.55-7.56. See paras. 7.26. -7.27 above.
[728] See, e.g. Panel Reports, *EC – Salmon (Norway)*, para. 7.387; and *Morocco – Hot-Rolled Steel (Turkey)*, paras. 7.105-7.106.
[729] See, e.g. Panel Reports, *Egypt – Steel Rebar*, para. 7.310; and *Mexico – Anti-Dumping Measures on Rice*, para. 7.200. See also Panel Report, *China – Broiler Products*, para. 7.555.

7.3.3.5 Korea's claims under Articles 1, 9.3, and 18.1 of the Anti-Dumping Agreement

7.228. Korea further claims that the USDOC's use of facts available inconsistently with Article 6.8 and Annex II of the Anti-Dumping Agreement "led to an anti-dumping duty that was imposed and collected in excess of the margins of dumping in violation of Articles 1, 9.3, and 18.1 of the Anti-Dumping Agreement".[730] According to Korea, because the margin of dumping was determined based on facts available in a manner inconsistent with Article 6.8 and Annex II, "the imposition of duties at the level of the margin of dumping automatically violated Article 9.3".[731] Moreover, Korea asserts that the violation of Article 6.8 and Annex II also "automatically leads" to a violation of Articles 1 and 18.1 of the Anti-Dumping Agreement, as "this USDOC investigation and the measure taken were not in accordance with the Anti-Dumping Agreement".[732]

7.229. The United States responds that Korea's claims under Articles 1, 9.3, and 18.1 are "entirely consequential" and "Korea offers no argument or evidence to support any independent breach of those provisions".[733] According to the United States, were the Panel to uphold Korea's claims under Article 6.8 and Annex II, "there would be no basis to decide Korea's consequential claims".[734] First, the United States "does not concede that such breaches are 'automatic'".[735] Second, the United States submits that deciding such claims would be serve "no useful purpose" and would provide no "additional guidance that would be useful regarding implementation of any recommendations adopted by the DSB".[736]

7.230. Korea does not present any independent bases for the alleged breaches of Articles 1, 9.3, and 18.1 of the Anti-Dumping Agreement; instead, its claims under these provisions are dependent entirely upon a finding that the United States acted inconsistently with Article 6.8 and Annex II of the Anti-Dumping Agreement.[737] In these circumstances – and having already found that the United States acted inconsistently with Article 6.8 and paragraph 1 of Annex II – we do not consider it necessary to rule upon Korea's claims under Articles 1, 9.3, and 18.1 in order to resolve the dispute before us.[738]

7.3.4 Countervailing duties on certain cold-rolled steel flat products from Korea (USDOC investigation number C-580-882)

7.3.4.1 Introduction

7.231. Korea claims that the United States acted inconsistently with Article 12.7 of the SCM Agreement in the countervailing duties investigation concerning certain CRS flat products from Korea (the "CRS CVD investigation").[739] Specifically, Korea claims that the USDOC acted inconsistently with Article 12.7 of the SCM Agreement by using facts available in respect of three issues:

a. POSCO's alleged failure to report certain cross-owned affiliate input suppliers ("cross-owned affiliate input suppliers")[740];

b. POSCO's alleged failure to report a facility located in a Free Economic Zone (FEZ) ("POSCO facility in an FEZ")[741]; and

[730] Korea's first written submission, para. 521.
[731] Korea's first written submission, paras. 518-519.
[732] Korea's first written submission, para. 520.
[733] United States' first written submission, para. 356.
[734] United States' first written submission, para. 358.
[735] United States' first written submission, para. 358.
[736] United States' first written submission, paras. 358-359.
[737] Korea's first written submission, paras. 519-520.
[738] See, e.g. Panel Reports, *US – Differential Pricing Methodology*, paras. 7.114-7.115; *Argentina – Poultry Anti-Dumping Duties*, para. 7.369; *US – Steel Plate*, para. 7.103; and *EU – Footwear (China)*, para. 7.935.
[739] Korea's first written submission, para. 335.
[740] Korea's first written submission, paras. 343, 391-401, and 426-429.
[741] Korea's first written submission, paras. 343, 402-413, and 430.

c. POSCO's affiliated trading company, Daewoo International Corporation (DWI)'s alleged failure to provide requested information about the use of Korean Resources Corporation (KORES) loans ("DWI loan data").[742]

7.232. Korea argues that POSCO applied its best efforts to respond to the USDOC's information requests, and did not significantly impede the investigation, or otherwise fail to provide necessary information pertaining to the three issues above.[743] Korea contends that the USDOC failed to use any of the substantiated facts on the record and disregarded all of the verifiable information provided by POSCO.[744] Korea also claims that the USDOC did not corroborate the accuracy and relevance of the "AFA rates" and failed to engage in the required comparative evaluation to determine whether the selected replacements constituted the "best information available".[745]

7.233. We begin by setting out the relevant factual background of the underlying investigation, followed by the parties' arguments. In section 7.3.4.4.1, we address Korea's claims of WTO-inconsistency regarding the USDOC's resort to facts available for each of the three issues identified above. Finally, in section 7.3.4.4.2, we address Korea's claims of WTO-inconsistency regarding the USDOC's selection of the replacement facts for each of the three issues.

7.3.4.2 Factual background

7.3.4.2.1 The USDOC's resort to facts available

7.3.4.2.1.1 Cross-owned affiliate input suppliers

7.234. In its initial questionnaire, the USDOC requested certain information concerning POSCO's cross-owned affiliate input suppliers.[746] POSCO responded that it did "not believe it [had] any affiliates that [met] any of the four cross-ownership criteria as defined [] by the [USDOC]", or that "POSCO or any of its affiliates [were] cross-owned by a third party".[747] In the same questionnaire, the USDOC sought the identity of all affiliated companies and a detailed description of the relationship between POSCO and these companies – requests with which POSCO complied.[748] The USDOC issued a supplemental questionnaire asking POSCO to confirm that no cross-owned affiliates supplied inputs in the production of subject merchandise.[749] POSCO recalled that it had already provided an answer to this question.[750]

7.235. Prior to verification, the USDOC instructed POSCO to "[b]e prepared to demonstrate that none of POSCO's other affiliated companies provided inputs for the production of cold-rolled steel or otherwise would fall under our attribution regulations".[751] During verification, the USDOC asked

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[742] Korea's first written submission, paras. 343, 414-423, and 431.
[743] Korea's first written submission, para. 336.
[744] Korea's first written submission, para. 337.
[745] Korea's first written submission, paras. 338 and 433-450.
[746] CVD CRS affiliated companies response, (Exhibit KOR-73 (BCI)). Section III of the USDOC's questionnaire reads, in relevant part:

> Cross-ownership exists between two companies where one company can use or direct the individual assets of another company in essentially the same ways it can use its own assets. Normally, such a relationship exists between two companies where one company holds, directly or indirectly, a majority voting interest in the other. In addition, if two companies are both cross-owned by a third party, the two companies themselves would be considered cross-owned (for example, cross-ownership exists between two companies owned by the same parent).
> You must provide a complete questionnaire response for those affiliates where "cross-ownership" exists, and one of the following situations exists:
> - the cross-owned company produces the subject merchandise; or
> - the cross-owned company is a holding company or a parent company (with its own operations) of your company; or
> - the cross-owned company supplies an input product to you for production of the downstream product produced by the respondent; or
> - the cross-owned company has received a subsidy and transferred it to your company.

(CVD CRS affiliated companies response, (Exhibit KOR-73 (BCI)), pp. 4-5)
[747] CVD CRS affiliated companies response, (Exhibit KOR-73 (BCI)), p. 5.
[748] CVD CRS affiliated companies response, (Exhibit KOR-73 (BCI)), pp. 3-4 and exhibit 1.
[749] CVD CRS second supplemental questionnaire response, (Exhibit KOR-74 (BCI)), p. 1.
[750] CVD CRS second supplemental questionnaire response, (Exhibit KOR-74 (BCI)), p. 1.
[751] CVD CRS verification report, (Exhibit KOR-75 (BCI)), p. 5.

POSCO to discuss and document (a) the corporate history, ownership, structure, and affiliations; (b) the products produced and exported; and (c) the location of all offices and facilities.[752] The USDOC found that four additional companies listed on POSCO's affiliation chart provided raw material inputs that were used in the production of CRS.[753]

7.236. In its final determination, the USDOC found that "POSCO failed to provide questionnaire responses for certain input suppliers and its statement that no affiliated companies in Korea provided inputs to POSCO's production of subject merchandise was verified to be incorrect".[754] POSCO argued that it was not required to provide questionnaire responses for the affiliated companies, as the input products they supplied were not "primarily dedicated" to the production of CRS.[755]

7.237. The USDOC stated that "[b]ecause POSCO failed to provide responses for cross-owned input suppliers … the [USDOC] was not provided the opportunity to carefully examine the full extent to which POSCO and all of its cross-owned entities, including the aforementioned companies, benefitted from subsidies that are attributed to POSCO".[756] According to the USDOC, the information requested was only provided near the conclusion of the final day of the verification, and therefore it "was unable to verify this information, a document that listed inputs used in the production of cold-rolled and providers of the inputs, due to the untimely nature and large amounts of data required to fully establish the credibility of the submission".[757] The USDOC concluded that POSCO failed to act to the best of its ability because it did not put in "maximum effort" to provide the USDOC with full and complete answers to all inquiries relating to the inputs provided by cross-owned affiliated companies.[758] The USDOC found that "inputs produced by POSCO Chemtech, POSCO P&S, POSCO MTech, and POS-HiMetal [were] primarily dedicated to the production of the downstream product".[759]

7.3.4.2.1.2 POSCO facility in an FEZ

7.238. Companies in a Korean FEZ can be approved to receive tax reduction and exemptions, exemptions and reduction of lease fees, and grants and financial support.[760] The USDOC requested POSCO and DWI provide information concerning subsidies provided to companies in an FEZ.[761] Both companies responded that they had "no facilities located in [an FEZ]" and thus were "not eligible for, and did not receive any tax reductions, exemptions, grants, or financial support under any of the three programs listed" in the USDOC's question.[762] In its preliminary determination, the USDOC found that POSCO and DWI "did not apply for or receive countervailable benefits during the POI" under programmes for subsidies to companies in an FEZ.[763]

7.239. During verification, the USDOC found that the POSCO Global R&D Centre was listed on the official Incheon FEZ government website as being located in the Incheon FEZ.[764] In the final determination, the USDOC explained as follows:

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[752] CVD CRS verification report, (Exhibit KOR-75 (BCI)), p. 5.
[753] CVD CRS issues and decision memorandum, (Exhibit KOR-77), p. 65. The four companies at issue were POSCO Chemtech, POSCO P&S, POSCO M-Tech, and POS-HiMetal. (CVD CRS verification report, (Exhibit KOR-75 (BCI)), pp. 10-14; CVD CRS issues and decision memorandum, (Exhibit KOR-77), p. 65).
[754] CVD CRS issues and decision memorandum, (Exhibit KOR-77), p. 64.
[755] CVD CRS issues and decision memorandum, (Exhibit KOR-77), pp. 58-59 and 64. US law provides that "[i]f there is cross-ownership between an input supplier and a downstream producer, and production of the input product is primarily dedicated to production of the downstream product, the Secretary will attribute subsidies received by the input producer to the combined sales of the input and downstream products produced by both corporations (excluding the sales between the two corporations)". (19 CFR 351.525, (Exhibit KOR-80), Section (b)(6)).
[756] CVD CRS issues and decision memorandum, (Exhibit KOR-77), pp. 64-65.
[757] CVD CRS issues and decision memorandum, (Exhibit KOR-77), pp. 66-67. (fn omitted)
[758] CVD CRS issues and decision memorandum, (Exhibit KOR-77), p. 69.
[759] CVD CRS issues and decision memorandum, (Exhibit KOR-77), p. 69.
[760] CVD CRS issues and decision memorandum, (Exhibit KOR-77), p. 34; GOK initial questionnaire, (Exhibit KOR-84 (BCI)), p. 107.
[761] CVD CRS initial questionnaire response, (Exhibit KOR-70 (BCI)), p. 52. POSCO responded to the USDOC's questionnaires on behalf of itself and DWI. (CVD CRS negative preliminary determination, (Exhibit KOR-87), p. 9).
[762] CVD CRS initial questionnaire response, (Exhibit KOR-70 (BCI)), pp. 52-53.
[763] CVD CRS negative preliminary determination, (Exhibit KOR-87), p. 41.
[764] CVD CRS issues and decision memorandum, (Exhibit KOR-77), pp. 72-73.

> We … asked POSCO officials for any information regarding the purpose and location of the facility, to which they stated that they would attempt to provide further details as they were currently unaware of the facility. Approximately two hours later, POSCO officials presented a map printed from a Korean website that had a hand-drawn border surrounding what they claimed to be the FEZ. The POSCO officials stated that the facility was located outside of the hand-drawn FEZ. To compare, we examined the FEZ map on the official Korean government website and found that the hand-drawn border did not conform to the map on the official government website. As such, we declined to accept the map presented by POSCO officials. We then offered repeatedly to visit the facility as depicted on the Korean government website in order to clarify its location and confirm non-use of the FEZ program, but POSCO officials declined.[765]

The USDOC found that it was unable to confirm POSCO's statement that it had no facilities located in an FEZ, and therefore did not receive any FEZ related benefits, because POSCO provided no information in its questionnaire responses with respect to this facility.[766]

7.240. The USDOC rejected POSCO's argument that the questions regarding the FEZ programme were untimely because they were posed during the DWI verification.[767] The USDOC explained that it had indicated in the verification outline that it was going to verify the "non-use" of the programme.[768] The USDOC also rejected POSCO's claim – based on a statement by the Government of Korea (GOK) that "during the investigation period, none of the respondents received tax reductions or exemptions, lease-fee reductions or exemptions, or grants or financial support due to their location in an FEZ" – that it did not receive any benefits due to its location in an FEZ.[769] The USDOC stated that it was not clear from the GOK statement whether "investigation period" referred to the period of investigation (POI) or the entire 15-year average useful life (AUL) of the "renewable physical asset"[770] and the USDOC, therefore, could not fill the gap in the record.[771] Furthermore, the USDOC disagreed with POSCO that it could not have benefitted from this programme on the basis that it was designated to attract foreign investment. According to the USDOC, certain shareholders of POSCO appeared to be foreign and thus POSCO could have been eligible to receive funding.[772] The USDOC also rejected POSCO's argument that none of the benefits received were related to the sale or production of the subject merchandise and were therefore not attributable to POSCO, because the USDOC was not able to verify the operations of the activities of the POSCO Global R&D Centre.[773] The USDOC concluded as follows:

> Because we are unable to confirm POSCO's statement that it has no facilities located in an FEZ, and, therefore, did not receive benefits under this program, we are relying on adverse facts available to find that this program was used by POSCO.[774]

7.3.4.2.1.3 DWI loan data

7.241. The USDOC requested POSCO and DWI to provide details regarding all assistance received during the POI in the form of "long-term loans" under the KORES and Korea National Oil Corporation (KNOC) programmes.[775] "Long-terms loans" from KORES and KNOC were introduced with the purpose of "enhancing and stabilizing the supply of energy resources in Korea".[776] KNOC is responsible for the development of oil, whereas KORES is responsible for the development of other natural resources.[777] DWI submitted that it had outstanding long-term borrowings from KORES and KNOC during the POI.[778] However, according to DWI, these loans were tied to non-subject

[765] CVD CRS issues and decision memorandum, (Exhibit KOR-77), p. 73.
[766] CVD CRS issues and decision memorandum, (Exhibit KOR-77), p. 73.
[767] CVD CRS issues and decision memorandum, (Exhibit KOR-77), p. 73.
[768] CVD CRS issues and decision memorandum, (Exhibit KOR-77), p. 73.
[769] CVD CRS issues and decision memorandum, (Exhibit KOR-77), pp. 73-74.
[770] See for example, CVD CRS issues and decision memorandum, (Exhibit KOR-77), p. 31.
[771] CVD CRS issues and decision memorandum, (Exhibit KOR-77), p. 74.
[772] CVD CRS issues and decision memorandum, (Exhibit KOR-77), p. 74.
[773] CVD CRS issues and decision memorandum, (Exhibit KOR-77), p. 74.
[774] CVD CRS issues and decision memorandum, (Exhibit KOR-77), p. 73.
[775] CVD CRS initial questionnaire response, (Exhibit KOR-70 (BCI)), p. 33.
[776] CVD CRS negative preliminary determination, (Exhibit KOR-87), p. 23 (referring to GOK initial questionnaire, (Exhibit KOR-84 (BCI)), p. 91).
[777] CVD CRS negative preliminary determination, (Exhibit KOR-87), p. 24.
[778] CVD CRS initial questionnaire response, (Exhibit KOR-70 (BCI)), p. 34.

merchandise and were unrelated to DWI's exports to the United States of subject merchandise produced by POSCO.[779] The USDOC issued a supplemental questionnaire requesting DWI to provide a complete response regarding investments using KORES and KNOC loans.[780] In response, DWI explained that there were two types of loans in the programme, [[***]] and [[***]].[781] DWI reported that it had received KNOC and KORES loans that were [[***]].[782]

7.242. In its preliminary determination, the USDOC found that POSCO maintained loans from KNOC and KORES, while DWI maintained long-term loans from KORES.[783] However, the USDOC explained that its analysis related solely to loans from KORES as information on the record demonstrated that KNOC loans to POSCO were tied to non-subject merchandise.[784] With respect to the KORES loans, the USDOC preliminarily determined that POSCO and DWI received a benefit equal to "the difference between the amount of interest POSCO and DWI paid on the KORES loans and the amount the recipient would pay on a comparable commercial loan" (a calculated subsidy rate of 0.01%).[785]

7.243. During verification, DWI submitted [[***]] under the KORES programme in the form of "[m]inor [c]orrections", that had initially been omitted due to an alleged "clerical mistake".[786] The USDOC found that the [[***]] loans instead constituted an additional [[***]] loans that DWI had initially failed to report.[787] The USDOC rejected the submission of the new loans at verification and explained in its final determination that this was because these loans amounted to "significant additions" and were not "minor corrections":

> As stated in the verification outline, we only accept information at verification as minor corrections that "corroborates, supports, and clarifies" factual information already on the record. Due to the magnitude of change in the reported lending under the specified program, we determined that the submission did not constitute a minor correction, and instead, consisted of new factual information. As such, we rejected the submission from the record. Therefore, because the extensive nature of the corrections presented at verification by DWI to its loans received under this program, we were not able to fully verify the use of this program.[788]

7.244. The USDOC thus concluded that "DWI withheld necessary information requested" by the USDOC regarding the use of this programme and that, as a result, "necessary" information was "missing on the record".[789]

7.3.4.2.2 The USDOC's selection of the replacement facts

7.245. The USDOC found that:

> [T]he application of AFA is warranted with respect to POSCO's responses for its failure to provide information for certain cross-owned affiliated companies, failure to report certain loans, and with respect to … POSCO's … failure to report [its] respective location[] in an FEZ.[790]

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[779] CVD CRS initial questionnaire response, (Exhibit KOR-70 (BCI)), p. 34. In detail, DWI reported that the KNOC loans were related to investments in the exploration and production of natural gas in [[***]], while the KORES loans were related to investments in [[***]].
[780] CVD CRS supplemental questionnaire, (Exhibit KOR-85), p. 4.
[781] CVD CRS second supplemental questionnaire response, (Exhibit KOR-74 (BCI)), exhibit F-11, p. 1. DWI explained that with [[***]], the repayment obligation is subject to the results of the development project. If the project fails, the company will be exempted from all or a portion of the repayment obligation. If the project succeeds, however, a portion of the project income is payable to KORES/KNOC. (Ibid.).
[782] CVD CRS second supplemental questionnaire response, (Exhibit KOR-74 (BCI)), p. 4 and exhibit F-11, pp. 1-2 and exhibit F-12.
[783] CVD CRS negative preliminary determination, (Exhibit KOR-87), p. 24.
[784] CVD CRS negative preliminary determination, (Exhibit KOR-87), p. 24.
[785] CVD CRS negative preliminary determination, (Exhibit KOR-87), p. 24.
[786] CVD CRS DWI verification minor correction, (Exhibit KOR-86 (BCI)).
[787] CVD CRS verification report, (Exhibit KOR-75 (BCI)), pp. 2-3.
[788] CVD CRS issues and decision memorandum, (Exhibit KOR-77), p. 76. (fns omitted)
[788] CVD CRS issues and decision memorandum, (Exhibit KOR-77), p. 76. See also CVD CRS verification report, (Exhibit KOR-75 (BCI)), pp. 2-3.
[789] CVD CRS issues and decision memorandum, (Exhibit KOR-77), p. 76.
[790] CVD CRS issues and decision memorandum, (Exhibit KOR-77), p. 9. (emphasis added)

In drawing an adverse inference, the USDOC determined that POSCO benefitted from all programmes under investigation, excluding programmes that were determined not to be countervailable.[791] The USDOC explained that in selecting an "AFA rate" it was "guided by the … methodology" whereby it uses "the highest calculated program-specific rates determined for a cooperating respondent in the same investigation, or, if not available, rates calculated in prior CVD cases involving the same country".[792]

7.246. When relying on "secondary information", the USDOC explained that "it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal".[793] However, this obligation does not apply when the information relied on for "adverse inferences" is from "the petition, a final determination in the investigation, any previous review … or determination … or any other information placed on the record".[794] Because the USDOC applied subsidy rates calculated in the underlying investigation, or previous investigations involving Korea, the USDOC found that the "corroboration exercise" was "inapplicable".[795] The USDOC calculated a CVD rate of 58.36% for POSCO.[796]

7.3.4.3 Main arguments of the parties

7.3.4.3.1 The USDOC's resort to facts available

7.247. For each of the three issues, Korea claims that the USDOC acted inconsistently with Article 12.7 of the SCM Agreement as the conditions for resort to the use of facts available were not met.[797]

7.3.4.3.1.1 Cross-owned affiliate input suppliers

7.248. Korea argues that POSCO did not refuse access to any information regarding its affiliates as all the information was made available on short notice and could have been verified if necessary.[798] According to Korea, POSCO did not simply make a "belated assertion", as claimed by the USDOC, but it actually provided all the relevant supporting information.[799] Korea argues that POSCO had not previously submitted information on the inputs purchased from its cross-owned affiliates because it had only sourced "minimal trace amounts".[800] Korea argues that this is confirmed by the USDOC's practice, and relevant US law, because "where the input is not primarily dedicated to the production of the downstream product, 'it is not reasonable to assume' that the subsidy to the input supplier was meant to benefit the downstream producer".[801] Noting that the concept of "primarily dedicated" is not defined in US law, Korea refers to prior instances where the USDOC evaluated this standard on the basis, *inter alia*, of "the proportion of the cross-owned affiliates' sales of inputs to the mandatory respondent as a percentage of the cross-owned affiliate's total sales".[802] Korea further asserts that the USDOC's questionnaire asked whether an affiliate supplies inputs *for the production* of cold-rolled products during the POI, and not whether there was *any* input that *could be used* in the production of the product, which was the USDOC's ultimate reason for resorting to facts available.[803] According to Korea, the USDOC did not point to evidence that the inputs at issue were actually used by POSCO in the production of subject merchandise that was exported to the United States, let alone that they were primarily dedicated to the production of the subject merchandise or any intermediate "downstream product".[804]

[791] CVD CRS issues and decision memorandum, (Exhibit KOR-77), pp. 12-13.
[792] CVD CRS issues and decision memorandum, (Exhibit KOR-77), p. 12.
[793] CVD CRS issues and decision memorandum, (Exhibit KOR-77), p. 15.
[794] CVD CRS issues and decision memorandum, (Exhibit KOR-77), p. 15.
[795] CVD CRS issues and decision memorandum, (Exhibit KOR-77), p. 15.
[796] CVD CRS issues and decision memorandum, (Exhibit KOR-77), p. 17.
[797] Korea's first written submission, paras. 390, 391, 402, 414, and 424.
[798] Korea's first written submission, para. 392.
[799] Korea's first written submission, para. 392.
[800] Korea's first written submission, para. 351.
[801] Korea's first written submission, para. 351.
[802] Korea's first written submission, para. 352.
[803] Korea's response to Panel question No. 21. See also Korea's second written submission, para. 149.
[804] Korea's comments on United States' response to Panel question No. 73, p. 67.

7.249. Korea argues that nothing in the record demonstrates that the USDOC considered such information to be "necessary".[805] In any event, Korea argues that the value of POSCO's transactions with these cross-owned affiliates was on the record from POSCO's initial responses, as part of POSCO's consolidated financial statements, and that the requested information was therefore provided "within a reasonable period".[806] Korea contends that, based on the consolidated financial statements, together with the data submitted by POSCO at verification concerning the total value of inputs sources from each affiliate, the USDOC could derive the percentage of the inputs provided to POSCO as a percentage of the affiliates' total sales.[807] According to Korea, the document provided by POSCO during verification formed part of the administrative record, and the USDOC was not permitted to ignore it on the basis that it constituted "new information".[808] Based on the above, Korea argues that the USDOC failed to use timely, appropriately submitted, and verifiable information from POSCO regarding its transactions with the cross-owned affiliates.[809] According to Korea, the USDOC had no factual basis for its determination that the recipient of these inputs, POSCO, benefitted from the subsidies received by its affiliated input suppliers.[810]

7.250. Korea submits that POSCO did not significantly impede the investigation since the inputs provided were negligible, and that there was sufficient information on the record (from the questionnaire responses and from the verification stage) to demonstrate this.[811] According to Korea, POSCO did not fail to act to the best of its ability, and, in fact, it went to extraordinary lengths to obtain the cooperation of its affiliates to engage with the USDOC and obtain information that was requested in the final stages of the investigation, despite being under the reasonable belief that it did not have to report this information.[812]

7.251. The United States responds that POSCO tried to substitute itself for the investigating authority in deciding that the affiliated inputs were not primarily dedicated to downstream products.[813] The USDOC's request was for POSCO to identify the affiliated suppliers, and not to engage in a "primarily dedicated" analysis.[814] The United States argues that POSCO could not itself decide whether the inputs were primarily dedicated, given that the USDOC has never established a "bright line threshold" for such a determination, and points out that Korea does not identify an instance where the USDOC permitted a respondent to make such a determination.[815] Finally, the United States contends that POSCO did not seek guidance to determine whether the information at stake was, in fact, relevant or not.[816]

7.252. The United States disagrees with Korea that all the information was on the record from the early stages of the investigation. Although POSCO listed the four cross-owned affiliates in its affiliation chart, neither that chart nor other information that POSCO provided prior to verification revealed that these companies produced inputs that could be used in the production of CRS.[817] Moreover, the United States submits that the USDOC did not initially focus on the issue of affiliated suppliers because POSCO falsely claimed that no such affiliated suppliers existed.[818] According to the United States, Korea's argument that the USDOC could have confirmed from the information available on the record that only trace amounts were provided by these affiliates, is based on the premise that the USDOC should have known that POSCO's response (that it received no inputs from affiliates) was false.[819] For the United States, these deductions from the available evidence were "neither simple, nor logical", nor based on any requirement in the SCM Agreement.[820] The

[805] Korea's first written submission, para. 396.
[806] Korea's first written submission, para. 394 (referring to CVD CRS initial questionnaire response, (Exhibit KOR-70 (BCI)), exhibit 20). See also Korea's second written submission, para. 154.
[807] Korea's responses to Panel question No. 72(a), paras. 76-77, No. 72(b), paras. 78-79, and No. 72(c), para. 80.
[808] Korea's comments on United States' response to Panel question No. 74(b), p. 70.
[809] Korea's first written submission, para. 429.
[810] Korea's first written submission, para. 428.
[811] Korea's first written submission, para. 397.
[812] Korea's first written submission, para. 399.
[813] United States' second written submission, para. 107.
[814] United States' second written submission, para. 109.
[815] United States' second written submission, para. 110.
[816] United States' second written submission, para. 113.
[817] United States' first written submission, para. 394.
[818] United States' first written submission, para. 395. See also United States' second written submission, para. 111.
[819] United States' response to Panel question No. 22, para. 99.
[820] United States' response to Panel question No. 22, para. 100.

United States argues that, in order to determine whether inputs were primarily dedicated to downstream products, the USDOC required an accurate response from POSCO.[821] If POSCO had responded in the affirmative, this would have allowed the USDOC to solicit responses from those affiliates and analyse whether the inputs were primarily dedicated to the production of the downstream product.[822]

7.253. The United States explains that the USDOC does not determine whether an input is "primarily dedicated" to the production of downstream products based on the input's relation to a percentage of an affiliates' total sales or a respondents' total cost of production. Rather, the USDOC's inquiry into whether an input is "primarily dedicated" to the production of downstream products involves a "fact intensive assessment" of the extent to which the input is dedicated to the production of intermediate inputs and subject merchandise (collectively, the "downstream products").[823] The United States argues that looking at the value of the transactions between POSCO and its affiliated inputs suppliers would not have provided the necessary information for the USDOC to determine whether the inputs were primarily dedicated to downstream products.[824] This is because the analysis does not rely on numerical values.[825]

7.254. According to the United States, the document provided by POSCO at verification listing the inputs used in the production of CRS, as well as the suppliers and value of those inputs[826], was relevant to verification of POSCO's statement that "no affiliated companies located in Korea provided inputs used in the production of the subject merchandise".[827] However, the quantity of inputs was not relevant to that inquiry.[828] The United States explains that, as POSCO had not reported its purchases of inputs from affiliated input suppliers, there was no underlying information for the USDOC to verify along with the document provided by POSCO; as such, the data would be regarded as new information.[829] The purpose of verification, as explained by the USDOC, "is to check the accuracy of factual information already submitted on the record; it is not an opportunity to provide new factual information, as the deadlines to submit factual information are explicitly set forth under 19 CFR 351.301".[830] The United States argues that, although the financial statements provide the total value of sales for each of POSCO's affiliates, they did not contain any information about whether each affiliate provided POSCO with inputs, which was provided only at verification.[831]

7.3.4.3.1.2 POSCO facility in an FEZ

7.255. Korea argues that POSCO did not refuse access to "necessary" information, and acted to the best of its ability, despite not being able to provide the exact information requested by the USDOC at the last moment.[832] According to Korea, instead of allowing POSCO to respond to the new information request with more time and in writing, the USDOC asked on one occasion to visit the facility immediately, but POSCO was unable to arrange such a visit.[833] Korea further argues that, even though the general verification outline refers to the FEZ programme in question, it specifically refers to documentary evidence and not to visiting a POSCO facility.[834]

7.256. In any event, Korea argues that the necessary information concerning any benefits related to the FEZ was already on the record, having been provided both by POSCO and the GOK.[835] In this respect, Korea maintains that the USDOC acted inconsistently by failing to use all substantiated facts

[821] United States' response to Panel question No. 72, para. 97.
[822] United States' response to Panel question No. 72, para. 98.
[823] United States' responses to Panel question No. 72, paras. 102-105 and No. 73, para. 106.
[824] United States' response to Panel question No. 72, para. 105.
[825] United States' comments on Korea's response to Panel question No. 72(b), para. 59.
[826] United States' response to Panel question No. 74(a), para. 107 (referring to CVD CRS verification report, (Exhibit KOR-75 (BCI)), pp. 10-11).
[827] United States' response to Panel question No. 74(b), para. 108 (referring to CVD CRS issues and decision memorandum, (Exhibit KOR-77), p. 64).
[828] United States' response to Panel question No. 74(b), para. 109.
[829] United States' response to Panel question No. 74(b), para. 109.
[830] United States' response to Panel question No. 74(b), para. 109 (referring to CVD CRS issues and decision memorandum, (Exhibit KOR-77), p. 67).
[831] United States' comments on Korea's response to Panel question No. 72(a), para. 56.
[832] Korea's first written submission, para. 403.
[833] Korea's first written submission, para. 406.
[834] Korea's second written submission, para. 160.
[835] Korea's first written submission, para. 407.

provided by POSCO that were on the record.[836] Korea recalls that the GOK in its questionnaire response stated that, "during the investigation period, none of the respondents received tax reductions or exemptions, lease-fee reductions or exemptions, or grants or financial support due to their location in an FEZ".[837] Korea argues that there is nothing "ambiguous" about this response from the GOK.[838] Had POSCO or Hyundai Steel received AUL benefits that were allocated forward, Korea contends that the allocated portion would have been "received" in the POI.[839] Thus, Korea explains that "the GOK's response that neither company received any FEZ benefits in the POI would capture any AUL benefits that may have been allocated forward to the POI".[840] According to Korea, although the USDOC determined that it was not able to verify this information, or to use the GOK's response to fill the gap in the record because the response did not clarify whether the "investigation period" referred to the POI or the "entire 15-year AUL", the USDOC never asked the GOK to explain this reference.[841] Korea notes that the United States fails to explain why it ignored the evidence supplied by the GOK, and that the alleged ambiguity of the USDOC's statement was not a proper basis for disregarding the veracity of the information provided and assume the opposite.[842]

7.257. Korea argues that the USDOC and the United States improperly shifted the focus of the inquiry, as the USDOC had initially requested POSCO to report if it had applied for, used, or benefitted from any FEZ assistance, and whether it had any facilities located in an FEZ.[843] Korea recalls that POSCO responded consistently and accurately to this question in the negative, and argues that the GOK's statement that POSCO did not receive any FEZ benefits should have sufficed to verify the non-use of the programme.[844] Finally, Korea asserts that the USDOC could have asked for information or checked itself whether POSCO was registered under the relevant FEZ programme, given that only registered companies could benefit therefrom.[845] When asked by the Panel to identify record evidence demonstrating that the operations of the POSCO facility in the FEZ were unrelated to the subject merchandise, Korea states that the USDOC did not engage with an analysis of the information regarding the FEZ facility.[846]

7.258. The United States responds that, in its initial questionnaire, POSCO denied having any facilities in an FEZ; at verification, however, the USDOC discovered that the POSCO Global R&D Centre was listed on the official Incheon FEZ government website as being located in an FEZ. Upon inquiry, POSCO officials submitted a "hand-drawn map" and stated that the facility was outside the FEZ. However, the USDOC found a discrepancy in the alignment of the borders on the hand-drawn map and the map on the official government website, and thus declined to accept the hand-drawn map offered by POSCO.[847] The United States submits that POSCO provided no information in its questionnaire about the FEZ facility and therefore the USDOC was unable to verify any information with respect to subsidy *use* by the FEZ facility. The United States contends that Korea cannot shift the blame to the wording of the USDOC's question, as POSCO's response was not accurate. In response to the question of whether POSCO had received any FEZ benefits, POSCO responded "that it did not benefit from any FEZ programs because it has 'no facilities located in a free economic zone ('FEZ') and *thus* was not eligible'".[848] The United States asserts that this response was shown to be incorrect and denied the USDOC the opportunity to examine whether POSCO benefited from FEZ assistance.[849]

[836] Korea's first written submission, para. 430.
[837] Korea's first written submission, para. 370 (quoting GOK initial questionnaire, (Exhibit KOR-84 (BCI)), p. 108).
[838] Korea's comments on the United States' response to Panel question No. 75, p. 72.
[839] Korea's comments on the United States' response to Panel question No. 75, p. 72.
[840] Korea's comments on the United States' response to Panel question No. 75, p. 72.
[841] Korea's first written submission, para. 370 (quoting CVD CRS issues and decision memorandum, (Exhibit KOR-77), p. 74).
[842] Korea's second written submission, para. 161.
[843] Korea's response to Panel question No. 25 (referring to CVD CRS initial questionnaire response, (Exhibit KOR-70 (BCI)), p. 13).
[844] Korea's response to Panel question No. 25. See also Korea's second written submission, para. 159.
[845] Korea's response to Panel question No. 25.
[846] Korea's response to Panel question No. 27.
[847] United States' first written submission, para. 382.
[848] United States' second written submission, para. 117. (quoting CVD CRS initial questionnaire response, (Exhibit KOR-70 (BCI)), p. 52 (emphasis added by the United States)).
[849] United States' second written submission, para. 117.

7.259. The United States submits that the USDOC explained in its questionnaire that it "allocates the benefits received from certain types of subsidies over time" and, "in order to appropriately measure any allocated subsidies", the USDOC relied on a 15-year AUL.[850] Although the POI was a discrete and recent period, the USDOC explained it was "investigating alleged subsidies received over a time period corresponding to the [AUL]".[851] Thus, the United States explains that a portion of a subsidy received several years before the POI would be allocated to the 12-month POI for purposes of calculating a CVD rate.[852]

7.260. The United States also argues that, contrary to Korea's assertions, the purpose and operations of the FEZ facility were never verified, and Korea points to nothing on the record to support its claim.[853] Finally, the United States submits that there is no support for Korea's argument that, as a Korean company, POSCO could not benefit from FEZ subsidies because, as the USDOC noted, information on the record demonstrates that certain shareholders of POSCO appear to be foreign and could have been eligible under the programme.[854] The United States also noted that, when offered an opportunity to provide an explanation at verification, POSCO could have presented materials to show that it did not benefit from the FEZ programme, instead of submitting a hand-drawn map.[855]

7.3.4.3.1.3 DWI loan data

7.261. Korea argues that DWI did not refuse access to "necessary" information, but, instead, actively participated and voluntarily reported the additional loans as soon as it discovered its inadvertent failure to do so in its initial responses.[856] Even assuming that the minor corrections could be rejected, Korea submits that there was no basis for the USDOC to reject information about the use of the KORES programme that was on the record from the start of the investigation.[857] Korea also submits that DWI provided the necessary information within a reasonable period of time by responding in a timely manner to the initial questionnaires and correcting record facts upon learning of errors. In so doing, DWI did not introduce new factual information about an unknown subsidy programme, but merely completed already provided information.[858] Korea maintains that the corrections were "minor", as they concerned the extent of use of the KORES programme, and were filed in time for the USDOC to verify the information. According to Korea, the nature and quantity of the information submitted was such that it did not impact the USDOC's ability to verify the information concerning the use of the KORES programme because the use of the programme was known and the corrected information only concerned [[***]] additional loans.[859] Korea also submits that DWI did not significantly impede the investigation and, in fact, acted in good faith by correcting the information as soon as it discovered the errors.[860] Finally, Korea contends that the USDOC failed to use all verifiable substantiated facts provided by DWI about the use of the KORES programme, while it was under the obligation to take into account all verifiable information even if they were deemed incomplete.[861]

7.262. Korea argues that irrespective of the counting of the additional loans as [[***]] loan programmes, or as [[***]] loan disbursements, what is of essence is that these programmes were "entirely unrelated to the production of the subject merchandise in question".[862] According to Korea, this is evident from the mere title of these programmes [[***]][863], as well as by DWI's responses

[850] United States' response to Panel question No. 75, para. 111 (referring to GOK initial questionnaire, (Exhibit KOR-84 (BCI)), pp. 2-3).
[851] United States' response to Panel question No. 75, para. 111 (referring to GOK initial questionnaire, (Exhibit KOR-84 (BCI)), p. 3).
[852] United States' response to Panel question No. 75, para. 111.
[853] United States' first written submission, para. 406.
[854] United States' first written submission, para. 406 (referring to CVD CRS issues and decision memorandum, (Exhibit KOR-77), p. 74).
[855] United States' second written submission, para. 120.
[856] Korea's first written submission, para. 416.
[857] Korea's first written submission, paras. 417 and 431.
[858] Korea's first written submission, para. 418.
[859] Korea's first written submission, para. 420. See also Korea's second written submission, para. 172.
[860] Korea's first written submission, para. 421.
[861] Korea's first written submission, paras. 425 and 431.
[862] Korea's response to Panel question No. 28(a). See also Korea's second written submission, paras. 166 and 171.
[863] For Korea, the titles of the loans make it clear that they were programmes for "exploration", unrelated to CRS production. (Korea's response to Panel question No. 77, paras. 85-86).

and the absence of any contrary information on the record.[864] Korea further argues that, from the outset of the investigation, there was information on the record indicating that the KORES loans as a whole were unrelated to the production of the subject merchandise.[865] Korea asserts that the USDOC assumed the KORES loans were tied to subject merchandise, and did not make an affirmative finding based on evidence.[866]

7.263. The United States responds that the additional loans unreported by DWI indicate that it was not acting in good faith.[867] Additionally, the United States highlights the USDOC's observation that the [[***]] additional loans represented a "significant change" in the magnitude of the funding provided under the programme.[868] The United States contends that the change was significant irrespective of the metric used to calculate the number of loans because, in relative terms, the total number of loans increased by [[***]]% and the total value of the loans also increased materially.[869] The United States also points out that the information ultimately provided was untimely and unsolicited.[870] The United States asserts that, given the extensive nature of the corrections, which could not be verified for lack of time, the USDOC properly resorted to the use of facts available.[871]

7.3.4.3.2 The USDOC's selection of the replacement facts

7.264. Following the USDOC's application of AFA, Korea argues that POSCO's margin increased from 0.18% in the preliminary determination to 59.72% in the final determination.[872] Korea asserts that the USDOC did not engage in a process of reasoning or evaluation and its selection of replacement facts was "not objective or fair", but, instead, was "punitive" in nature.[873] Korea argues that the USDOC failed to exercise special circumspection or check the information, as required by Article 12.7 of the SCM Agreement.[874] Korea contends that Article 12.7 of the SCM Agreement imposes the same substantive obligations as paragraph 7 of Annex II to the Anti-Dumping Agreement.[875]

7.265. Korea argues that a comparative evaluation of the facts on the record would have confirmed that it was not reasonable to conclude that POSCO benefitted from all subsidy programmes in the investigation.[876] According to Korea, speculating and assuming that the cross-owned affiliates benefitted from all subsidy programmes was not the "best information available".[877] In relation to POSCO's facility in an FEZ, Korea argues that the USDOC's assumption that POSCO used the programmes at issue had no factual basis in the record, and the USDOC did not explain how and why the inference drawn was the "best information available" to replace the allegedly missing information.[878] In relation to DWI's loan data, Korea argues that the USDOC did not examine whether the single loan programme rate was the best information, or appropriate and relevant for DWI or POSCO.[879]

7.266. The United States responds that Korea fails to establish that the USDOC selected information inconsistently with Article 12.7.[880] The United States contends that Korea points to no evidence on the record demonstrating that it was unreasonable for the USDOC to conclude that POSCO's affiliated

[864] Korea's response to Panel question No. 28(a) (referring to CVD HRS supplemental new subsidy allegation questionnaire response, (Exhibit KOR-94 (BCI)), exhibit 21).
[865] Korea's response to Panel question No. 28(c). See also Korea's second written submission, para. 168.
[866] Korea's comments on the United States' response to Panel question No. 76, p. 73.
[867] United States' first written submission, para. 410.
[868] United States' first written submission, para. 411.
[869] United States' second written submission, para. 126.
[870] United States' first written submission, para. 412.
[871] United States' first written submission, para. 411.
[872] Korea's first written submission, para. 446.
[873] Korea's first written submission, para. 436.
[874] Korea's first written submission, para. 445.
[875] Korea's response to Panel question No. 80, para. 94.
[876] Korea's first written submission, para. 440.
[877] Korea's first written submission, para. 440.
[878] Korea's first written submission, paras. 441 and 443.
[879] Korea's first written submission, para. 444.
[880] United States' first written submission, para. 415.

companies benefitted from the subsidy programmes and that the FEZ programmes were used by POSCO.[881]

7.267. The United States asserts that the USDOC did not have an opportunity to carefully examine the use and the extent of the benefit received from the subsidy programmes at issue due to POSCO's failure to accurately report certain necessary information.[882] According to the United States, Article 12.7 of the SCM Agreement acknowledges that non-cooperation may lead to an outcome that is less favourable for the non-cooperating party, and Korea does not point to anything on the record demonstrating that the USDOC's determination was not accurate.[883] As to the appropriateness and relevance of the selected rates for POSCO and DWI, the United States observes that these rates reflected the actual experiences of companies in Korea and the real subsidy practices of the GOK.[884] According to the United States, it is a "logical inference" that the non-cooperating company has benefitted from the subsidy programmes at issue, at least as much as the cooperating company in the same industry who received the higher benefit amount.[885] The United States contends that nothing in Article 12.7 precludes an investigating authority to select replacement rates originally determined in other investigations, especially when there are no subsidy rates available from identical or similar programmes.[886]

7.3.4.4 Evaluation by the Panel

7.3.4.4.1 The USDOC's resort to facts available

7.268. Article 12.7 of the SCM Agreement provides that:

> In cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.

7.269. Under Article 12.7, an investigating authority may resort to facts available, *inter alia*, when "any interested Member or interested party" refuses access to, or otherwise does not provide, the "necessary" information. Article 12.7 of the SCM Agreement refers to "necessary" information and not to "required" or "requested" information.[887] As discussed above, "'necessary information' refers to the specific information held by an interested Member or an interested party that is requested by an investigating authority *for the purpose of making determinations*".[888] Ultimately, the question of whether certain information is "necessary" is to be assessed in light of the specific facts and circumstances of a given case, including the specific determination that is sought to be made and for which information is sought.

7.270. The use of the terms "*refuses* access to, or otherwise does not *provide*" in Article 12.7 implies a certain *response* – or a lack thereof – by an "interested Member or interested party" to a *request* for information by an investigating authority. In determining whether an evidentiary gap sufficient to warrant recourse to the facts available exists, an investigating authority may thus limit itself to the information provided by an "interested Member or interested party" in direct response(s) to the authority's specific request. There may be other information elsewhere on the record that would allow the filling of such a gap, but this does not require an investigating authority to examine exhaustively the entire record *before* resorting to the use of facts available. Rather, an investigating authority must examine all information provided by an "interested Member or interested party" in direct response to its specific request before resorting to facts available, and, subsequently, it must

[881] United States' first written submission, para. 415.
[882] United States' first written submission, paras. 416-417.
[883] United States' first written submission, para. 418.
[884] United States' first written submission, para. 420.
[885] United States' first written submission, para. 420.
[886] United States' first written submission, para. 422.
[887] The panel in *Egypt – Steel Rebar* drew this distinction in the context of Article 6.8 of the Anti-Dumping Agreement. (Panel Report, *Egypt – Steel Rebar*, para. 7.151. See also Panel Report, *US – Supercalendered Paper*, para. 7.174).
[888] Panel Report, *EC – Salmon (Norway)*, para. 7.343. (emphasis added)

fully take into account any other information on the record as part of its selection of the reasonable replacement for the missing "necessary" information.[889]

7.271. With these observations in mind, we address Korea's claims with respect to the USDOC's resort to facts available in relation to each of the three issues, namely, cross-owned affiliate input suppliers, POSCO's facility in an FEZ, and DWI's loan data.

7.3.4.4.1.1 Cross-owned affiliate input suppliers

7.272. Korea advances two main arguments in support of its claim that the USDOC acted inconsistently with Article 12.7 with respect to POSCO's reporting of certain inputs supplied by its cross-owned affiliates. First, Korea argues that, in its questionnaire responses, POSCO did not report certain inputs provided by its cross-owned affiliates as these were not "primarily dedicated" to the production of the subject-merchandise and therefore did not fall within the scope of its reporting obligation.[890] Second, Korea argues that there was other information on the record that would have allowed the USDOC to determine that POSCO sourced only trace amounts of inputs from its cross-owned affiliates.[891] Korea thus asserts that the USDOC erred in resorting to facts available as no "necessary" information was missing from the record. The United States responds that although Korea attempts to "shift blame" onto the USDOC, POSCO did not actually provide the requested information within a reasonable period of time.[892] According to the United States, nothing on the record indicates that the amounts of the inputs were "negligible"[893], and, in any event, only the USDOC can determine whether the inputs were primarily dedicated to the production of the subject merchandise.[894]

7.273. For Korea, POSCO's response – that no affiliated companies provided inputs to the production of subject merchandise[895] – was "accurate" in light of the USDOC's "practice" requiring the disclosure only of affiliates that provide materials that are primarily dedicated to the production of subject merchandise.[896] We recall that, in its initial questionnaire, the USDOC requested POSCO to provide "complete questionnaire" responses for those affiliates that were "cross-owned", *inter alia*, in instances where the cross-owned company "supplies" an input to POSCO for "production of the downstream product produced by the respondent".[897] We note that the USDOC's query does not limit the reporting of such instances based on volume, value, or any other criteria. Instead, the USDOC's question is broadly worded and encompasses information concerning *all* instances where inputs are supplied by a cross-owned affiliate.

7.274. Upon questioning by the Panel, Korea agreed with the United States that "it is the USDOC that determines whether an input is 'primarily dedicated' to the production of the downstream product".[898] The information requested by the USDOC was not limited to those inputs that are primarily dedicated, but concerned *all* instances where inputs are supplied by a cross-owned affiliate. Without such information, the USDOC could not have determined which inputs were "primarily dedicated" to the production of the downstream product. In this sense, the information requested by the USDOC was "necessary" for the purpose of making its determination.

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[889] See also para. 7.138 above.
[890] Korea's first written submission, para. 351.
[891] Korea's first written submission, para. 394; responses to Panel question No. 72(a), paras. 76-77, No. 72(b), paras. 78-79, and No. 72(c), para. 80.
[892] United States' first written submission, paras. 394-395.
[893] United States' first written submission, para. 399.
[894] United States' first written submission, para. 399.
[895] CVD CRS affiliated companies response, (Exhibit KOR-73 (BCI)), p. 4.
[896] Korea's second written submission, para. 149.
[897] CVD CRS affiliated companies response, (Exhibit KOR-73 (BCI)), pp. 4-5.
[898] Korea's response to Panel question No. 21. The relevant provision of US law, namely 19 CFR 351.525(b)(6), relates to the conduct of the Secretary of the USDOC, including in relation to the attribution of a subsidy to a product in the case of cross-owned input suppliers. Subsection (iv) of that provision states that "*[i]f there* is cross-ownership between an input supplier and a downstream producer, and production of the input product is primarily dedicated to production of the downstream product, *the Secretary will attribute* subsidies received by the input producer to the combined sales of the input and downstream products produced by both corporations (excluding the sales between the two corporations)". (19 CFR 351.525, (Exhibit KOR-80), Section (b)(6) (emphasis added)). The provision does not concern an interested party's reporting obligation; nor does it limit this obligation to only those inputs that an interested party considers are primarily dedicated to the production of the downstream product.

7.275. Korea adds that interested parties are nonetheless "entitled to rely on prior proceedings and expression of relevant USDOC practice when responding to such questions".[899] In its response to the USDOC's initial questionnaire above, POSCO stated that "[t]here were no cross-owned companies located in Korea that provided inputs to POSCO's production of subject merchandise".[900] POSCO went on to explain that:

> [I]t has affiliated companies located outside Korea that *supplied a small volume of inputs* of [[***]] during the POI. These affiliated companies were: [[***]]. However, as non-Korean companies, they are not subject to this investigation, which involves only subsidies provided by the Government of Korea.[901]

POSCO thus stated that it did "not believe it [had] any affiliates that [met] any of the four cross-ownership criteria as defined above by the [USDOC]", nor that "POSCO or any of its affiliates [were] cross-owned by a third party".[902]

7.276. We note that, as part of its response, POSCO explained the basis for why it did not report inputs supplied by its non-Korean cross-owned affiliates. However, POSCO did not offer a similar explanation that it was not reporting certain inputs supplied by its Korean cross-owned affiliates because they were, in its view, not primarily dedicated to the production of the subject-merchandise.[903] This reason was provided by POSCO only at verification[904], after the USDOC found that certain inputs supplied by POSCO's cross-owned affiliates were used, or "could be" used, in the production of CRS. By not explaining the basis for not reporting certain inputs supplied by its Korean cross-owned affiliates as part of its initial questionnaire response, POSCO created a situation whereby the USDOC could not explore this issue until "the very last juncture of the investigation", as it was precluded from seeking any further clarifications and verifying the information that was belatedly provided.[905] For these reasons, we disagree with Korea that the "record evidence substantiates POSCO's belief that it did not need to report such inputs, even from its cross-owned affiliates, when the inputs were clearly not 'primarily dedicated' to the production of CR[S] products".[906] Any such "belief" that POSCO may have had at the time of its response was expressed only with respect to "affiliated companies located outside Korea", for whom POSCO provided an explanation.

7.277. Korea also argues that, in any event, "necessary" information was not "missing" because "the value of the transactions with these cross-owned affiliates and the value of the transactions in relation to the cross-owned affiliates' total sales were part of POSCO's consolidated financial statements", that were on "the record from POSCO's earliest responses".[907] However, as the United States points out, POSCO's consolidated financial statements do "not contain any information about whether each affiliate provided POSCO with inputs".[908] Indeed, Korea acknowledges that any information concerning the "total value of inputs sourced from each affiliate" was submitted only at verification.[909]

7.278. In any event, we do not consider this to be an issue relating to the USDOC's resort to facts available. Korea does not argue, and we do not find, that the "other information" that Korea refers to – namely, POSCO's consolidated financial statements – was provided in direct response to the USDOC's query concerning POSCO's cross-owned affiliate input suppliers. In these circumstances, it was reasonable for the USDOC to limit itself to the information provided by POSCO in direct response to the USDOC's specific request in determining whether an evidentiary gap sufficient to warrant

[899] Korea's response to Panel question No. 21.
[900] CVD CRS affiliated companies response, (Exhibit KOR-73 (BCI)), p. 5.
[901] CVD CRS affiliated companies response, (Exhibit KOR-73 (BCI)), p. 5. (emphasis added)
[902] CVD CRS affiliated companies response, (Exhibit KOR-73 (BCI)), p. 5.
[903] United States' response to Panel question No. 72(d), para. 101.
[904] The USDOC issued a supplemental questionnaire on 5 November 2015, wherein it asked POSCO to confirm that they had provided responses for all cross-owned companies that fell within 19 CFR 351.525(b)(6). POSCO responded that it believed that it had provided responses for all cross-owned companies that fell within 19 CFR 351.525(b). (CVD CRS second supplemental questionnaire response, (Exhibit KOR-74 (BCI)), p. 1).
[905] United States' first written submission, paras. 395-397; second written submission, para. 104.
[906] Korea's first written submission, para. 352.
[907] See, e.g. Korea's second written submission, para. 154. See also Korea's response to Panel question No. 72.
[908] United States' comments on Korea's response to Panel question No. 72(a).
[909] Korea's response to Panel question No. 72.

recourse to the facts available existed.[910] The extent to which there was other information on the record that would have allowed the USDOC to deduce that the inputs at issue were not primarily dedicated to the production of the downstream product relates properly to the USDOC's selection of the replacement facts, which we review below.[911]

7.279. Thus, based on the scope of the USDOC's request, the nature of the determination to be made, as well as the text of POSCO's response, we find that the USDOC did not err in finding that POSCO "refuse[d] access to", or "otherwise d[id] not provide", "necessary" information within the meaning of Article 12.7 of the SCM Agreement. We therefore find that Korea has not established that the USDOC's resort to facts available with respect to information concerning cross-owned affiliate input-suppliers is inconsistent with Article 12.7 of the SCM Agreement.

7.3.4.4.1.2 POSCO facility in an FEZ

7.280. Korea argues that, throughout the investigation, POSCO stated that it did not use or benefit from any FEZ programmes.[912] Korea submits that this response remains accurate, and is independent of whether or not POSCO had a facility located in the FEZ. Korea contends that the non-receipt of any subsidies under the FEZ programme was confirmed by the GOK in its questionnaire response and that, as a result, there was no "necessary" information missing so as to justify the USDOC's resort to facts available.[913] Korea argues that investigating authorities cannot impose unreasonable demands on foreign producers.[914] According to Korea, the USDOC's information request from the USDOC was "unreasonable".[915]

7.281. We note that the parties agree that POSCO actually did, in fact, have a facility located in the Incheon FEZ.[916] The issue before us is whether an "interested Member or interested party refuse[d] access to, or otherwise d[id] not provide, necessary information" for purposes of Article 12.7 of the SCM Agreement. Our examination of this issue must be carried out in the specific facts and circumstances of this case. In its initial questionnaire, the USDOC posed several "program specific questions" to POSCO. For all these questions, the USDOC offered the following general instructions:

> For each program, if your company (including cross-owned affiliates required to respond, as well as all trading companies) did not apply for, use, or benefit from that program during the POI, you must clearly state so. Otherwise, please answer the questions listed. To determine the information which must be reported under each program, please see the instructions for each program in this section of the questionnaire and in the referenced appendices.[917]

Following these general instructions, the USDOC posed several programme specific questions. With respect to "subsidies to companies located in certain economic zones" the USDOC's initial questionnaire identified certain programmes and offered the following instructions:

> 1. Tax Reductions and Exemptions in Free Economic Zones
>
> 2. Exemptions and Reductions of Lease Fees in Free Economic Zones
>
> 3. Grants and Financial Support in Free Economic Zones
>
> 4. Acquisition and Property Tax Benefits to Companies Located in Industrial Complexes
>
> Please respond to the Standard Questions Appendix for each program listed above.[918]

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[910] See para. 7.270 above.
[911] See paras. 7.303-7.313 below.
[912] Korea's second written submission, para. 138.
[913] Korea's second written submission, para. 138.
[914] Korea's first written submission, para. 412 (referring to Appellate Body Report, *US – Hot-Rolled Steel*, paras. 100-101).
[915] Korea's first written submission, para. 413.
[916] Korea's response to Panel question No. 25, pp. 25-26.
[917] CVD CRS initial questionnaire response, (Exhibit KOR-70 (BCI)), p. 13.
[918] CVD CRS initial questionnaire response, (Exhibit KOR-70 (BCI)), p. 52. (emphasis original)

7.282. Similar to its questionnaire to POSCO, in its questionnaire to GOK, the USDOC posed several "program-specific questions" and offered the following general instructions:

> For each program, if no companies under investigation or "cross-owned" companies as defined in Section III applied for, used, or benefited from that program *during the POI*, the GOK must so state and provide a brief explanation of the program and a detailed description of the records kept on that program. Otherwise, please answer all of the questions listed, except as directed below.[919]

7.283. POSCO responded that it had "no facilities located in [an FEZ] and thus was not eligible for and did not receive any tax reductions, exemptions, grants or financial support under any of the three programs listed in the [USDOC]'s question".[920] The GOK responded that:

> During the investigation period, none of the respondents received tax reductions or exemptions, lease-fee reductions or exemptions, or grants or financial support due to their location in an FEZ.[921]

7.284. During verification, the USDOC subsequently discovered that a POSCO facility, namely, the POSCO Global R&D Centre, "was listed on the official Incheon FEZ government website as being located in the Incheon FEZ".[922] The USDOC asked for further information relating to the purpose and location of this facility. POSCO officials presented a map printed from a Korean website that had a "hand-drawn border" surrounding what they claimed to be the FEZ.[923] The USDOC, however, found that the hand-drawn border did not conform to the map on the official government website, and therefore declined to accept the map presented by POSCO officials. The USDOC officials then offered to visit the site of the facility immediately in order to clarify its location and confirm POSCO's non-use of the FEZ programme. According to the USDOC's verification report, "POSCO officials declined this suggestion".[924] In its case brief, POSCO noted that this request to visit the FEZ facility was made a day after the conclusion of the POSCO verification and on the last day of the DWI verification, without any prior notice, and that "[t]he POSCO representative present did not think this would be feasible or accomplish any purpose".[925]

7.285. We note that the USDOC's questionnaire instructed POSCO to "clearly state" that it "did not apply for, use, or benefit from that program [i.e. the relevant FEZ programmes] during the POI".[926] Similarly, the determination made by the USDOC was that Hyundai Steel and POSCO received this subsidy during the POI, and that [they] benefited from the subsidy".[927] Thus, the determination made by the USDOC was not focused on whether POSCO had certain facilities *located* in an FEZ, but instead concerned the issue of whether POSCO *received subsidies* under the relevant FEZ programmes identified by the USDOC.

7.286. Information relating to the location of POSCO's facilities in an FEZ, though not requested specifically by the USDOC, was provided by POSCO in support of its assertion that that it did not receive any subsidies under any of the three programmes identified by the USDOC.[928] The logic underlying POSCO's response to the USDOC's query and the USDOC's subsequent discovery at verification of a POSCO facility in the FEZ could have called into question the accuracy of POSCO's reporting. However, we note that the GOK's response to the same query by the USDOC did

[919] GOK initial questionnaire, (Exhibit KOR-84 (BCI)), p. 3. (emphasis added)
[920] CVD CRS initial questionnaire response, (Exhibit KOR-70 (BCI)), p. 52.
[921] GOK initial questionnaire, (Exhibit KOR-84 (BCI)), p. 108.
[922] CVD CRS issues and decision memorandum, (Exhibit KOR-77), pp. 72-73. This information was discovered by the USDOC when it had already completed the verification at POSCO and was undertaking the verification exercise at DWI's headquarters. The USDOC discovered the information on the official website of the Incheon FEZ during verification of DWI's response that it was not located in the Songdo International City Zone.
[923] CVD CRS issues and decision memorandum, (Exhibit KOR-77), p. 73.
[924] CVD CRS verification report, (Exhibit KOR-75 (BCI)), pp. 38-39. See also CVD CRS issues and decision memorandum, (Exhibit KOR-77), pp. 72-73.
[925] CVD CRS POSCO and DWI case brief, (Exhibit KOR-83 (BCI)), p. 6.
[926] CVD CRS initial questionnaire response, (Exhibit KOR-70 (BCI)), p. 13.
[927] CVD CRS issues and decision memorandum, (Exhibit KOR-77), p. 35.
[928] In its initial questionnaire response, POSCO stated that it "has no facilities located in a free economic zone ('FEZ') and *thus* was not eligible for and did not receive any tax reductions, exemptions, grants or financial support under any of the three programs listed in the [USDOC]'s question". (CVD CRS initial questionnaire response, (Exhibit KOR-70 (BCI)), pp. 52-53 (emphasis added)).

not concern whether POSCO maintained a facility in an FEZ, but instead clearly stated that "[d]uring the investigation period, none of the respondents received tax reductions or exemptions, lease-fee reductions or exemptions, or grants or financial support due to their location in an FEZ".[929]

7.287. The United States explains that the GOK's response was not used by the USDOC because the "statement is ambiguous [as] it is not clear what Korea means by the 'period of investigation'".[930] The USDOC found that it was "unable to use the GOK's response to fill this 'gap' in the record" because "the GOK's response does not clarify if the 'investigation period' it refers to is the POI or the entire 15-year AUL".[931] In this regard, we note that the USDOC provided the following instructions in its questionnaire to the GOK:

> Respondents should be aware that the [USDOC] allocates the benefits received from certain types of subsidies over time (see 19 CFR 351.524). As noted above, the AUL for this investigation is 15 years. Thus, in order to appropriately measure any allocated subsidies, the [USDOC] will use a 15-year AUL in this investigation. Although the POI is a recent period, we are investigating alleged subsidies received over a time period corresponding to the AUL.[932]

7.288. In its questionnaires to both POSCO and the GOK, the USDOC sought to confirm the non-use of these programmes *during the POI*. In its questionnaire to POSCO, the USDOC requested POSCO to "clearly state" that it "did not apply for, use, or benefit from that program during the POI".[933] Similarly, in its questionnaire to the GOK, the USDOC required the GOK to state "[f]or each program, if no companies under investigation or 'cross-owned' companies as defined in Section III applied for, used, or benefited from that program during the POI".[934] The GOK's response was limited to the "investigation period" and was therefore consistent with the scope of the USDOC's query.[935] In response to the USDOC's question about the application of a 15-year AUL period, the GOK separately responded that "[t]he GOK does not have any particular view on the [USDOC]'s application of the 15-year AUL in this CVD investigation".[936]

7.289. Thus, the GOK responded to the USDOC's specific queries directed at the use of these programmes "during the POI". The GOK also did not express "any particular view" on the USDOC's application of the 15-year AUL in this investigation. In these circumstances, we do not agree with the United States that the "Government of Korea did not clarify whether the investigation period that it referred to is the year long [POI] or the entire 15-year average useful life".[937] Given the GOK's responses, to the extent that the USDOC continued to consider its response "ambiguous", it should have sought further clarifications from the GOK. An unbiased and objective investigating authority would not have remained passive in the face of such an alleged ambiguity in the reporting basis.[938] Based on the exchange between the USDOC and the GOK, the USDOC's conclusion that the GOK's response was "ambiguous" is, in our view, not one that an unbiased and objective investigating authority would have reached.

7.290. The United States argues that the USDOC determined that the GOK's response was "ambiguous regarding whether the respondents *benefitted* during the [POI] from subsidies received prior to the [POI]". As discussed above, the USDOC's ultimate determination was made with respect to the POI, and found that POSCO both "*received this subsidy during the POI*, and that it *benefited from* the subsidy".[939] Thus, the USDOC's ultimate determination was not limited to whether POSCO benefitted from subsidies received prior to the POI; instead the USDOC clearly found that POSCO

[929] GOK initial questionnaire, (Exhibit KOR-84 (BCI)), p. 108.
[930] United States' responses to Panel question No. 26, para. 113; and No. 75, paras. 111-113.
[931] CVD CRS issues and decision memorandum, (Exhibit KOR-77), p. 74.
[932] GOK initial questionnaire, (Exhibit KOR-84 (BCI)), p. 3.
[933] CVD CRS initial questionnaire response, (Exhibit KOR-70 (BCI)), p. 13.
[934] GOK initial questionnaire, (Exhibit KOR-84 (BCI)), p. 3.
[935] GOK initial questionnaire, (Exhibit KOR-84 (BCI)), p. 108. (emphasis added)
[936] GOK initial questionnaire, (Exhibit KOR-84 (BCI)), p. 2.
[937] United States' response to Panel question No. 75, para. 112.
[938] Past panels and the Appellate Body have previously found, albeit in different a context, that "authorities charged with conducting an inquiry or a study – to use the treaty language, an 'investigation' – 'must actively seek out pertinent information' and may not remain 'passive in the face of possible shortcomings in the evidence submitted'". (Panel Report, *China – Broiler Products*, para. 7.261 (referring to Appellate Body Report, *US – Wheat Gluten*, paras. 53 and 55)). (fns omitted)
[939] CVD CRS issues and decision memorandum, (Exhibit KOR-77), p. 35. (emphasis added)

"received this subsidy during the POI". The USDOC's determination does not explain why the GOK's response was ambiguous as to the *receipt* of subsidies during the POI. Even if the USDOC had a reasonable basis to consider the GOK's response to be ambiguous, any such ambiguity could only concern subsidies that were received in the past and whether they continued to benefit POSCO during the POI, and not whether any subsidies were *received* during the POI – as ultimately found by the USDOC. Thus, we find that the USDOC was not justified in disregarding the information provided by the GOK – an interested Member – on the basis of a purported ambiguity relating to the AUL when the response was clear as to the non-receipt of subsidies during the POI, which was also the focus of the USDOC's ultimate determination.

7.291. Accordingly, in the circumstances of this case, we find that the USDOC acted inconsistently with Article 12.7 of the SCM Agreement in resorting to facts available with respect to information concerning POSCO's facility in an FEZ because it erroneously disregarded the GOK's response on this issue.

7.3.4.4.1.3 DWI loan data

7.292. Korea asserts that the USDOC acted inconsistently with Article 12.7 of the SCM Agreement by refusing to accept certain allegedly "minor corrections" relating to the use of the KORES programme that were submitted voluntarily by DWI at verification. In addition, Korea challenges the USDOC's decision to not use information that was already on the record, despite DWI's active participation in the investigation.

7.293. We recall that in response to the USDOC's initial questionnaire section concerning "energy and resource subsidies", DWI identified certain "outstanding long-term borrowings" from the KORES and the KNOC during the POI.[940] DWI explained as follows:

> DWI's KNOC loans are related to investments in the exploration and production of natural gas in [[***]]. They are thus tied to non-subject merchandise and unrelated to DWI's exports to the United States of subject merchandise produced by POSCO. DWI's KORES loans are related to investments in [[***]]. As with the KORES loans, these loans are tied to non-subject merchandise and are unrelated to DWI's exports to the United Sates of subject merchandise produced by POSCO. Therefore, as it did in *NOES from Korea,* the [USDOC] should determine that KORES and KNOC loans that are not tied to subject merchandise are not countervailable.[941]

7.294. Subsequently, at the start of the verification, DWI presented "'two new loans' under the [KORES] program, which were not previously reported".[942] In presenting its minor correction, DWI explained as follows:

> While preparing for the verification [DWI] found a clerical mistake in reporting KORES loans by missing two loans as follows.
>
> a. Loan relating to [[***]]
>
> b. Loan relating to [[***]][.][943]

DWI also submitted a chart which listed [[***]] different "[l]oan [a]greement[s]" (by date).[944] [[***]] loan Agreements were listed as having the "purpose" of [[***]], and [[***]] had their stated purpose as [[***]].[945]

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[940] CVD CRS initial questionnaire response, (Exhibit KOR-70 (BCI)), p. 34.
[941] CVD CRS initial questionnaire response, (Exhibit KOR-70 (BCI)), p. 34. (emphasis original) The reference to KORES loans in the penultimate sentence appears to be a typographical error and should instead refer to KNOC loans.
[942] CVD CRS verification report, (Exhibit KOR-75 (BCI)), p. 3.
[943] CVD CRS DWI verification minor correction, (Exhibit KOR-86 (BCI)), attachment 1.
[944] CVD CRS verification report, (Exhibit KOR-75 (BCI)), p. 3; CVD CRS DWI verification minor correction, (Exhibit KOR-86 (BCI)), attachment A.
[945] CVD CRS DWI verification minor correction, (Exhibit KOR-86 (BCI)), attachment A.

7.295. In its verification report, the USDOC explained that:

> In the loan chart presented to [USDOC] officials, two loans were circled, indicating the circled loans were being submitted as minor corrections. Company officials explained that when DWI reported the KORES loans in its initial questionnaire response, two [[***]] were omitted due to a misunderstanding that only [[***]] loans were required to be reported. Upon reviewing the loan chart, we noted that there were [[***]] loans submitted as minor corrections. We did not explicitly state that we would accept the submission as a minor correction at the time of verification. As noted above and in "Rejection of DWI Minor Corrections," we rejected this minor correction submission.[946]

7.296. In its final determination, the USDOC resorted to the use of facts available on the basis that "DWI withheld necessary information requested by the [USDOC] regarding it use of [the KORES] program and that as a result, necessary information is missing on the record".[947] The USDOC explained that:

> At verification, DWI presented a list of loans that it characterized as a minor correction, claiming that it received "two loans," *under the KORES and KNOC lending programs*. … Due to the magnitude of change in the reported lending under the specified program, we determined that the submission did not constitute a minor correction, and instead, consisted of new factual information. As such, we rejected the submission from the record. Therefore, because the extensive nature of the corrections presented at verification by DWI to its loans received under this program, we were not able to fully verify the use of this program.[948]

7.297. The United States argues that, with the additional loans, the total value of DWI's loans increased from [[***]] loans and [[***]] loans – an increase of more than [[***]]% and [[***]]%, respectively.[949]

7.298. The determination made by the USDOC was whether POSCO received a benefit under the programmes[950], and information was requested from POSCO and DWI for purposes of making this determination. In its initial questionnaire response, POSCO and DWI explained that, "[f]or projects related to the development of strategic mineral resources, KORES lends the funds to the company for foreign resources development. For projects related to petroleum and natural gas, KNOC lends the funds to the company for foreign resources development".[951] In relation to the loans that were reported before verification, POSCO and DWI both submitted that the loans were tied to non-subject merchandise and unrelated to the exports of CRS to the United States.[952] Thus, evidence existed on the record suggesting that the purpose for which the subsidies were given was not related to the production or export of the subject merchandise.[953] This evidence was provided in direct response to the USDOC's query, which in turn was made in light of the determination it sought to make, i.e. whether a benefit was received.

7.299. Korea considers it evident from the title of the loans that they were related to "exploration" and therefore unrelated to the "production" of CRS.[954] According to Korea, POSCO provided an explanation of its manufacturing process in its initial questionnaire response, and this information was sufficient for the USDOC to determine that *exploration* of [[***]] and [[***]] were unrelated to the production of CRS, because the loans were for *exploration*, not production, and for goods

[946] CVD CRS verification report, (Exhibit KOR-75 (BCI)), p. 3 (fn omitted). See also Rejection of POSCO's resubmission, (Exhibit KOR-95).
[947] CVD CRS issues and decision memorandum, (Exhibit KOR-77), p. 76.
[948] CVD CRS issues and decision memorandum, (Exhibit KOR-77), p. 76. (fns omitted; emphasis added)
[949] United States' second written submission, para. 126.
[950] CVD CRS issues and decision memorandum, (Exhibit KOR-77), pp. 19-20.
[951] CVD CRS initial questionnaire response, (Exhibit KOR-70 (BCI)), exhibit F-1, p. 1.
[952] CVD CRS initial questionnaire response, (Exhibit KOR-70 (BCI)), pp. 27-28 and 33-34.
[953] The USDOC found sufficient information on the record to determine that KNOC loans were tied to non-subject merchandise, but did not find that KORES loans were tied to non-subject merchandise. (CVD CRS issues and decision memorandum, (Exhibit KOR-77), pp. 23-24; United States' response to Panel question No. 76, para. 114. See also HRS Sections B-C questionnaire response, (Exhibit KOR-56 (BCI)), pp. 23-24).
[954] Korea's response to Panel question No. 28(a). See also Korea's second written submission, para. 169; and response to Panel question No. 77, para. 86.

unrelated to the production of CRS.[955] POSCO's initial questionnaire response also stated that DWI was primarily a "trading company" with no production operations related to the subject merchandise.

7.300. The information provided by POSCO pertaining to the use of these programmes – in addition to POSCO's express statements that the KORES and KNOC loans were tied to non-subject merchandise and were therefore not countervailable – was relevant to the determination made by the USDOC that POSCO received a measurable benefit from the KORES and KNOC loan programmes.[956] Were it to be established that the loans programmes were, in fact, unrelated to the production of CRS, any changes in the magnitude of the loan amounts would be irrelevant to the inquiry of whether POSCO benefitted from these loans. The USDOC, however, did not make any attempt to determine whether, in light of POSCO's statements and the supporting evidence, the KORES loan programme was, in fact, tied to non-subject merchandise.[957] The USDOC did not take into account this evidence relating to the *use* of these loan programmes. Nor did the USDOC provide a reasoned and adequate explanation as to why the alleged changes in the magnitude of the loan amounts would preclude reliance upon evidence concerning the *use* and *purpose* of the loan programmes. In light of the record evidence suggesting that the programmes could be unrelated to the production of CRS, we consider that an unbiased and objective investigating authority would have at least sought to ascertain certain basic aspects of the information properly before it – such as the use of the programmes – notwithstanding the timing of subsequent submissions or the magnitude of change in reported lending. The USDOC was not justified in finding that the loan data pertaining to the additional loans reported at verification by DWI amounted to missing "necessary" information because it did not consider or explain why the other information on the record did not establish that these loans were unrelated to the subject merchandise.

7.301. Accordingly, in the circumstances of this case, we find that the USDOC acted inconsistently with Article 12.7 of the SCM Agreement in resorting to facts available with respect to information concerning DWI loan data as it did not take into account information that was submitted as part of POSCO's and DWI's direct responses before concluding that DWI had failed to provide "necessary" information.

7.3.4.4.2 The USDOC's selection of the replacement facts

7.302. We turn now to consider Korea's claims that the USDOC acted inconsistently with Article 12.7 in its selection of the replacement facts. Like Article 6.8 of the Anti-Dumping Agreement, Article 12.7 of the SCM Agreement imposes an obligation on investigating authorities to select those facts that *reasonably replace* the missing "necessary" information.[958] In selecting *reasonable replacements*, an investigating authority must take into account all facts that are properly before it. While an investigating authority may take into account the procedural circumstances surrounding non-cooperation in its selection of the replacement facts, an authority is not permitted to select facts in order to punish non-cooperation.[959]

7.3.4.4.2.1 Cross-owned affiliate input suppliers

7.303. Korea argues that there was sufficient information on the record – from POSCO's questionnaire responses and from verification – to demonstrate that the inputs at issue were not "primarily dedicated" to the production of the subject-merchandise.[960] According to Korea, following its finding that POSCO failed to provide "necessary" information, the USDOC erroneously inferred that the inputs produced by the four cross-owned affiliates at issue were "primarily dedicated" to the production of the downstream product.

7.304. Korea challenges the USDOC's conclusion and identifies two pieces of information provided by POSCO that would have allowed the USDOC to determine that the inputs at issue were not

[955] Korea's response to Panel question No. 77, paras. 85-86.
[956] CVD CRS issues and decision memorandum, (Exhibit KOR-77), pp. 19-20.
[957] In its preliminary determination, the USDOC made such a finding for only the KNOC programme, that the "information on the record sufficiently demonstrates that the loans from KNOC to POSCO are tied to non-subject merchandise". (CVD CRS negative preliminary determination, (Exhibit KOR-87), p. 24).
[958] See para. 7.41 above.
[959] See para. 7.41 above.
[960] Korea's first written submission, para. 397. Korea presents this argument as part of its claim that the conditions to resort to facts available were not met. However, in our view, this argument pertains to the USDOC's selection of replacement facts and as such, we address it here.

primarily dedicated to the production of CRS. First, Korea points out that the four affiliates at issue were all identified in POSCO's affiliation chart filed at the outset of the investigation.[961] Korea also submits that "the value of POSCO's transactions … in relation to the cross-owned affiliates' sales were part of POSCO's consolidated financial statements", that were on the record from POSCO's earliest responses.[962] Second, Korea submits that the information submitted by POSCO during verification also contained a list of all the raw materials that it used for the production of CRS, including the suppliers for each of these inputs, and established that only "insignificant" amounts of inputs were provided by the four affiliates at issue.[963] According to Korea, this information, when read together, indicated that the "percentage of the inputs provided to POSCO as a percentage of the affiliates' total sales ranged from [[***]] to [[***]]% or between [[***]] to [[***]]% when measured against POSCO's total cost of production for CR[S] products".[964]

7.305. Concerning the financial statements, the United States explains that "POSCO's consolidated financial statements, *which [the] USDOC examined in full*, contain general information pertaining to cross-owned affiliates".[965] According to the United States, these "financial statements do not provide any information on whether or to what extent such cross-owned affiliates provided inputs that POSCO used in the production of subject merchandise".[966] As to the information provided at verification, the United States submits that the USDOC took into account that information for verifying the accuracy of POSCO's questionnaire response insofar as it was "relevant to *that* inquiry".[967]

7.306. We recall that, upon discovering at verification that, contrary to its initial responses, POSCO received from its cross-owned affiliate input suppliers "inputs that 'could' be used to produce downstream products"[968], the USDOC determined that "POSCO withheld requested necessary information during the course of the investigation, impeded the proceeding, and through its actions prevented the [USDOC] from being able to verify that information". On these bases, the USDOC found that the use of "facts available" was "warranted in determining the existence of cross-owned affiliates that provided inputs used in the production of subject merchandise".[969]

7.307. Noting that POSCO "failed to identify or provide necessary information as to its respective cross-owned companies" despite "repeated requests", the USDOC found that POSCO did not act to the "best of its ability" and that an "adverse inference that POSCO and its cross-owned input suppliers received certain subsidies, benefitted from those subsidies, and that those subsidies were specific, is warranted in this case".[970] In drawing this adverse inference, the USDOC explained that:

> Because POSCO failed to report the necessary information and only after discovery at verification did it report on the last day that some of the inputs provided by the aforementioned affiliated companies were, in fact, used in the production of the subject merchandise, the [USDOC] concludes that inputs produced by POSCO Chemtech, POSCO P&S, POSCO MTech, and POS-HiMetal are primarily dedicated to the production of the downstream product, within the meaning of 19 CFR 351.525(b)(6)(iv).[971]

7.308. Following its finding that POSCO failed to provide the "necessary" information, the USDOC thus immediately inferred that the inputs produced by the four cross-owned affiliates at issue were

[961] Korea's first written submission, para. 394 (referring to CVD CRS affiliated companies response, (Exhibit KOR-73 (BCI)), exhibit 1).
[962] Korea's first written submission, para. 394 (referring to CVD CRS initial questionnaire response, (Exhibit KOR-70 (BCI)), exhibit 20).
[963] Korea's first written submission, paras. 348 and 356 (referring to CVD CRS verification report, (Exhibit KOR-75 (BCI)), p. 11; and POSCO verification exhibit PVE-3, (Exhibit KOR-76 (BCI))).
[964] Korea's first written submission, para. 352; responses to Panel question No. 72(a), paras. 76-77, No. 72(b), paras. 78-79, and No. 72(c), para. 80. Korea explains that these figures can be derived from "[t]he 2014 audited consolidated financial statement lists POSCO's total cost-of-sales on the income statement, and at verification POSCO submitted the total value of inputs sourced from each affiliate". (Ibid.).
[965] United States' response to Panel question No. 22, para. 100 (referring to CVD CRS issues and decision memorandum, (Exhibit KOR-77), p. 15). (emphasis added)
[966] United States' responses to Panel question No. 22, para. 100, and No. 72(d), paras. 97-105.
[967] United States' response to Panel question No. 74(b), para. 109. (emphasis added)
[968] United States' response to Panel question No. 74(a), para. 107 (referring to CVD CRS issues and decision memorandum, (Exhibit KOR-77), pp. 65-67).
[969] CVD CRS issues and decision memorandum, (Exhibit KOR-77), p. 10.
[970] CVD CRS issues and decision memorandum, (Exhibit KOR-77), p. 10. (emphasis added)
[971] CVD CRS issues and decision memorandum, (Exhibit KOR-77), p. 69. (fn omitted)

primarily dedicated to the production of the downstream product. The USDOC provided no further explanation as to how its finding that the inputs supplied by these cross-owned affiliates were primarily dedicated to the production of the downstream product was based on positive evidence on the record.

7.309. The United States' assertion that the USDOC "examined in full" the consolidated financial statements submitted by POSCO is not supported by record evidence. The part of the final determination that the United States cites simply indicates that the USDOC applied an "AFA rate" to POSCO for "[v]arious grants contained in Financial Statements".[972] The USDOC's analysis does not explain the examination it undertook of POSCO's financial statements, or how this examination was with a view to ascertaining whether the value of POSCO's transactions in relation to the cross-owned affiliates' sales were part of POSCO's financial statements, as alleged by Korea.[973] Moreover, Korea does not rely upon the financial statements in isolation, but uses them *together with* the information supplied by POSCO during verification.[974]

7.310. With respect to the information provided at verification, we note the United States' argument that "a document listing input suppliers (including affiliated input suppliers) would be relevant in verifying POSCO's statement", but the "quantity of inputs purchased, would *not* be relevant to that inquiry".[975] Be that as it may, we recall that the determination made by the USDOC was that these inputs were "primarily dedicated" to the production of the downstream product. Article 12.7 allows an investigating authority to "fill in the gaps" by using the "facts" that are "available" to it, but this does not serve as a license to base determinations solely upon "non-factual assumptions or speculation".[976] Rather, an investigating authority continues to be under an obligation to take into account all facts that are properly before it in order to make determinations on the basis of reasonable replacements for the missing information. In the circumstances of this case, the USDOC ought to have taken into account the input purchase data provided at verification, particularly when the data was contained in the same document listing the input suppliers – information which the USDOC took into account for verification purposes – in order to select reasonable replacements for the missing "necessary" information.

7.311. The USDOC explained that it was not able to "verify the validity of the input amounts" due to the "untimely nature and large amounts of data required to fully establish the credibility of the submission".[977] However, the fact that the data provided at verification may have been "untimely" and in "large amounts"[978], and therefore it may have been "inconvenient or impractical" for the USDOC to take further steps to confirm the basic nature of the data, cannot outweigh the due process rights that are enjoyed by interested parties throughout the course of an investigation.[979] The United States argues that the information concerning the value of inputs provided by POSCO is "not relevant to [the USDOC's] fact intensive primarily dedicated analysis because the analysis considers whether an input is primarily dedicated not the value that is dedicated".[980] This, however, is exactly what the USDOC failed to do, i.e. to examine whether the information provided by POSCO was *relevant* for purposes of its "primarily dedicated analysis".

7.312. In sum, the determination as to whether inputs were primarily dedicated ought to have been made by the USDOC in light of all the facts that were properly available to it. It is clear that these facts included the information relating to cross-owned affiliates and their sales in POSCO's consolidated financial statements submitted as a questionnaire response, as well as the information provided at verification. The USDOC did not consider whether the information that was

[972] CVD CRS issues and decision memorandum, (Exhibit KOR-77), p. 15.

[973] The consolidated financial statements contain information on "related party transactions" with cross-owned affiliates for 2013-2014 as well as the total sales figures for them. (CVD CRS initial questionnaire response, (Exhibit KOR-70 (BCI)), exhibit 20, pp. 110-111).

[974] Korea's responses to Panel question No. 72(a), paras. 76-77, No. 72(b), paras. 78-79, and No. 72(c), para. 80.

[975] United States' response to Panel question No. 74(b), paras. 108-109. (emphasis added)

[976] Appellate Body Reports, *US – Carbon Steel (India)*, paras. 4.417 and 4.419; *Mexico – Anti-Dumping Measures on Rice*, para. 294; *US – Countervailing Measures (China)*, para. 4.178; and *US – Anti-Dumping Methodologies (China)*, para. 5.172.

[977] CVD CRS issues and decision memorandum, (Exhibit KOR-77), p. 67.

[978] CVD CRS issues and decision memorandum, (Exhibit KOR-77), p. 67.

[979] Panel Report, *US – Supercalendered Paper*, para. 7.177. See also Appellate Body Reports *Mexico – Anti-Dumping Measures on Rice*, para. 292; and *EC – Tube or Pipe Fittings*, para. 138 (quoting Appellate Body Report, *EC – Bed Linen* (*Article 21.5 – India)*, para. 136).

[980] United States' comments on Korea's response to Panel question No. 72(a).

before it indicated that the inputs at issue were primarily dedicated for the production of the downstream product. Upon discovering at verification that, contrary to POSCO's questionnaire response, cross-owned affiliates supplied inputs that could have been used for the production of the downstream product, the USDOC simply assumed – impermissibly, in our view – that the inputs were primarily dedicated for the production of the downstream product without taking into account the information that was properly before it.[981]

7.313. Accordingly, in the circumstances of this case, we find that, in selecting the replacement facts, the USDOC did not take into account all the information that was properly before it and made an assumption unsupported by positive evidence that the inputs supplied by the cross-owned affiliates discovered at verification were "primarily dedicated" to the production of the downstream product. Because the USDOC erred in finding that the inputs supplied by the cross-owned affiliates were "primarily dedicated" to the production of the CRS products at issue, it also erred in finding that the relevant subsidies received by these affiliates were countervailable and attributable to POSCO. We therefore find that the USDOC acted inconsistently with Article 12.7 of the SCM Agreement in its selection of the replacement facts with respect to cross-owned affiliate input suppliers.

7.3.4.4.2.2 POSCO facility in an FEZ

7.314. We have already found that the USDOC erred in resorting to facts available with respect to POSCO's facility in an FEZ. In these circumstances, we do not consider that making further findings on Korea's claims concerning the USDOC's selection of the replacement facts on the basis of the record used for the USDOC's WTO-inconsistent findings would assist in providing a positive solution to the dispute before us.[982]

7.3.4.4.2.3 DWI loan data

7.315. We have already found that the USDOC erred in resorting to facts available with respect to the DWI loan data. In these circumstances, we do not consider that making further findings on Korea's claims concerning the USDOC's selection of the replacement facts on the basis of the record used for the USDOC's WTO-inconsistent findings would assist in providing a positive solution to the dispute before us.[983]

7.3.4.5 Korea's claims under Articles 10, 19.4, and 32.1 of the SCM Agreement

7.316. Korea further claims that, as a result of the USDOC's use of facts available inconsistently with Article 12.7 of the SCM Agreement, the United States imposed countervailing duties "in excess of the amount of the subsidy found to exist, in violation of Article 19.4", as well as in violation of Articles 10 and 32.1 of the SCM Agreement.[984] According to Korea, because the margin of countervailing duty was determined based on facts available in a manner inconsistent with Article 12.7, "the countervailing duty levied automatically violated Article 19.4 of the SCM Agreement".[985] Moreover, Korea asserts that the violation of Article 12.7 also "automatically leads" to a violation of Articles 10 and 32.1 of the SCM Agreement, as "this USDOC investigation and the measure taken were not in accordance with the SCM Agreement".[986]

7.317. The United States responds that Korea's claims under Articles 10, 19.4, and 32.1 are "entirely consequential" and "Korea offers no argument or evidence to support any independent breach of those provisions".[987] According to the United States, were the Panel to uphold Korea's claims under Article 12.7, "there would be no basis to decide Korea's consequential claims".[988] First, the United States "does not concede that such breaches are 'automatic'".[989] Second,

[981] CVD CRS issues and decision memorandum, (Exhibit KOR-77), p. 67. (emphasis added)
[982] See, e.g. Panel Reports, *Egypt – Steel Rebar*, para. 7.310; and *Mexico – Anti-Dumping Measures on Rice*, para. 7.200. See also Panel Report, *China – Broiler Products*, para. 7.555.
[983] See, e.g. Panel Reports, *Egypt – Steel Rebar*, para. 7.310; and *Mexico – Anti-Dumping Measures on Rice*, para. 7.200. See also Panel Report, *China – Broiler Products*, para. 7.555.
[984] Korea's first written submission, paras. 455-456.
[985] Korea's first written submission, paras. 451-452.
[986] Korea's first written submission, para. 453.
[987] United States' first written submission, para. 425.
[988] United States' first written submission, para. 427.
[989] United States' first written submission, para. 427.

the United States submits that deciding such claims would be serve "no useful purpose" and would provide no "additional guidance that would be useful regarding implementation of any recommendations adopted by the DSB".[990]

7.318. Korea does not present any independent bases for the alleged breaches of Articles 10, 19.4, and 32.1 of the SCM Agreement; instead, its claims under these provisions are dependent entirely upon a finding that the United States acted inconsistently with Article 12.7 of the SCM Agreement.[991] In these circumstances – and having already found that the United States acted inconsistently with Article 12.7 of the SCM Agreement – we do not consider it necessary to rule upon Korea's claims under Articles 10, 19.4, and 32.1 of the SCM Agreement in order to resolve the dispute before us.[992]

7.3.5 Countervailing duties on certain hot-rolled steel flat products from Korea (USDOC investigation number C-580-884)

7.3.5.1 Introduction

7.319. Korea claims that the United States acted inconsistently with Article 12.7 of the SCM Agreement in the countervailing duties investigation concerning certain HRS flat products from Korea (the "HRS CVD investigation").[993] Specifically, Korea claims that the USDOC acted inconsistently with Article 12.7 of the SCM Agreement by using facts available in respect of three issues:

a. POSCO's alleged failure to provide certain information relating to its cross-owned affiliate input suppliers ("cross-owned affiliate input suppliers")[994];

b. POSCO's alleged failure to provide requested information about the POSCO Global R&D Centre in the FEZ ("POSCO facility in an FEZ")[995]; and

c. DWI's alleged failure to provide requested information about the use of KORES loans ("DWI loan data").[996]

7.320. Korea claims that POSCO did not "refuse access" to, or otherwise fail to provide "necessary" information or significantly impede the investigation, with respect to the three issues presented above.[997] Furthermore, Korea claims that the USDOC disregarded verifiable information that was submitted by POSCO acting to the best of its ability and did not engage in a comparative evaluation and assessment in order to arrive at an accurate determination, thus failing to select the "best information available".[998]

7.321. We begin by setting out the relevant factual background of the underlying investigation, followed by the parties' arguments. In section 7.3.5.4.1 we address Korea's claims of WTO-inconsistency regarding the USDOC's resort to facts available for each of the three issues identified above. Finally, in section 7.3.5.4.2 we address Korea's claims of WTO-inconsistency regarding the USDOC's selection of the replacement facts.

7.3.5.2 Factual background

7.322. The USDOC initiated the HRS CVD investigation on 9 September 2015.[999] This followed the initiation of the CRS CVD investigation on 17 August 2015.[1000] POSCO was selected as a mandatory

[990] United States' first written submission, para. 428.
[991] Korea's first written submission, paras. 451-453.
[992] Panel Report, *US – Carbon Steel (India)*, para. 7.537.
[993] Korea's first written submission, para. 523.
[994] Korea's first written submission, paras. 533, 589-609, and 634-635.
[995] Korea's first written submission, paras. 533, 610-622, and 636.
[996] Korea's first written submission, paras. 533, 623-630, and 637.
[997] Korea's first written submission, para. 524.
[998] Korea's first written submission, paras. 527-528 and 644-646.
[999] CVD HRS negative preliminary determination, (Exhibit KOR-105), p. 1.
[1000] CVD CRS negative preliminary determination, (Exhibit KOR-87), p. 1.

respondent in both investigations.[1001] The USDOC conducted the two investigations simultaneously, with the CRS CVD investigation being further advanced given its earlier initiation date. For example, in the CRS CVD investigation, the USDOC issued its preliminary determination on 15 December 2015[1002], conducted verification of POSCO in March 2016[1003], and issued its final determination on 29 July 2016.[1004] These events were followed closely by the HRS CVD investigation, with the USDOC issuing its preliminary determination on 8 January 2016, conducting verification of POSCO in May 2016[1005], and issuing its final determination on 12 August 2016.[1006] Thus, as discussed below, despite the broad factual similarity between the issues in the two investigations, POSCO modified its responses in the HRS CVD investigation in light of the issues that it had already encountered in the CRS CVD investigation.

7.3.5.2.1 The USDOC's resort to facts available

7.3.5.2.1.1 Cross-owned affiliate input suppliers

7.323. In section III of its initial questionnaire dated 24 September 2015, the USDOC requested complete responses for certain "'cross-owned' affiliated companies".[1007] The USDOC specified which companies it considered "cross-owned", and in which situations responses were required, i.e. if the "cross-owned company supplies an input product … for production of the downstream product produced by the respondent".[1008]

7.324. In its joint response with its affiliated trading company, DWI, POSCO stated that it did "not believe it [had] any affiliates that [met] any of the four cross-ownership criteria as defined above by the [USDOC]", nor that "POSCO or any of its affiliates [were] cross-owned by a third party".[1009] DWI also responded that it did not have any cross-owned affiliates as defined by the USDOC, however, it submitted a complete response to the USDOC's questionnaire "because it is a trading company that was involved in POSCO's exports of subject merchandise to the United States during the POI".[1010]

7.325. On 6 April 2016, the USDOC issued a supplemental questionnaire to POSCO.[1011] Together with its response – filed a week later on 13 April 2016 – POSCO included a submission explaining that, "[i]n the course of preparing for the upcoming verification, POSCO … discovered some issues with its initial questionnaire responses that it would like to clarify".[1012] One of these issues pertained to cross-owned affiliate input suppliers and POSCO clarified "that it did have several cross-owned affiliates that provided negligible amounts of inputs that could be used in the production of the downstream product (although POSCO [could not] determine if these inputs were actually used to produce the subject merchandise during the POI)".[1013] It noted, however, that under the USDOC's regulations, any subsidies to these affiliated companies were not attributable to POSCO because the production of the inputs was not "primarily dedicated" to the production of the subject merchandise.[1014] POSCO also provided a list of inputs purchased from cross-owned affiliates that could be used in the production of the downstream product, along with the values of those sales as a percentage of the cross-owned affiliates' total sales.[1015] This information allegedly demonstrated that any inputs supplied by the cross-owned affiliates represented an insignificant part of their total

[1001] CVD HRS negative preliminary determination, (Exhibit KOR-105), p. 2; CVD CRS negative preliminary determination, (Exhibit KOR-87), p. 2.
[1002] CVD CRS negative preliminary determination, (Exhibit KOR-87).
[1003] CVD CRS verification report, (Exhibit KOR-75 (BCI)).
[1004] CVD CRS final determination, (Exhibit KOR-71).
[1005] CVD HRS verification report, (Exhibit KOR-96 (BCI)).
[1006] CVD HRS final determination, (Exhibit KOR-88).
[1007] CVD HRS affiliated companies response, (Exhibit KOR-91 (BCI)), p. 4.
[1008] CVD HRS affiliated companies response, (Exhibit KOR-91 (BCI)), pp. 4-5.
[1009] CVD HRS affiliated companies response, (Exhibit KOR-91 (BCI)), p. 5.
[1010] CVD HRS affiliated companies response, (Exhibit KOR-91 (BCI)), pp. 5-6. In the same questionnaire, the USDOC requested the identity of all affiliated companies, and a detailed description of the relationship between POSCO and DWI, and these companies – requests with which the two companies complied. (CVD HRS affiliated companies response, (Exhibit KOR-91 (BCI)), pp. 3-4 and exhibits 1 and 2).
[1011] CVD HRS supplemental questionnaire response, (Exhibit KOR-92 (BCI)).
[1012] CVD HRS supplemental questionnaire response, (Exhibit KOR-92 (BCI)), p. 5.
[1013] CVD HRS supplemental questionnaire response, (Exhibit KOR-92 (BCI)), p. 6.
[1014] CVD HRS supplemental questionnaire response, (Exhibit KOR-92 (BCI)), p. 6 (referring to 19 CFR 351.525, (Exhibit KOR-80), Section (b)(6)(iv)).
[1015] CVD HRS supplemental questionnaire response, (Exhibit KOR-92 (BCI)), p. 7 and exhibit 20.

sales.[1016] The following day, on 14 April 2016, the USDOC responded by letter explaining that the submission included with the supplemental questionnaire response was not "information submitted in response to questionnaires", and therefore constituted "new factual information" that was "untimely and unsolicited".[1017]

7.326. In response to the USDOC's supplemental new subsidy allegation questionnaire dated 26 April 2016, POSCO again attempted to submit the same information, arguing that "timeliness" was not an issue as the USDOC continued to collect new information, as evidenced by the new subsidy allegation questionnaire.[1018] POSCO also argued that this information did not substantially prejudice any party, and thus it was within the USDOC's discretion to accept it.[1019] On the same day as POSCO's response, the USDOC again declined to take into account the "new, untimely and unsolicited information".[1020]

7.327. During verification conducted in May 2016, the USDOC asked POSCO and DWI to discuss and document (a) corporate history, ownership, structure, and affiliations; (b) products produced and exported; and (c) location of all offices and facilities.[1021] The USDOC also asked POSCO and DWI to "[b]e prepared to demonstrate that none of POSCO's other affiliated companies provided inputs for the production of hot-rolled steel or otherwise would fall under our attribution regulations".[1022] The USDOC's verification report explains that:

> [C]ounsel for POSCO stated that another ongoing proceeding had queried POSCO's reporting of possible cross-owned companies. The officials then provided us a list of raw material purchases by POSCO as well as a list of inputs that may go into the production of hot-rolled steel. … Officials clarified that this list includes all possible inputs to a typical hot-rolled product, rather than all inputs purchased by POSCO. Company officials explained that it would not be possible to produce an exhaustive list of all inputs because each product is made to a specific purchase order and the company would be unable to review every purchase order made during the POI. However, the list is a reasonable reflection of the inputs to the subject merchandise. Additionally, company officials stated that, as an initial matter, because POSCO produces many products and is a fully integrated producer, they cannot trace every element and input to the subject merchandise.
>
> The official then continued on how it determined if any POSCO affiliate needed to provide a response. … Then they determined whether any of the companies provided any inputs that could be used to produce subject merchandise or the downstream product, and whether the inputs were primarily dedicated. In order to determine which inputs were primarily dedicated, they looked at the value of the input supplied by the affiliated company. If the value of the input was small, either relative to POSCO's cost of sales or relative to the total value of the affiliated companies' sales, they determined that it was not primarily dedicated.[1023]

The USDOC requested further explanations for the following companies from the list presented by POSCO at verification: POSCO Chemtech, POS-HiMetal, POSCO M-Tech, and POSCO P&S.[1024]

[1016] CVD HRS supplemental questionnaire response, (Exhibit KOR-92 (BCI)), p. 7.
[1017] USDOC letter on CVD HRS, (Exhibit KOR-93), p. 1. Because the new factual information was submitted after the latest period available for the submission of such information – 30 days before the preliminary determination – the USDOC explained it "cannot accept this new, untimely and unsolicited information for this proceeding". (Ibid.).
[1018] CVD HRS supplemental new subsidy allegation questionnaire response, (Exhibit KOR-94 (BCI)), pp. 5-6 and 8-9.
[1019] CVD HRS supplemental new subsidy allegation questionnaire response, (Exhibit KOR-94 (BCI)), pp. 5-7.
[1020] Rejection of POSCO's resubmission, (Exhibit KOR-95).
[1021] CVD HRS verification report, (Exhibit KOR-96 (BCI)), p. 4.
[1022] CVD HRS verification report, (Exhibit KOR-96 (BCI)), p. 4.
[1023] CVD HRS verification report, (Exhibit KOR-96 (BCI)), pp. 4-5.
[1024] CVD HRS verification report, (Exhibit KOR-96 (BCI)), p. 5. These were the same four companies at issue in the CRS CVD investigation. See para. 7.237 above.

7.328. In its final determination, the USDOC found that POSCO failed to provide questionnaire responses for certain input suppliers, and that it had incorrectly stated that no affiliates provided inputs to its production of subject merchandise:

> POSCO failed to satisfy its statutory duty to reply accurately and completely to requests for necessary information regarding its affiliates, pursuant to section 776(a)(1) of the Act. … Without the complete, accurate and reliable data upon which to attribute the unreported companies' subsidies to POSCO, the [USDOC] cannot accurately calculate POSCO's CVD subsidy rate for this final determination. Consequently, we determine that because POSCO withheld necessary information, failed to provide such information by the deadlines for submission, and significantly impeded the investigation, we find that the use of facts available is warranted in accordance with sections 776(a)(1) and (2) of the Act.[1025]

7.3.5.2.1.2 POSCO facility in an FEZ

7.329. In its initial questionnaire, the USDOC asked POSCO certain questions regarding subsidies to companies located in an FEZ.[1026] Both POSCO and DWI replied that they had no facilities located in an FEZ and were therefore not eligible for and did not receive any tax reductions, exemptions, grants, or financial support under any of the three programmes listed in the USDOC's question.[1027] Additionally, the GOK in its initial response stated that, during the investigation period, none of the respondents received any benefit under the FEZ programmes, referring specifically to the Incheon FEZ, among others.[1028]

7.330. In its supplemental questionnaire response, POSCO clarified that it had certain facilities located in FEZs, however it confirmed that it did not receive any FEZ-related benefits since it was not an eligible foreign-invested enterprise.[1029] The USDOC rejected POSCO's attempted clarification with respect to POSCO facilities in an FEZ as constituting unsolicited and new factual information.[1030] POSCO made a second attempt to clarify its initial response in its new subsidy allegation questionnaire response. POSCO argued that "timeliness" was not an impediment for the USDOC to accept the information since the USDOC continued to collect new information, and, as this information did not substantially prejudice any party, it was within the USDOC's discretion to accept it.[1031] On the same day, the USDOC again declined to take into account this "new, untimely and unsolicited information".[1032]

7.331. During verification, POSCO presented what it considered to be "minor corrections", including the "clarification" that POSCO maintained a Global R&D Centre located in Songdo International City, which is part of the Incheon FEZ.[1033] The USDOC accepted this clarification as a "minor correction", but explained that it would not verify the use or non-use of the alleged FEZ programmes as POSCO had "only stated that the company had no facilities located in an FEZ".[1034]

7.332. In the final determination, the USDOC rejected POSCO's claim that it did not receive any benefits because it, in fact, had a facility located in an FEZ.[1035] The USDOC also rejected POSCO's argument that it could not have benefitted from this programme on the basis that it was designated to attract foreign investment.[1036] According to the USDOC, certain shareholders of POSCO appeared to be foreign and thus POSCO could have been eligible to receive funding.[1037]

[1025] CVD HRS issues and decisions memorandum, (Exhibit KOR-98), p. 61.
[1026] CVD HRS initial questionnaire response, (Exhibit KOR-90 (BCI)), p. 45.
[1027] CVD HRS initial questionnaire response, (Exhibit KOR-90 (BCI)), p. 45.
[1028] CVD HRS GOK questionnaire response, (Exhibit KOR-100), pp. 67-68 and exhibit FEZ-1.
[1029] CVD HRS supplemental questionnaire response, (Exhibit KOR-92 (BCI)), pp. 5-6.
[1030] USDOC letter on CVD HRS, (Exhibit KOR-93).
[1031] CVD HRS supplemental new subsidy allegation questionnaire response, (Exhibit KOR-94 (BCI)), pp. 5-7.
[1032] Rejection of POSCO's resubmission, (Exhibit KOR-95).
[1033] CVD HRS POSCO minor corrections, (Exhibit KOR-99), p. 1 and attachment 3.
[1034] CVD HRS verification report, (Exhibit KOR-96 (BCI)), p. 3.
[1035] CVD HRS issues and decisions memorandum, (Exhibit KOR-98), p. 69.
[1036] CVD HRS issues and decisions memorandum, (Exhibit KOR-98), pp. 69-70.
[1037] CVD HRS issues and decisions memorandum, (Exhibit KOR-98), pp. 69-70.

The USDOC concluded that POSCO did not act to the best of its ability and that the application of facts available with an adverse inference was therefore warranted.[1038]

7.3.5.2.1.3 DWI loan data

7.333. In its initial questionnaire, the USDOC requested details regarding all assistance received during the POI under the KORES and KNOC loan programmes.[1039] DWI responded that it had outstanding long-term borrowings from KORES and KNOC during the POI. It explained, however, that these loans were tied to non-subject merchandise and were unrelated to DWI's exports to the United States of subject merchandise produced by POSCO.[1040]

7.334. The USDOC issued a supplemental questionnaire requesting DWI to provide a complete questionnaire response regarding investments using KORES and KNOC loans.[1041] DWI responded that it had reported only [[***]] that it received under these programmes during the POI, as opposed to [[***]].[1042] DWI provided a chart listing the loans it had received under these programmes.[1043]

7.335. The USDOC subsequently issued a new subsidy allegation questionnaire. In response, POSCO sought to clarify, *inter alia*, issues regarding certain KORES loans received by DWI.[1044] POSCO reported that DWI received additional funding for two projects ([[***]] and [[***]]), for which it had also received loans pursuant to Korea Export Import Bank's (KEXIM) Overseas Investment Credit programme.[1045] POSCO also argued that these loans were not tied to subject merchandise, and therefore any benefit could not be attributed to the subject merchandise.[1046] The USDOC declined to take into account this information on the basis that it was "new, untimely and unsolicited".[1047]

7.336. POSCO and DWI again attempted to report this additional funding during verification as a "minor correction", however, the USDOC did not accept it and declined to verify the loans.[1048] In its final determination, the USDOC explained that it did not accept this information as a "minor correction" because it constituted a "significant change in the magnitude of the funding provided under the program".[1049] The USDOC rejected POSCO's argument that the KORES programme was verified in its entirety, recalling that it had declined to verify the additional loans provided.[1050] The USDOC found that DWI withheld necessary information regarding the use of the KORES programme and thus the use of facts available was warranted.[1051]

7.3.5.2.2 The USDOC's selection of the replacement facts

7.337. The USDOC found that:

> [G]iven the information reported in its questionnaire response, and the conflicting information discovered at verification, we determine that POSCO withheld requested necessary information during the course of the investigation, impeded the proceeding, and through its actions prevented the [USDOC] from being able to verify that

[1038] CVD HRS issues and decisions memorandum, (Exhibit KOR-98), p. 69.
[1039] CVD HRS initial questionnaire response, (Exhibit KOR-90 (BCI)), p. 31.
[1040] CVD HRS initial questionnaire response, (Exhibit KOR-90 (BCI)), pp. 31-32. Specifically, DWI reported that the KNOC loans were related to investments in the exploration and production of [[***]], while the KORES loans were related to investments in [[***]]. (Ibid.).
[1041] CVD HRS supplemental questionnaire, (Exhibit KOR-101), p. 4.
[1042] CVD HRS supplemental questionnaire response, (Exhibit KOR-102 (BCI)), exhibit E-11, pp. 1-2. See para. 7.241 above.
[1043] CVD HRS supplemental questionnaire response, (Exhibit KOR-102 (BCI)), exhibit E-12.
[1044] CVD HRS supplemental new subsidy allegation questionnaire response, (Exhibit KOR-94 (BCI)), p. 9.
[1045] CVD HRS supplemental new subsidy allegation questionnaire response, (Exhibit KOR-94 (BCI)), p. 9.
[1046] CVD HRS supplemental new subsidy allegation questionnaire response, (Exhibit KOR-94 (BCI)), pp. 9-10.
[1047] Rejection of POSCO's resubmission, (Exhibit KOR-95).
[1048] CVD HRS verification report, (Exhibit KOR-96 (BCI)), p. 3.
[1049] CVD HRS issues and decisions memorandum, (Exhibit KOR-98), p. 72.
[1050] CVD HRS issues and decisions memorandum, (Exhibit KOR-98), p. 72.
[1051] CVD HRS issues and decisions memorandum, (Exhibit KOR-98), p. 72.

> information. Therefore, the [USDOC] determines that the use of facts available … is warranted in determining the existence of cross-owned affiliates that provided inputs used in the production of subject merchandise.
>
> We further find that an adverse inference is warranted, pursuant to section 776(b) of the Act. POSCO failed to identify or provide necessary information as to its respective cross-owned companies. Additionally, we find that POSCO failed to report that one of its facilities is located in a FEZ and that DWI failed to report certain loans. As a result, we find that POSCO did not act to the best of its ability in this investigation. Accordingly, we find that an adverse inference that POSCO and its cross-owned input suppliers benefited from those subsidies is warranted in this case.[1052]

7.338. The USDOC explained that in applying AFA to POSCO, it was guided by the "methodology" whereby it selected "the highest calculated program-specific rates determined for a cooperating respondent in the same investigation, or, if not available, rates calculated in prior CVD cases involving the same country".[1053] The USDOC found that POSCO benefitted from all programmes under investigation, but excluded programmes determined not to be countervailable.[1054] The USDOC calculated a CVD rate of 57.04% for POSCO.[1055]

7.3.5.3 Main arguments of the parties

7.3.5.3.1 The USDOC's resort to facts available

7.339. Korea claims that, for each of the three issues, the USDOC acted inconsistently with Article 12.7 of the SCM Agreement as the conditions for resorting to the facts available were not met.[1056] With respect to each issue, Korea argues that no information was "discovered" by the USDOC, but, instead, POSCO "reported the relevant information from the outset, and then offered additional clarification well before the verification when similar issues arose in the further progressed [CRS] CVD Investigation".[1057] Referring to the findings in *US – Hot-Rolled Steel*, Korea contends that additional information with respect to each issue was provided in a timely manner despite the fact that it was submitted after the relevant deadlines.[1058]

7.340. The United States submits that the USDOC did not take the additional information into account as it was provided several months after the expiry of the applicable deadlines.[1059] The United States also takes issue with Korea's reliance on *US – Hot-Rolled Steel*, arguing that the factors identified by the Appellate Body in that case do not find any basis in the text of the covered agreements.[1060] According to the United States, Korea ignores the number of days by which the interested party missed the deadline.[1061] The United States asserts that accepting information nearly four months after the relevant deadline would have likely compromised the USDOC's ability to conduct the investigation expeditiously, and would have undermined the "effectiveness and efficiency" of the proceedings.[1062]

7.3.5.3.1.1 Cross-owned affiliate input suppliers

7.341. Korea argues that POSCO did not refuse to provide necessary information concerning certain cross-owned affiliated input suppliers.[1063] Korea explains that – unlike the situation in the CRS CVD investigation – POSCO attempted to provide the information more than a month before verification in the investigation at issue.[1064] Korea argues that the information regarding inputs provided by

[1052] CVD HRS issues and decisions memorandum, (Exhibit KOR-98), pp. 9-10.
[1053] CVD HRS issues and decisions memorandum, (Exhibit KOR-98), p. 11.
[1054] CVD HRS issues and decisions memorandum, (Exhibit KOR-98), p. 12.
[1055] CVD HRS issues and decisions memorandum, (Exhibit KOR-98), p. 17.
[1056] Korea's first written submission, paras. 588 and 631.
[1057] Korea's second written submission, paras. 232-233.
[1058] Korea's second written submission, paras. 237-238 (referring to Appellate Body Report, *US – Hot-Rolled Steel*, paras. 87-89; and Panel Report, *US – Hot-Rolled Steel*, paras. 7.54-7.55 and 7.57).
[1059] United States' second written submission, paras. 129-139.
[1060] United States' second written submission, paras. 134-135.
[1061] United States' second written submission, para. 138.
[1062] United States' second written submission, para. 138.
[1063] Korea's first written submission, para. 597.
[1064] Korea's first written submission, para. 597.

POSCO's cross-owned affiliates was not "necessary" as those inputs were not "primarily dedicated" to the production of the subject merchandise, and because it could not be determined whether the inputs were actually used in the production of HRS.[1065] As to the issue of timeliness, Korea argues that the requested information was provided within a reasonable period of time, as part of its supplemental responses dated 13 April 2016 and 3 May 2016, as well as at verification.[1066] In any event, Korea contends that the values of these transactions were already on the record as part of POSCO's initial submission of its consolidated financial statements.[1067] Finally, given that POSCO itself alerted the USDOC to this issue, Korea argues that POSCO acted to the best of its ability and did not impede the investigation.[1068]

7.342. The United States responds that it was only after the "discovery" at verification in the CRS CVD investigation that POSCO submitted the information in this investigation, nearly four months after the deadline for submitting new factual information had passed.[1069] The United States also submits that, besides being untimely and unsolicited, this information was included as part of the supplemental questionnaire response pertaining to a request for different information, and was therefore rejected by the USDOC for being unrelated to its request.[1070] The United States notes that the USDOC had requested POSCO to identify the inputs provided by affiliated parties, and not to conduct a "primarily dedicated" analysis.[1071] The United States argues that, had POSCO responded that it had cross-owned affiliate input suppliers, the USDOC would have requested further information from those suppliers.[1072]

7.3.5.3.1.2 POSCO facility in an FEZ

7.343. Korea argues that POSCO provided information with respect to its facility in an FEZ over a month before the planned verification.[1073] Korea explains that POSCO provided this information as a "clarification", and it was consistent with the response already provided by the GOK.[1074] Therefore, according to Korea, the information requested was provided within a reasonable period.[1075] Korea contends that timeliness was not an issue since the USDOC was still issuing supplemental questionnaires when POSCO submitted the information, meaning that it was still collecting new information.[1076] Korea further argues that there was no "necessary" information missing, as there was a significant amount of record evidence that would have allowed the USDOC to fill in any possible gap and find that POSCO did not benefit from any FEZ programme.[1077] Korea contends that the USDOC could have requested to visit POSCO's R&D facility to verify that it did not receive a benefit; however, it did not do so and the United States should not conflate the factual situation of this investigation with the CRS CVD investigation.[1078]

7.344. The United States responds that the information was rejected because it was untimely and unsolicited and the USDOC clearly indicated that verification could not be used for the submission of new information.[1079] According to the United States, nothing in the SCM Agreement obliges an investigating authority to take into account information submitted well after the "factual deadline".[1080] Furthermore, the United States explains that the purpose of verification is to verify the response provided by a company against that company's records.[1081] Therefore, the USDOC allowed the "minor correction" that POSCO had a facility in an FEZ because it was relevant to POSCO's previous reporting regarding whether they had a facility in an FEZ.[1082] However, the USDOC

[1065] Korea's first written submission, paras. 590-593.
[1066] Korea's first written submission, paras. 595-596.
[1067] Korea's first written submission, paras. 595-596.
[1068] Korea's first written submission, para. 607.
[1069] United States' first written submission, para. 378.
[1070] United States' first written submission, para. 378.
[1071] United States' second written submission, paras. 109-112.
[1072] United States' response to Panel question No. 81(a), paras. 118 and 121.
[1073] Korea's first written submission, para. 558.
[1074] Korea's second written submission, para. 232.
[1075] Korea's first written submission, paras. 617-619.
[1076] Korea's second written submission, para. 242.
[1077] Korea's first written submission, paras. 611-616.
[1078] Korea's second written submission, para. 245.
[1079] United States' first written submission, para. 384.
[1080] United States' second written submission, para. 122.
[1081] United States' response to Panel question No. 82, para. 125.
[1082] United States' response to Panel question No. 82, paras. 125-126.

was not able to verify the *use* of the programmes because POSCO had reported that it did not maintain any facilities within an FEZ.[1083]

7.3.5.3.1.3 DWI loan data

7.345. Korea argues that upon discovering an "inadvertent error", POSCO submitted information concerning certain additional loans under the KORES programme on 3 May 2016 – a few weeks before verification – together with its response to the USDOC's new subsidy allegation questionnaire.[1084] Korea argues that the *use* of the programme was already known to the USDOC, and POSCO's corrections concerned only the *extent* of the use of the programme.[1085] Korea contends that the USDOC had already found that DWI's use of the programme was *de minimis*; therefore, the minor additional information could not have had any meaningful impact on the benefit calculation.[1086] Korea points out that DWI specifically stated that the additional loans were tied to inputs not used in the production of the subject merchandise.[1087] Even though these loans were not relevant for this investigation – as there was no benefit attributed to the production of HRS – DWI submitted these additional loans in order to complete the information provided earlier.[1088]

7.346. The United States maintains that, as with the other information discovered during verification in the CRS CVD investigation, POSCO tried to put untimely and unsolicited information on the record of this investigation twice, but it was rejected by the USDOC.[1089]

7.3.5.3.2 The USDOC's selection of the replacement facts

7.347. Korea claims that the USDOC acted inconsistently with Article 12.7 of the SCM Agreement by drawing adverse inferences that the cross-owned affiliates benefitted from all the subsidy programmes at issue; that POSCO obtained benefits under the FEZ programme; and that DWI obtained a benefit under the KORES programme.[1090] Korea argues that the USDOC failed to evaluate comparatively all substantiated facts on the record in order to determine the "best available information" for arriving at an "accurate" determination.[1091]

7.348. Korea also argues that the USDOC acted inconsistently with Article 12.7 of the SCM Agreement by not exercising special circumspection in its selection of the subsidy rates. According to Korea, the USDOC failed to corroborate the selected rates and simply chose the highest calculated rates.[1092] Moreover, the replacement facts were selected in a punitive manner, on the basis of whether they were "sufficiently adverse" to POSCO and DWI.[1093] For Korea, the punitive character of the selected rates is evident from their "excessive and unrealistic" nature.[1094]

7.349. The United States responds that Korea fails to establish that the USDOC selected information inconsistently with Article 12.7.[1095] The United States contends that Korea points to no evidence on the record demonstrating that it was unreasonable for the USDOC to conclude that POSCO's affiliated companies benefitted from the subsidy programmes and that the FEZ programmes were used by POSCO.[1096] Similarly, the United States asserts that Korea points to nothing on the record to demonstrate that the USDOC's determination is not accurate.[1097] In response to Korea's argument that the USDOC failed to use the "relevant 'verifiable' information" on the record, the United States

[1083] United States' response to Panel question No. 82, para. 127. (emphasis added)
[1084] Korea's first written submission, para. 578.
[1085] Korea's first written submission, para. 626. (emphasis added)
[1086] Korea's first written submission, paras. 627-628.
[1087] Korea's second written submission, para. 232.
[1088] Korea's second written submission, para. 243.
[1089] United States' first written submission, para. 390.
[1090] Korea's first written submission, paras. 639, 644-646, and 651.
[1091] Korea's first written submission, para. 640.
[1092] Korea's first written submission, para. 651.
[1093] Korea's first written submission, paras. 642-643 and 651.
[1094] Korea's first written submission, paras. 648-650.
[1095] United States' first written submission, para. 415.
[1096] United States' first written submission, para. 415.
[1097] United States' first written submission, para. 418.

argues that the information submitted before verification was properly found to be unsolicited and untimely and, accordingly, it did not constitute "verifiable information on the record".[1098]

7.3.5.4 Evaluation by the Panel

7.3.5.4.1 The USDOC's resort to facts available

7.350. Pursuant to Article 12.7 of the SCM Agreement, an investigating authority may only resort to facts available when an interested party "refuses access to, or otherwise does not provide, necessary information within a reasonable period".[1099] In the HRS CVD investigation, POSCO attempted to submit information in relation to each of the three issues after the relevant deadline imposed by the USDOC, but before verification. Therefore, the main issue before us is whether the information provided by POSCO was submitted within a "reasonable period". The SCM Agreement does not define what constitutes a "reasonable period" for purposes of Article 12.7. Referring to the Appellate Body's discussion of Article 6.8 and Annex II of the Anti-Dumping Agreement in *US – Hot-Rolled Steel*, Korea identifies the factors that an investigating authority must consider in determining whether information was submitted within a "reasonable period".[1100] We do not consider it necessary to opine upon the relevance of the factors propounded by the Appellate Body in that dispute in the abstract. That said, for present purposes, we note that the use of the term "reasonable" in Article 12.7 of the SCM Agreement implies "a degree of *flexibility* that involves consideration of all of the circumstances of a particular case. What is 'reasonable' in one set of circumstances may prove to be less than 'reasonable' in different circumstances".[1101]

7.351. Although the SCM Agreement envisages that investigating authorities can impose time-limits for responses, the mere fact that information is provided after the expiry of such time-limits does not, *without more*, establish that the information was not provided within a "reasonable period" under Article 12.7.[1102] Article 12 – entitled "Evidence" – uses both the terms "time-limit" and "reasonable period".[1103] In our view, the drafters' careful choice of words also implies that they carry different meanings. This supports our understanding that a time-limit imposed by an investigating authority does not *ipso facto* constitute a "reasonable period" in all circumstances. While it is proper for an investigating authority to attach importance to time-limits fixed for questionnaire responses, in determining whether information is submitted within a reasonable period of time, an investigating authority is required to do more than merely establish that a deadline was exceeded. In this sense, Article 12.7 strikes a balance between "the rights of the investigating authorities to control and expedite the investigating process, and the legitimate interests of the parties to submit information and to have that information taken into account".[1104] Exactly what factors may be considered by an investigating authority – in addition to the expiry of the relevant deadline – remains a function of the specific facts and circumstances of a given case.[1105] With this understanding, we turn to examine Korea's claims with respect to the USDOC's resort to facts available in relation to each of the three issues.

7.3.5.4.1.1 Cross-owned affiliate input suppliers

7.352. Korea argues that no "necessary" information was missing as the inputs provided by the cross-owned companies were not "primarily dedicated" to the production of the subject merchandise, and, in any event, the requested information was provided within a reasonable period of time.[1106]

[1098] United States' first written submission, para. 424.
[1099] Article 12.7 of the SCM Agreement. See also paras. 7.269-7.270 above.
[1100] Korea's second written submission, paras. 237-238 (referring to Appellate Body Report, *US – Hot-Rolled Steel*, paras. 87-89; and Panel Report, *US – Hot-Rolled Steel*, paras. 7.54-7.55 and 7.57).
[1101] Appellate Body Report, *US – Hot-Rolled Steel*, para. 84. (emphasis added)
[1102] Panel Report, *US – Steel Plate*, para. 7.76.
[1103] Footnote 40 to Article 12.1.1 provides, in relevant part, that "[a]s a general rule, the time-limit for exporters shall be counted from the date of receipt of the questionnaire". In addition, paragraph 6 of Annex II to the Anti-Dumping Agreement also distinguishes between "time-limits" and "reasonable period". Paragraph 6 provides, in relevant part, that "[i]f evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefor, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation".
[1104] Appellate Body Report, *US – Hot-Rolled Steel*, para. 86.
[1105] Appellate Body Report, *US – Hot-Rolled Steel*, para. 84.
[1106] Korea's first written submission, paras. 591 and 595.

The United States argues that the USDOC properly rejected the information submitted by POSCO as being "untimely and unsolicited".[1107]

7.353. The USDOC, in its initial questionnaire, requested POSCO to provide "complete questionnaire" responses for those affiliates that were cross-owned, *inter alia*, in instances where the cross-owned company "supplies" an input to POSCO for "production of the downstream product produced by the respondent".[1108] The USDOC did not limit its query by referring to the criterion of "primarily dedicated" products. Instead, the USDOC's question is broadly worded and could encompass information concerning *all* instances where inputs are supplied by a cross-owned affiliate for the production of the downstream product. In its response to the USDOC's supplemental questionnaire submitted on 13 April 2016, POSCO explained that "it did have several cross-owned affiliates that provided negligible amounts of inputs that could be used in the production of the downstream product (although POSCO [could not] determine if these inputs were actually used to produce the subject merchandise during the POI)".[1109] POSCO provided a list of the inputs that it purchased from cross-owned affiliates during the POI that could be used in the production of the downstream product, along with the values of those sales as a percentage of the cross-owned affiliates' total sales.[1110] According to POSCO, this demonstrated that any inputs supplied represented an insignificant part of the affiliates' total sales, and they were not "primarily dedicated" to the production of the downstream product.[1111]

7.354. Through its letter dated 14 April 2016, the USDOC rejected the information concerning cross-owned affiliate input suppliers. The USDOC reasoned, first, that the information concerning cross-owned affiliate input suppliers constituted "unsolicited new factual information" as it "was not related to the information requested by the [USDOC] in its supplemental questionnaire".[1112] Second, the USDOC noted that the deadline for the submission of such new factual information under US law is 30 days prior to preliminary determination (in this case, the preliminary determination was issued on 15 January 2016).[1113] Noting that the "new factual information" was submitted "after the latest period available for the submission of unsolicited new factual information", the USDOC rejected the information provided as being "new, untimely and unsolicited".[1114] As such, the only reason provided by the USDOC for rejecting the "new" information was that it was submitted after "the latest period available". POSCO made a second attempt to submit the same information together with its new subsidy allegation questionnaire response.[1115] The USDOC again rejected this "new, untimely and unsolicited information" provided by POSCO as it was provided after the deadline for the submission of new factual information.[1116]

7.355. Thus, on both occasions that POSCO tried to submit information concerning cross-owned affiliate input suppliers, the USDOC rejected POSCO's submission for the *sole reason* that it was provided after the applicable deadline for the submission of new factual information under US law, i.e. 30 days before the preliminary determination. While it is undisputed that POSCO provided the information concerning cross-owned affiliates after the expiry of this statutory deadline, this, in and of itself, does not mean that it was not provided within a "reasonable period" for purposes of Article 12.7 of the SCM Agreement. As discussed, whether an interested party refuses access to, or otherwise fails to provide, necessary information within a "reasonable period", must be assessed in the specific facts and circumstances of a given case.[1117] The mere fact that the information was provided after the relevant deadline does not, without more, establish that it was not provided within a "reasonable period".

7.356. In its final determination, the USDOC found "that POSCO *only provided* information at verification which would have allowed the [USDOC] to investigate further regarding the inputs provided by the companies" and that "*only after discovery* at verification did it report on the last day that some of the inputs provided by the aforementioned affiliated companies were, in fact, used in

[1107] United States' first written submission, para. 398.
[1108] CVD HRS affiliated companies response, (Exhibit KOR-91 (BCI)), pp. 4-5.
[1109] CVD HRS supplemental questionnaire response, (Exhibit KOR-92 (BCI)), p. 6.
[1110] CVD HRS supplemental questionnaire response, (Exhibit KOR-92 (BCI)), p. 7 and exhibit 20.
[1111] CVD HRS supplemental questionnaire response, (Exhibit KOR-92 (BCI)), p. 7.
[1112] USDOC letter on CVD HRS, (Exhibit KOR-93).
[1113] USDOC letter on CVD HRS, (Exhibit KOR-93).
[1114] USDOC letter on CVD HRS, (Exhibit KOR-93).
[1115] See para. 7.330 above.
[1116] Rejection of POSCO's resubmission, (Exhibit KOR-95).
[1117] See paras. 7.350-7.351 above.

the production of the subject merchandise".[1118] We find that these observations by the USDOC are not supported by the record evidence in so far as POSCO did, in fact, submit this information prior to verification, only for it to be *rejected* by the USDOC. The USDOC made no mention in the final determination of POSCO's prior attempts to submit this information, nor did it provide any reasons for rejecting this information in its final determination. To this extent, these statements by the USDOC do not reflect conduct that would be expected from an unbiased and objective investigating authority.

7.357. For the above reasons, we find that Korea has established that the USDOC acted inconsistently with Article 12.7 of the SCM Agreement because it rejected the information concerning the cross-owned affiliate input suppliers *solely* on the basis that it was provided after the time-limit imposed by the USDOC, without considering whether, in light of the specific facts and circumstances, the information submitted by POSCO was nonetheless submitted within a "reasonable period".[1119]

7.3.5.4.1.2 POSCO facility in an FEZ

7.358. Korea argues that the USDOC improperly resorted to the use of facts available as the requested information was provided by Korea within a "reasonable period".[1120] The United States responds that the information was rejected because it was untimely and unsolicited.[1121]

7.359. In response to the USDOC's initial questionnaire, POSCO stated that it "has no facilities located in a free economic zone ('FEZ') and thus was not eligible for and did not receive any tax reductions, exemptions, grants or financial support under any of the three programs listed in the [USDOC]'s question".[1122] Pursuant to the general instructions offered by the USDOC, the initial questionnaire did not inquire whether POSCO had any facilities located in an FEZ. Instead, the questionnaire required POSCO to "clearly state" that it "did not apply for, use, or benefit from that program during the POI". Thus, information relating to the location of POSCO's facility in an FEZ was not specifically requested by the USDOC. Such information, however, was offered by POSCO in its response as the basis for its assertion that it did not receive any subsidies under the FEZ programmes. At the same time, the GOK in its own questionnaire response stated in relation to FEZ benefits that, "[d]uring the investigation period, none of the respondents received a benefit under this program".[1123]

7.360. Following its initial response, POSCO subsequently attempted to submit a "clarification" regarding the FEZ issue together with its supplemental questionnaire response. POSCO clarified that it had certain facilities located in FEZs, however, as it initially stated and as confirmed by the GOK's response, "it did not receive any benefits for being located in an FEZ".[1124] In support, POSCO also noted that "it is not a foreign-invested enterprise, and as the GOK reported the FEZ benefits are limited to foreign-invested enterprises".[1125] The USDOC declined to accept this clarification, finding, instead, that it constituted "new factual information submitted to the [USDOC] after the latest period available for the submission of unsolicited new factual information on the record".[1126] POSCO again attempted to submit this information in a subsequent questionnaire response, while arguing that timeliness was not an issue, since "[t]his information did not substantially prejudice any party, as it was submitted in the context of a response to the [USDOC]'s own request for additional and new information based on a new subsidy allegation that had been filed by the petitioner some 4 months ago".[1127] The USDOC again rejected this information for the same reasons as before, i.e. it constituted unsolicited, new factual information submitted after the relevant deadline.[1128]

[1118] CVD HRS issues and decisions memorandum, (Exhibit KOR-98), pp. 63 and 65. (emphasis added)
[1119] See, e.g. Appellate Body Report, *US – Hot-Rolled Steel*, para. 89.
[1120] Korea's first written submission, para. 617.
[1121] United States' first written submission, para. 408.
[1122] CVD HRS initial questionnaire response, (Exhibit KOR-90 (BCI)), p. 45.
[1123] CVD HRS GOK questionnaire response, (Exhibit KOR-100), pp. 67-68.
[1124] CVD HRS supplemental questionnaire response, (Exhibit KOR-92 (BCI)), p. 5.
[1125] CVD HRS supplemental questionnaire response, (Exhibit KOR-92 (BCI)), p. 6.
[1126] USDOC letter on CVD HRS, (Exhibit KOR-93).
[1127] CVD HRS supplemental new subsidy allegation questionnaire response, (Exhibit KOR-94 (BCI)), pp. 5-7.
[1128] Rejection of POSCO's resubmission, (Exhibit KOR-95).

7.361. The record evidence suggests that POSCO submitted its clarifications concerning the FEZ issue together with its clarifications concerning the issue of cross-owned affiliate input suppliers as part of both its supplemental responses. The USDOC did not offer any specific or different reasons for rejecting the information relating to FEZs. Instead, the USDOC rejected POSCO's "clarifications" on the FEZ issue together with its "clarifications" on the issue of the cross-owned affiliates for the same reason: that the information relating to both issues was unsolicited, new factual information that was submitted after the applicable deadline.

7.362. Finally, in its final determination, the USDOC found that "POSCO *did not reveal* the fact that it had a facility located in an FEZ until verification" and, therefore, the USDOC "did not have an opportunity to follow up on [POSCO's] claim, or the GOK's claim prior to verification".[1129] This is not supported by the record evidence. POSCO did, in fact, submit information prior to verification explaining that it had facilities in an FEZ, only for it to be *rejected* by the USDOC. The USDOC made no mention in the final determination of POSCO's prior attempts to submit this information, nor did it provide any reasons for rejecting this information. To this extent, these statements do not reflect conduct that would be expected from an unbiased and objective investigating authority. The *sole reason* for the USDOC's rejection of the information supplied by POSCO concerning the FEZ issue was that it was submitted after the expiry of the applicable deadline.

7.363. For the above reasons, we find that Korea has established that the USDOC acted inconsistently with Article 12.7 of the SCM Agreement because it rejected the information concerning POSCO's facility in an FEZ *solely* on the basis that it was provided after the time-limit imposed by the USDOC, without considering whether, in light of the specific facts and circumstances, the information submitted by POSCO was nonetheless submitted within a "reasonable period".[1130]

7.3.5.4.1.3 DWI loan data

7.364. Korea argues that the USDOC erred in resorting to facts available as the revised loan data was provided by DWI within a "reasonable period".[1131] The United States maintains that, as with the other information discovered during verification, POSCO tried twice to put untimely and unsolicited information on the record of the investigation, which was rejected properly by the USDOC.[1132]

7.365. In response to the USDOC's initial questionnaire section concerning "[e]nergy and [r]esource [s]ubsidies", DWI identified certain "outstanding long-term borrowings" from KORES and KNOC during the POI.[1133] DWI explained as follows:

> DWI's KNOC loans are related to investments in the exploration and production of [[***]]. They are thus tied to non-subject merchandise and unrelated to DWI's exports to the United States of subject merchandise produced by POSCO. DWI's KORES loans are related to investments in [[***]]. As with the KORES loans, these loans are tied to non-subject merchandise and are unrelated to DWI's exports to the United Sates of subject merchandise produced by POSCO. Therefore, as it did in [*Non-Oriented Electrical Steel from the Republic of Korea*], the [USDOC] should determine that KORES and KNOC loans that are not tied to subject merchandise are not countervailable.[1134]

7.366. Through its supplemental questionnaire, the USDOC requested complete responses "regarding investments using [KORES] and [KNOC] loans".[1135] In response to the question regarding the eligibility criteria for the KORES programme, DWI submitted that it had "long-term foreign currency loans from KORES for [[***]] that are [[***]]".[1136]

[1129] CVD HRS issues and decisions memorandum, (Exhibit KOR-98), p. 69. (emphasis added)
[1130] See, e.g. Appellate Body Report, *US – Hot-Rolled Steel*, para. 89.
[1131] Korea's first written submission, para. 626.
[1132] United States' first written submission, para. 390.
[1133] CVD HRS initial questionnaire response, (Exhibit KOR-90 (BCI)), p. 32.
[1134] CVD HRS initial questionnaire response, (Exhibit KOR-90 (BCI)), p. 32 (emphasis original). The reference to KORES loans in the penultimate sentence appears to be a typographical error and should instead refer to KNOC loans.
[1135] CVD HRS supplemental questionnaire, (Exhibit KOR-101), p. 4.
[1136] CVD HRS supplemental questionnaire response, (Exhibit KOR-102 (BCI)), exhibit E-11, pp. 1-2.

7.367. Subsequently, as part of its new subsidy allegation supplemental response, POSCO submitted – as a clarification – "additional funding from KORES" for two projects that had already been reported in previous questionnaire responses, as they received funding under the KEXIM loans.[1137] The "two projects" were "[[***]] and [[***]]".[1138] DWI submitted a chart which listed [[***]] individual "[l]oan [a]greement[s]".[1139] The "purpose of loan" for [[***]] agreements was listed as [[***]], and [[***]] Agreements had their stated purpose as [[***]].[1140] This information was provided by DWI together with its second attempt at submitting "clarifications" in respect of the cross-owned affiliate input suppliers and POSCO's facility in an FEZ. The USDOC rejected this additional information on the basis that it constituted unsolicited factual information that was provided after the expiry of the applicable deadline.[1141] The USDOC did not provide any reasons specific to the information concerning the DWI loan data. For example, the USDOC did not consider the ease with which the data could be used to establish that the loans were related to the production of non-subject merchandise and not the export of HRS to the United States.[1142]

7.368. In its final determination, the USDOC stated that, "[a]t verification, DWI presented a list of KORES loans *that it had not previously reported* as a minor correction".[1143] While we do not disagree that DWI attempted to submit the information at verification, the USDOC does not address in its verification report, or final determination, the previous attempts made by POSCO and DWI to submit the information. All of these previous attempts were rejected by the USDOC. As such, the USDOC's statement that the loans were not "previously reported" by DWI is not supported by record evidence and is not consistent with the conduct of an objective and unbiased investigating authority. We find that the *sole reason* for the USDOC's rejection of the information concerning the additional KORES loans that was submitted by POSCO and DWI in their new subsidy allegation supplemental response was that it was submitted after the expiry of the applicable deadline.

7.369. For the above reasons, we find that Korea has established that the USDOC acted inconsistently with Article 12.7 of the SCM Agreement because it rejected the information concerning DWI loan data *solely* on the basis that it was provided after the time-limit imposed by the USDOC, without considering whether, in light of the specific facts and circumstances, the information submitted by POSCO was nonetheless submitted within a "reasonable period".[1144]

7.3.5.4.2 The USDOC's selection of the replacement facts

7.370. We have already found that the USDOC acted inconsistently with Article 12.7 of the SCM Agreement in resorting to facts available with respect to each of the three issues discussed above. In these circumstances, we do not consider that making further findings concerning the USDOC's selection of the replacement facts on the basis of the record used for the USDOC's WTO-inconsistent findings would assist in providing a positive solution the dispute before us.[1145]

7.3.5.5 Korea's claims under Articles 10, 19.4, and 32.1 of the SCM Agreement

7.371. Korea further claims that, as a result of the USDOC's use of facts available inconsistently with Article 12.7 of the SCM Agreement, "the United States imposed countervailing duties in violation of Articles 10, 19.4, and 32.1 of the SCM Agreement".[1146] According to Korea, because the margin of countervailing duty was determined based on facts available in a manner inconsistent with Article 12.7, "the countervailing duty levied automatically violated Article 19.4 of the

[1137] CVD HRS supplemental new subsidy allegation questionnaire response, (Exhibit KOR-94 (BCI)), p. 9.
[1138] CVD HRS supplemental new subsidy allegation questionnaire response, (Exhibit KOR-94 (BCI)), p. 9.
[1139] CVD HRS supplemental new subsidy allegation questionnaire response, (Exhibit KOR-94 (BCI)), exhibit 21.
[1140] CVD HRS supplemental new subsidy allegation questionnaire response, (Exhibit KOR-94 (BCI)), exhibit 21.
[1141] Rejection of POSCO's resubmission, (Exhibit KOR-95).
[1142] See, e.g. paras. 7.292-7.301 above.
[1143] CVD HRS issues and decisions memorandum, (Exhibit KOR-98), p. 72. (emphasis added)
[1144] See, e.g. Appellate Body Report, *US – Hot-Rolled Steel*, para. 89.
[1145] See, e.g. Panel Reports, *Egypt – Steel Rebar*, para. 7.310; *Mexico – Anti-Dumping Measures on Rice*, para. 7.200. See also Panel Report, *China – Broiler Products*, para. 7.555.
[1146] Korea's first written submission, para. 657.

SCM Agreement".[1147] Moreover, Korea asserts that the violation of Article 12.7 also "automatically leads" to a violation of Articles 10 and 32.1 of the SCM Agreement, as "the USDOC Hot Rolled CVD investigation and the CVD measure taken were not in accordance with the SCM Agreement".[1148]

7.372. The United States responds that Korea's claims under Articles 10, 19.4, and 32.1 are "entirely consequential" and "Korea offers no argument or evidence to support any independent breach of those provisions".[1149] According to the United States, were the Panel to uphold Korea's claims under Article 12.7, "there would be no basis to decide Korea's consequential claims".[1150] First, the United States "does not concede that such breaches are 'automatic'".[1151] Second, the United States submits that deciding such claims would be serve "no useful purpose" and would provide no "additional guidance that would be useful regarding implementation of any recommendations adopted by the DSB".[1152]

7.373. Korea does not present any independent bases for the alleged breaches of Articles 10, 19.4, and 32.1 of the SCM Agreement; instead, its claims under these provisions are dependent entirely upon a finding that the United States acted inconsistently with Article 12.7 of the SCM Agreement.[1153] In these circumstances – and having already found that the United States acted inconsistently with Article 12.7 of the SCM Agreement – we do not consider it necessary to rule upon Korea's claims under Articles 10, 19.4, and 32.1 of the SCM Agreement in order to resolve the dispute before us.[1154]

7.3.6 Anti-dumping duties on large power transformers from Korea (USDOC investigation number A-580-867)

7.3.6.1 Introduction

7.374. Korea claims that the USDOC used facts available inconsistently with Article 6.8 and Annex II of the Anti-Dumping Agreement in three administrative reviews concerning the anti-dumping duties imposed on LPTs.[1155]

7.375. In the remand proceedings for the second administrative review (POR2)[1156], the USDOC found that Hyundai Heavy Industries (HHI) "refused to provide the necessary information for [the USDOC] to apply its capping methodology".[1157] The information at issue concerned "the sale price, discounts, rebates and all other revenues and expenses" ("service-related revenues").[1158] In section 7.3.6.2.4 below, we address Korea's claims that the USDOC erred in its resort to facts available and its subsequent selection of the replacement facts in respect of HHI's reporting of service-related revenues.

7.376. In the third administrative review (POR3)[1159], the USDOC found that HHI "significantly impeded this review by failing to act to the best of its ability by not providing complete and accurate information".[1160] On the basis of four "specific examples" the USDOC found that HHI "demonstrated a pattern of behavior" which caused the USDOC "to question certain fundamental aspects of [HHI's] reporting".[1161] Korea challenges the USDOC's use of facts available in respect of each of the four "specific examples" or issues concerning HHI's reporting of (a) service-related revenues,

[1147] Korea's first written submission, paras. 653-654.
[1148] Korea's first written submission, para. 655.
[1149] United States' first written submission, para. 425.
[1150] United States' first written submission, para. 427.
[1151] United States' first written submission, para. 427.
[1152] United States' first written submission, para. 428.
[1153] Korea's first written submission, paras. 653-655.
[1154] Panel Report, *US – Carbon Steel (India)*, para. 7.537.
[1155] Korea did not pursue its "as applied" claim against the Expedited First Sunset Review of the Anti-Dumping Duty Order on Large Power Transformers from the Republic of Korea identified in paragraph 2.2(f)(iii) of this Panel Report.
[1156] POR2 covers the period 1 August 2013 to 31 July 2014.
[1157] LPT POR2 final results of redetermination, (Exhibit KOR-207 (revised, public version)), p. 24.
[1158] LPT POR2 final results of redetermination, (Exhibit KOR-207 (revised, public version)), p. 24.
[1159] POR3 covers the period 1 August 2014 to 31 July 2015.
[1160] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 4.
[1161] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 4.

(b) home-market prices, (c) accessories, and (d) certain sales documentation.[1162] For each issue, Korea contends that the USDOC erred in resorting to the use of facts available[1163], as well as in its subsequent selection of the replacement facts.[1164] In section 7.3.6.3.2 below, we address Korea's claims concerning the USDOC's resort to facts available with respect to each of the four issues, followed by its claims concerning the USDOC's selection of the replacement facts in section 7.3.6.3.3.

7.377. In the fourth administrative review (POR4)[1165], the USDOC applied facts available to HHI and Hyosung Corporation (Hyosung).[1166] With respect to HHI, the USDOC identified deficiencies in HHI's reporting of three issues and found that, "[c]ollectively", these issues demonstrated that HHI impeded the review[1167] and "failed to put forth its maximum effort to cooperate in this review".[1168] Korea challenges the USDOC's resort to facts available in respect of the three issues concerning HHI's (a) reporting of accessories, (b) reporting of gross unit price for certain home market sales, and (c) non-disclosure of an allegedly affiliated US sales agent.[1169] In section 7.3.6.4.2 below, we address Korea's claims against the USDOC's resort to facts available for HHI in respect of each of these three issues.

7.378. With respect to Hyosung, the USDOC found in POR4 that Hyosung's failure to report or explain certain issues caused the USDOC "to question the reliability of the information provided".[1170] Korea challenges the USDOC's resort to facts available with respect to Hyosung's reporting of (a) service-related revenues, (b) an invoice that overlapped between two review periods, and (c) certain discounts and price adjustments.[1171] In section 7.3.6.4.3 below, we address Korea's claims concerning the USDOC's resort to facts available for Hyosung with respect to each of the three issues.

7.379. As to the selection of the replacement facts, the USDOC applied "total AFA" with respect to both HHI and Hyosung in POR4.[1172] We address Korea's claims that the USDOC erred in its selection of the replacement facts with respect to both HHI and Hyosung in section 7.3.6.4.4 below. Finally, in relation to POR4, Korea also claims that the USDOC acted inconsistently with Article 9.4 of the Anti-Dumping Agreement by calculating the "all others rate" for three non-selected exporters of LPTs on the basis of the "AFA rates" for HHI and Hyosung.[1173] We address this claim in section 7.3.6.4.5 below.

7.3.6.2 The second administrative review (POR2)

7.3.6.2.1 Introduction

7.380. Korea's claims in POR2 concern HHI's reporting of service-related revenues. We begin by setting out the relevant factual background of the POR2 proceedings. We then summarize the parties' main arguments, before examining Korea's claims pertaining to the USDOC's resort to facts available as well as its selection of the replacement facts.

7.3.6.2.2 Factual background

7.381. In its POR2 final determination, the USDOC calculated a dumping margin for HHI without using facts available.[1174] However, in the remand proceedings following a court appeal by the petitioner, the USDOC calculated a dumping margin of 25.51% for HHI using facts available – an

[1162] Korea's first written submission, paras. 775-797 and 838-840.
[1163] Korea's first written submission, para. 775.
[1164] Korea's first written submission, paras. 659 and 767.
[1165] POR4 covers the period from 1 August 2015 to 31 July 2016.
[1166] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), p. 3.
[1167] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), p. 4.
[1168] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), p. 4.
[1169] Korea's first written submission, paras. 798-818 and 842-845.
[1170] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), p. 4.
[1171] Korea's first written submission, paras. 819-832 and 846-850.
[1172] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), p. 3.
[1173] Korea's first written submission, para. 872.
[1174] Korea's first written submission, para. 664.

increase from a margin of 4.07% in the final determination.[1175] Korea challenges the USDOC's final determination in the remand proceedings (the "final redetermination").

7.382. In its initial questionnaire, the USDOC requested HHI to report the gross unit price for US sales "as it appear[ed] on the invoice for sales shipped and invoiced in whole or in part".[1176] For certain fields of its questionnaire, including the field for gross unit prices, the USDOC instructed HHI to report, *inter alia*, "[a]ll price adjustments granted, including discounts and rebates", and to "create a separate field for reporting each additional charge" in cases that the invoice to the customer included "separate charges for other services directly related to the sale, such as a charge for shipping".[1177] HHI responded by adding the price-related fields "ADDPOPRU" and "ADDPOEXPU" and explained as follows:

> ADDPOPRU is sales amount under a separate purchase order for services that were not included in the purchase order for the transformer (*e.g.,* supervision), but that are related to the transformer. ADDPOEXPU is the expense associated with the additional services.[1178]

7.383. The USDOC issued a supplemental questionnaire requesting HHI to clarify if it considered "a sales amount entered under ADDPOPRU to be part of the purchase price of an LPT, even though the amount appeared on a separate purchase order".[1179] HHI responded that, in light of the USDOC's instructions in prior segments of the proceedings, the gross unit price included the value of services "[w]here the terms of sale require[d] [HHI] to perform such services".[1180] HHI explained that, "[i]n accordance with the [USDOC]'s decision in the Original Investigation, where the customer has issued a separate, additional purchase order for services related to, but not included in the purchase order for the sale, [HHI] has reported the value of the additional purchase order and related expenses separately (*i.e.*, in fields ADDPOPRU and ADDPOEXPU)".[1181] HHI also clarified that the sales amount reported as ADDPOPRU was not included in the reported gross unit price (GRSUPRRU), and the corresponding expense (ADDPOEXPU) was not included as part of a sales expense.

7.384. In its final determination, the USDOC rejected the petitioner's assertion that HHI had failed to report reimbursed expenses from services, and, as a result, HHI had misstated the gross unit prices.[1182] The USDOC did not understand the US sales at issue to satisfy the conditions under which reimbursed expenses arose and therefore did not require them to be separately reported.[1183] As such, the USDOC did not apply its capping methodology, i.e. its practice of capping the reported service-related revenues by the actual expenses in order to avoid the overstatement of gross unit prices.[1184] Finding the reported gross unit price for each sale to be the appropriate basis for the calculation of the export price for the final dumping margin[1185], the USDOC declined the petitioner's request to "at least apply partial facts available" as follows:

> Specifically, we cannot conclude that necessary information is not available on the record, nor can we find that [HHI] withheld information requested by the [USDOC], that it failed to provide such information in the form or manner requested, that it acted to significantly impede the proceeding, or that it provided requested information that could not be verified. As discussed in response to the other comments filed for these final results, [HHI] has complied with all of our requests for information, and the necessary information requested by the [USDOC] and provided by [HHI] is sufficient to determine [HHI]'s final dumping margin for this review period.[1186]

[1175] Korea's first written submission, paras. 676 and 684.
[1176] LPT POR2 initial questionnaire, (Exhibit USA-23), p. C-20.
[1177] LPT POR2 initial questionnaire, (Exhibit USA-23), p. C-18. (emphasis omitted)
[1178] LPT POR2 Sections B-C questionnaire response, (Exhibit USA-24 (BCI)), p. C-28.
[1179] LPT POR2 supplemental Sections B-C questionnaire response, (Exhibit KOR-248 (BCI)), p. 14.
[1180] LPT POR2 supplemental Sections B-C questionnaire response, (Exhibit KOR-248 (BCI)), pp. 14-15.
[1181] LPT POR2 supplemental Sections B-C questionnaire response, (Exhibit KOR-248 (BCI)), p. 15.
[1182] LPT POR2 issues and decisions memorandum, (Exhibit KOR-110), pp. 38-40. (emphasis added)
[1183] LPT POR2 issues and decisions memorandum, (Exhibit KOR-110), p. 40.
[1184] LPT POR2 final results of redetermination, (Exhibit KOR-207 (revised, public version)), pp. 6-7.
[1185] LPT POR2 issues and decisions memorandum, (Exhibit KOR-110), p. 40.
[1186] LPT POR2 issues and decisions memorandum, (Exhibit KOR-110), p. 50.

7.385. The petitioner appealed certain aspects of the USDOC's final determination to the US Court of International Trade (USCIT)[1187], arguing, *inter alia*, that the USDOC failed to cap the revenues that HHI had included "in its gross unit prices for subject merchandise for sales-related services that were separately purchased by the customer by the amount of the related expenses incurred by [HHI] on those services".[1188] The USDOC requested – and was granted – a voluntary remand to evaluate its treatment of service-related revenues.[1189] In its draft redetermination in the remand proceedings (the "draft redetermination"), the USDOC determined that it would cap the service-related revenues.[1190] According to the USDOC, the documentation it re-examined indicated that, for certain US sales sequence numbers (SEQUs), the price charged to the final customer included revenues that were dedicated to various services, and that these revenues exceeded the related service expense.[1191] The USDOC found that HHI had overstated the gross-unit prices and had not separately reported service-related revenue.[1192] The USDOC thus found that the conditions for resorting to facts available were met:

> After re-examining the record evidence, we find that *applying [the USDOC]'s standard practice to cap [HHI]'s service-related revenues by the corresponding expense is warranted*. However, because necessary information is missing from the record due to [HHI]'s failure to report service-related revenues, as [the USDOC] requested, *we find that [HHI] impeded this review by failing to provide information necessary for [the USDOC] to apply its standard capping methodology*. Therefore, we find that the application of facts available is warranted in order to cap [HHI]'s service related revenues by the associated expenses.[1193]

7.386. HHI alleged multiple deficiencies in the USDOC's draft redetermination with respect to service-related revenues.[1194] HHI argued that in the draft redetermination, the USDOC abandoned the "Original Test" applied in the original investigation, the POR1 review, as well as the POR2 final determination, and used instead a "New Test" in order to determine whether service-related revenue existed.[1195] According to HHI, under the "Original Test", "service-related revenue existed only if [HHI] was not required to provide a service under the terms of sale and [HHI] nevertheless provided the service for a separate amount", while under the "New Test", "service-related revenue exists if certain sales documents identified revenue for the service, regardless of whether [HHI] was required to provide the service under the terms of sale".[1196]

7.387. For HHI, there was no basis for the USDOC's resort to facts available as it did not notify HHI of any deficiencies in its reporting, and it did not give an opportunity to provide information that was relevant for the "New Test".[1197] Even assuming that the USDOC had valid grounds for using facts available, HHI argued there was no basis for drawing adverse inferences, as the USDOC did not clearly articulate how HHI "failed to act to the best of its ability".[1198] Finally, HHI argued that the draft redetermination failed to acknowledge the USDOC's prior treatment of HHI's service-related revenues and the USDOC's confirmation that HHI had properly reported this information.[1199] HHI noted that the documents allegedly showing service-related revenues were available to the USDOC well in advance of verification, as was HHI's methodology for reporting service-related revenues.[1200] According to HHI, the USDOC could not fault HHI for a "failure" to report information

[1187] LPT POR2 court remand, (Exhibit KOR-206 (BCI)); United States' first written submission, para. 204.
[1188] LPT POR2 court remand, (Exhibit KOR-206 (BCI)), p. 3.
[1189] United States' first written submission, para. 204. The USDOC's final determination in the remand proceedings was partially affirmed by the USCIT. The matter was again remanded to the USDOC, these proceedings were ongoing at the time of this dispute. Korea's challenge in the current dispute pertains to the final determination in the first remand proceedings. (Korea's response to Panel question No. 32, p. 30).
[1190] LPT POR2 draft results of redetermination, (Exhibit KOR-207 (public version)), p. 13.
[1191] LPT POR2 draft results of redetermination, (Exhibit KOR-207 (public version)), p. 12.
[1192] LPT POR2 draft results of redetermination, (Exhibit KOR-207 (public version)), p. 13.
[1193] LPT POR2 draft results of redetermination, (Exhibit KOR-207 (public version)), p. 11. (emphasis added)
[1194] LPT POR2 HHI comments on draft redetermination, (Exhibit KOR-114 (BCI)), p. 2.
[1195] LPT POR2 HHI comments on draft redetermination, (Exhibit KOR-114 (BCI)), pp. 2-3.
[1196] LPT POR2 HHI comments on draft redetermination, (Exhibit KOR-114 (BCI)), pp. 2-3.
[1197] LPT POR2 HHI comments on draft redetermination, (Exhibit KOR-114 (BCI)), pp. 8-10.
[1198] LPT POR2 HHI comments on draft redetermination, (Exhibit KOR-114 (BCI)), pp. 10-12.
[1199] LPT POR2 HHI comments on draft redetermination, (Exhibit KOR-114 (BCI)), pp. 17-18.
[1200] LPT POR2 HHI comments on draft redetermination, (Exhibit KOR-114 (BCI)), p. 17. The sequence numbers in question that the USDOC examined during verification were SEQUs [[***]].

under the revised interpretation of service-related revenues of 2018, when it had submitted its responses in 2015.[1201] HHI also argued that the USDOC should have notified HHI of the change in its interpretation.[1202] In any event, HHI argued that if the USDOC would continue to apply this new test in the final redetermination, it had to reopen the factual record.[1203]

7.388. In its final redetermination in the remand proceedings, the USDOC addressed HHI's argument that the USDOC had changed its methodology in its redetermination by stating that it voluntarily sought remand specifically to examine the capping methodology as its "understanding of the information continues to evolve".[1204] The USDOC explained that, "[b]ased on the plain language of the law and [the USDOC]'s regulations, it has been [the USDOC]'s stated practice to decline to treat service-related revenue as an addition to U.S. price under section 1677a(c)(1) of the Act or as a price adjustment under 19 CFR 351.102(b)(38)".[1205] According to the USDOC:

> If a respondent collects, as a portion of the final price to the customer, a portion of revenue which is dedicated to covering a service-related expense, and that service-related expense is less than the revenue set aside to cover the expense, then this is service-related revenue which is part of the material terms of sale and must be capped. [HHI] cannot prevent the application of [the USDOC]'s capping methodology based on a technicality concerning whether a respondent chooses to separately itemize service-related charges in sales contracts or invoices. [The USDOC]'s determination in this remand redetermination is not a change in methodology, but is instead an appropriate application of our capping methodology pursuant to the statute and past practice.[1206]

In response to HHI's comment that it was not informed of any change in the applicable methodology, the USDOC stated that it had instructed HHI to report actual and estimated costs and expenses – information that was "necessary" for the USDOC to apply its capping methodology.[1207]

7.389. The USDOC found that HHI "refused to provide the necessary information for [the USDOC] to apply its capping methodology"[1208] and that HHI "failed to cooperate to the best of its ability by not providing the information requested. Therefore, partial adverse facts available [was] warranted".[1209] The USDOC re-examined [[***]] sales in the remand proceedings. For [[***]] sales, the USDOC applied facts available by reducing the gross unit price by the difference between the service-related expenses and service revenues reported by HHI, expressed as a percentage.[1210] For all other sales[1211], the USDOC applied facts available with an adverse inference by reducing the gross unit prices by the highest percentage rate difference identified in one of the [[***]] examined sales.[1212] This resulted in a dumping margin of 25.51% for HHI.[1213]

7.3.6.2.3 Main arguments of the parties

7.390. Korea claims that the USDOC acted inconsistently with Article 6.8 of the Anti-Dumping Agreement in resorting to facts available, as HHI did not refuse access to, or otherwise fail to provide, "necessary" information.[1214] Korea contends that the services performed under the terms of sale were not separate, and that the revenues for such services were correctly reported by HHI as part of the sales price for the LPTs.[1215] According to Korea, "problems arose" in the POR2 remand proceedings because the USDOC applied a different definition of "service-related revenue",

[1201] LPT POR2 HHI comments on draft redetermination, (Exhibit KOR-114 (BCI)), p. 19.
[1202] LPT POR2 HHI comments on draft redetermination, (Exhibit KOR-114 (BCI)), p. 20.
[1203] LPT POR2 HHI comments on draft redetermination, (Exhibit KOR-114 (BCI)), pp. 21-22.
[1204] LPT POR2 final results of redetermination, (Exhibit KOR-207 (revised, public version)), p. 20.
[1205] LPT POR2 final results of redetermination, (Exhibit KOR-207 (revised, public version)), p. 21.
[1206] LPT POR2 final results of redetermination, (Exhibit KOR-207 (revised, public version)), p. 22.
[1207] LPT POR2 final results of redetermination, (Exhibit KOR-207 (revised, public version)), p. 24.
[1208] LPT POR2 final results of redetermination, (Exhibit KOR-207 (revised, public version)), p. 24.
[1209] LPT POR2 final results of redetermination, (Exhibit KOR-207 (revised, public version)), p. 24.
[1210] LPT POR2 draft results of redetermination, (Exhibit USA-27 (BCI)), pp. 13-14.
[1211] Other than [[***]]; LPT POR2 draft results of redetermination, (Exhibit USA-27 (BCI)), p. 14.
[1212] LPT POR2 draft results of redetermination, (Exhibit USA-27 (BCI)), p. 14.
[1213] LPT POR2 final results of redetermination, (Exhibit KOR-207 (revised, public version)), pp. 24 and 32.
[1214] Korea's first written submission, paras. 769 and 771.
[1215] Korea's first written submission, para. 769.

without explaining this new definition and without providing HHI with a reasonable opportunity to respond.[1216] To the extent that any "necessary" information was missing, Korea argues that this was due to the USDOC's failure to inform HHI.[1217]

7.391. Korea challenges the USDOC's "refusal" to permit HHI to submit "necessary" information in the remand proceedings, "after [the] USDOC changed its practice and despite … HHI's express request for permission to submit the data".[1218] Korea emphasizes that the USDOC did not "discover" upon remand any information was "hidden" by HHI, and that the sales documentation on the record was exactly the same for the final determination and for the remand determination. Rather, it was the USDOC that changed its methodology.[1219] Korea argues that the United States mischaracterizes the facts by stating that the USDOC "initially did not look beyond what HHI reported" as the USDOC accurately described what HHI had done initially and concluded that HHI's reporting was proper.[1220]

7.392. Korea does not challenge the USDOC's capping methodology[1221] or the USDOC's right to change its practice.[1222] According to Korea, however, an investigating authority's ability to change practice is restrained by the "minimum" requirement of providing notice to the interested parties and providing an opportunity for interested parties to submit information under the new practice.[1223] According to Korea, the USDOC was required under paragraph 6 of Annex II to the Anti-Dumping Agreement to do so before resorting to facts available.[1224] Korea argues that the USDOC should have issued an additional supplemental questionnaire and accepted HHI's request to reopen the record.[1225] Furthermore, Korea argues that the information on the record allowed the USDOC to apply its standard capping methodology.[1226] On this basis, Korea submits that the USDOC acted inconsistently with paragraphs 3 and 5 of Annex II by failing to take into account verifiable and appropriately submitted information – even though it may not have been ideal – and by finding that HHI had failed to act to the best of its ability.[1227]

7.393. The United States responds that service-related revenues should have been capped in the final determination, but despite the USDOC's requests to report "the sale price, discounts, rebates and all other revenues and expenses", HHI refused to provide the "necessary" information.[1228] Because of HHI's failure, the USDOC was unable to apply its standard capping methodology.[1229] According to the United States, the USDOC did not change its treatment of service-related revenues, but its understanding of HHI's transactions and accounting "continue[d] to evolve".[1230] The USDOC initially did not look beyond what HHI reported, but, upon re-examination of the evidence in the remand proceedings, found that "the fact that certain expenses 'are not on the invoice to the unaffiliated customer, or part of the purchase order, does not negate the fact that these are revenue, collected by [HHI] from the unaffiliated customer and dedicated to cover service expenses, and

[1216] Korea's first written submission, para. 770.
[1217] Korea's first written submission, para. 771; second written submission, para. 290.
[1218] Korea's response to Panel question No. 35, p. 33.
[1219] Korea's second written submission, paras. 287 and 292.
[1220] Korea's second written submission, para. 288 (quoting United States' first written submission, para. 210).
[1221] Korea's second written submission, para. 289.
[1222] Korea's response to Panel question No. 35, p. 33.
[1223] Korea's response to Panel question No. 35, p. 33. See also Korea's second written submission, para. 290.
[1224] Korea's second written submission, paras. 286 and 290. Relatedly, Korea also asserts in its first written submission that if "necessary" information was missing, "it was missing because the USDOC failed to request [it] specifically", as required under paragraph 1 of Annex II. (Korea's first written submission, para. 774).
[1225] Korea's first written submission, para. 836.
[1226] Korea's first written submission, para. 773 (referring to LPT POR2 draft results of redetermination, (Exhibit KOR-207 (public version)), p. 13); second written submission, para. 295.
[1227] Korea's first written submission, para. 837.
[1228] United States' first written submission, paras. 221-222.
[1229] United States' first written submission, paras. 222 and 224. The United States submits that, in any event, HHI did not act to the best of its ability as it "possessed the information necessary to report specific service-related revenues for specific service-related expenses, but failed to do so". (United States' first written submission, para. 225).
[1230] LPT POR2 final results of redetermination, (Exhibit KOR-207 (revised, public version)), p. 20; see also United States' response to Panel question No. 35, paras. 131-139; and second written submission, para. 78.

which exceed those service expenses'".[1231] The United States argues that nothing in the Anti-Dumping Agreement requires an investigating authority to ignore certain facts simply because its understanding of equivalent facts was less developed in an earlier segment of the proceedings.[1232] Thus, the United States' submits that the USDOC properly resorted to facts available.[1233]

7.394. Responding to Korea's argument that the USDOC never informed HHI of the deficiencies in its reporting, the United States alleges that HHI failed to report service-related revenues and expenses as originally instructed by the USDOC and misled the USDOC "by mischaracterizing its need to report revenues and expenses separately", and thus HHI "never provided [the USDOC] with an opportunity to inform [HHI] of any deficiencies".[1234] The United States contends that "HHI reported to [the] USDOC on multiple occasions that it had no service-related revenues to report" and for this reason "USDOC's obligation to inform HHI of the nature of any deficiency never arose".[1235] The United States points out that HHI had the opportunity to submit comments on the USDOC's draft redetermination, which were addressed by the USDOC in its final redetermination.[1236] The United States also asserts that there was no verifiable or appropriately submitted information on the record for the USDOC to take into account pursuant to paragraph 3 and paragraph 5 of Annex II.[1237]

7.395. As to the selection of the replacement facts, Korea argues that the USDOC acted inconsistently with Article 6.8 and Annex II as it did not engage in the process of reasoning and evaluation that was required in the circumstances.[1238] Referring to the panel's findings in *Canada – Welded Pipe*, Korea argues that the USDOC failed to provide a reasoned and adequate explanation, or to engage in the requisite comparative evaluation for determining how or why the highest calculated difference between HHI's reported service-related expenses and revenues was a reasonable replacement for the allegedly missing information.[1239] According to Korea, the USDOC's selection of the replacement facts was not objective and fair, but, instead, was arbitrary and punitive in nature.[1240]

7.396. The United States responds that the USDOC selected reasonable replacements for the missing information after ascertaining their relevance and reliability based on HHI's own reported information and the actual revenues.[1241] According to the United States, the USDOC engaged in a process of reasoning and evaluation, whereby it determined that purchase orders for [[***]] of the [[***]] sales examined contained the information required by the USDOC – "meaning that HHI could have reported the revenues separately, but elected not to" do so.[1242] According to the United States, the mere fact that the result was less favourable for HHI does not indicate that the USDOC acted in a punitive manner or inconsistently with Article 6.8.[1243]

7.3.6.2.4 Evaluation by the Panel

7.3.6.2.4.1 The USDOC's resort to facts available

7.397. Korea claims that the USDOC acted inconsistently with Article 6.8 and paragraphs 3, 5, and 6 of Annex II of the Anti-Dumping Agreement in resorting to the use of facts available in respect of HHI's reporting of service-related revenues.

7.398. We recall that, in its final determination for POR2, the USDOC did not object to HHI's understanding of its reporting obligations and *accepted* the information submitted by HHI in

[1231] United States' first written submission, para. 210 (quoting LPT POR2 final results of redetermination, (Exhibit USA-29 (BCI)), p. 23-24).
[1232] United States' second written submission, para. 78.
[1233] United States' first written submission, para. 211.
[1234] United States' response to Panel question No. 84, paras. 135 and 142.
[1235] United States' first written submission, para. 218.
[1236] United States' response to Panel question No. 34, para. 129.
[1237] United States' first written submission, para. 222.
[1238] Korea's first written submission, para. 854.
[1239] Korea's first written submission, para. 853 (referring to Panel Report, *Canada – Welded Pipe*, para. 7.133).
[1240] Korea's first written submission, paras. 853-854.
[1241] United States' first written submission, para. 227.
[1242] United States' first written submission, para. 228.
[1243] United States' first written submission, paras. 227 and 229.

the face of express objections by the petitioner. The USDOC stated that, "[a]lthough some expense amounts (and spare part amounts) may have been broken out in the purchase orders, the totals on the purchase orders are lump-sum amounts and these amounts all tie to the invoice totals".[1244] Specifically, for the expenses that the petitioner took issue with, the USDOC found that there was no basis to indicate that HHI sought or obtained reimbursements for these expenses from the customers and that, despite being broken out in the purchase orders, the totals in these purchase orders were "lump sum" amounts.[1245] Importantly, the USDOC accepted HHI's understanding of the reporting requirements, and the application of these requirements to the service-related revenues and expenses for the US sales at issue after a "review of the sales traces".[1246] Ultimately, the USDOC concluded that the record did not suggest that HHI improperly reported its sales data, and that all the "necessary" information had been provided.[1247] Thus, as part of its POR2 final determination, the USDOC *accepted* the information, as well as HHI's underlying reporting basis.

7.399. Following remand from the USCIT, the USDOC, in its draft redetermination, decided to apply its "standard practice to cap [HHI]'s service-related revenues by the corresponding expense" and found that necessary information was missing from the record due to HHI's failure to report service-related revenues, "as [the USDOC] requested".[1248] In its final redetermination results upon remand, the USDOC explained that:

> [The USDOC]'s capping methodology is not dependent upon whether a respondent must provide the service under the terms of sale as [HHI] contends, but whether such services were provided and whether the revenue amounts collected for the provision of such services exceed the cost of those services. Neither is [the USDOC]'s capping methodology dependent upon whether the service-related expenses and revenues are separate line-items on an invoice to the unrelated customer. … [The USDOC]'s capping methodology, generally, may nevertheless be applied notwithstanding whether the amounts are specified in sales contracts with, or invoices to, the customer. If a respondent collects, as a portion of the final price to the customer, a portion of revenue which is dedicated to covering a service-related expense, and that service-related expense is less than the revenue set aside to cover the expense, then this is service-related revenue which is part of the material terms of sale and must be capped. [HHI] cannot prevent the application of [the USDOC]'s capping methodology based on a technicality concerning whether a respondent chooses to separately itemize service-related charges in sales contracts or invoices. [The USDOC]'s determination in this remand redetermination is not a change in methodology, but is instead an appropriate application of our capping methodology pursuant to the statute and past practice.[1249]

Addressing HHI's assertion that the USDOC did not inform it of any change in methodology or any deficiencies in the information supplied, the USDOC noted that:

> [The USDOC] requested that [HHI] report the sale price, discounts, rebates and all other revenues and expenses in the currencies in which they were earned or incurred. [The USDOC] also notified [HHI] that it expected to obtain information "with regard to actual and estimated costs and expenses" through December 31, 2014. [The USDOC]'s instructions indicate that [HHI] should report actual and estimated expenses. Yet, [HHI] refused to provide the necessary information for [the USDOC] to apply its capping methodology.[1250]

7.400. We note that Korea does not take issue with the USDOC's right to change its "practice" relating to the reporting of service-related revenues[1251] or to apply the "capping methodology" during

[1244] LPT POR2 issues and decisions memorandum, (Exhibit KOR-110), pp. 39-40.
[1245] LPT POR2 issues and decisions memorandum, (Exhibit KOR-110), pp. 39-40.
[1246] LPT POR2 issues and decisions memorandum, (Exhibit KOR-110), p. 39.
[1247] LPT POR2 issues and decisions memorandum, (Exhibit KOR-110), p. 50.
[1248] LPT POR2 draft results of redetermination, (Exhibit KOR-207 (public version)), p. 11.
[1249] LPT POR2 final results of redetermination, (Exhibit KOR-207 (revised, public version)), pp. 21-22.
[1250] LPT POR2 final results of redetermination, (Exhibit KOR-207 (revised, public version)), p. 24. (fns omitted)
[1251] Korea's response to Panel question No. 35, p. 33. Korea notes however that, "as pointed out in Korea's opening statement for the first substantive meeting, the USDOC's changed practice relating to service-related revenues does not seem as reasonable as its previous practice". (Ibid.).

the remand proceedings.[1252] Thus, the USDOC's ability to steer the course of its investigation, by, *inter alia*, determining the standard for reporting service-related revenues and deciding whether to apply the "capping methodology" is not in dispute before us. That said, irrespective of the reasons underlying the USDOC's rejection of the information that was originally submitted by HHI and accepted by the USDOC in its final determination, the USDOC's continues to be subject to the obligations under Article 6.8 and Annex II of the Anti-Dumping Agreement at all times.

7.401. The first sentence of paragraph 6 of Annex II to the Anti-Dumping Agreement requires that:

> If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefor, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation.

7.402. Under the second sentence of paragraph 6, "[i]f the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determinations". Nothing in the text of paragraph 6 limits these obligations to certain stages of an investigation. Rather, by its terms, paragraph 6 sets out the obligations that investigating authorities must discharge whenever "evidence or information is not accepted". In interpreting paragraph 6 of Annex II, we also consider important the context provided by Article 6.2 of the Anti-Dumping Agreement, which provides, in relevant part, that:

> *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.[1253]

7.403. As discussed above, in its final determination for POR2, the USDOC *accepted* HHI's understanding of the reporting requirements, as well as the reporting of the specific services at issue, after a "review of the sales traces"[1254], and concluded that HHI had provided all the "necessary" information.[1255] Subsequently, in its draft redetermination in the remand proceedings, the USDOC *rejected* the information relating to service-related revenues that was initially *accepted* by the USDOC in its final determination.

7.404. Having "not accepted" the information supplied by HHI, the USDOC was required, under the first sentence of paragraph 6 of Annex II, to inform HHI "forthwith" of the reasons for such rejection, and to provide an opportunity to HHI to furnish further explanations. We note the United States' argument that HHI "chose to report its data a certain way and misled [the USDOC] regarding its reasons for doing so", and, "[b]y adopting this course of action, [HHI] never gave [the USDOC] an opportunity to inform [HHI] of any deficiencies".[1256] The United States' argument acknowledges that the USDOC did not inform HHI of any deficiencies in the submitted information. From the USDOC's refusal to reopen the record, it is also clear that no additional information was requested by the USDOC or provided by HHI during the remand proceedings.[1257]

7.405. We disagree with the United States' argument that HHI "misled" the USDOC regarding its reasons for reporting the service-related revenues in "a certain way" and thus HHI "never provided [the USDOC] with an opportunity to inform [HHI] of any deficiencies".[1258] As discussed above, in response to a clarification sought by the USDOC in the supplemental questionnaire for POR2, HHI stated its understanding that reporting of services separately from the gross-unit prices was required when the services were not performed in "the terms of sale".[1259] HHI thus clearly set out its

[1252] LPT POR2 draft results of redetermination, (Exhibit KOR-207 (public version)), p. 11. See also Korea's first written submission, para. 773.
[1253] Emphasis added.
[1254] LPT POR2 issues and decisions memorandum, (Exhibit KOR-110), p. 39.
[1255] LPT POR2 issues and decisions memorandum, (Exhibit KOR-110), p. 50.
[1256] United States' response to Panel question No. 84, para. 135.
[1257] Korea's first written submission, para. 836; United States' response to Panel question No. 34, para. 130.
[1258] United States' response to Panel question No. 84, para. 135.
[1259] LPT POR2 supplemental Sections B-C questionnaire response, (Exhibit KOR-248 (BCI)), pp. 14-15. See para. 7.383 above.

understanding of its reporting obligations from the outset of the proceedings. In its final determination, the USDOC did not find any fault with HHI's understanding of its reporting obligations. Thus, instead of "misleading" the USDOC, HHI disclosed its basis for reporting service-related revenues from the outset and the USDOC never took issue with HHI's position until the draft redetermination. Moreover, the United States' argument that "[the] USDOC's obligation to inform HHI of the nature of any deficiency never arose" because "HHI reported to [the] USDOC on multiple occasions that it had no service-related revenues to report"[1260] is also circular inasmuch as it seeks to justify the USDOC's failure to inform to inform HHI of any deficiencies in its reporting precisely because of those very deficiencies.

7.406. Paragraph 6 of Annex II requires that the interested party be informed of the reasons why submitted information is not accepted by an investigating authority irrespective of the reasons for the non-acceptance or the accuracy of the interested party's reporting. The USDOC rejected the information relating to service-related revenues that it had originally accepted in its final determination for POR2. The discussion above reveals that the USDOC did not inform HHI "forthwith" of the reasons for such rejection.

7.407. We note the United States' argument that HHI had the opportunity to comment on the USDOC's draft redetermination, and that the USDOC addressed these comments before rejecting HHI's suggestions in its final redetermination.[1261] However, we do not consider that, in the circumstances of this case, HHI's comments on the USDOC's draft redetermination amount to an opportunity to provide further explanations in the sense of paragraph 6, because, as part of its comments, HHI expressly requested the USDOC to reopen the record and request information with respect to service-related revenues during the remand proceedings[1262], but the USDOC declined HHI's request.[1263] Therefore, we conclude that the USDOC did not provide an opportunity to HHI for furnishing further explanations within a reasonable period, due account being taken of the time-limits of the investigation. In the circumstances of this case, this ought to have included an opportunity to submit further information in accordance with the USDOC's requirements.

7.408. We therefore find that the USDOC acted inconsistently with paragraph 6 of Annex II to the Anti-Dumping Agreement because – having "not accepted" the information provided by HHI – the USDOC failed to inform HHI "forthwith" of the reasons for its non-acceptance and failed to provide an opportunity to HHI for furnishing "further explanations within a reasonable period, due account being taken of the time-limits of the investigation". Given that paragraph 6 of Annex II serves as a precondition for an investigating authority's proper resort to facts available under Article 6.8 of the Anti-Dumping Agreement, we find that the USDOC also acted inconsistently with that provision in resorting to facts available with respect to HHI's reporting of service-related revenues in POR2.[1264] In light of our findings of WTO-inconsistency, we do not consider it necessary to rule upon Korea's claims under paragraphs 3 and 5 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us.[1265]

7.3.6.2.4.2 The USDOC's selection of the replacement facts

7.409. We have already found that the USDOC erred in resorting to facts available with respect to HHI's reporting of information concerning service-related revenues. In these circumstances, we do not consider that making further findings on Korea's claims concerning the USDOC's selection of the replacement facts on the basis of the record used for the USDOC's WTO-inconsistent findings would assist in providing a positive solution to the dispute before us.[1266]

[1260] United States' first written submission, para. 218.
[1261] United States' response to Panel question No. 34, para. 129.
[1262] LPT POR2 HHI comments on draft redetermination, (Exhibit KOR-114 (BCI)), pp. 21-22.
[1263] LPT POR2 final results of redetermination, (Exhibit KOR-207 (revised, public version)), pp. 19 and 24.
[1264] Panel Reports, *China – GOES*, paras. 7.384-7.385; *US – Steel Plate*, paras. 7.55-7.56; and *Mexico – Steel Pipes and Tubes*, para. 7.190.
[1265] See, e.g. Panel Reports, *EC – Salmon (Norway)*, para. 7.387; and *Morocco – Hot-Rolled Steel (Turkey)*, paras. 7.105-7.106.
[1266] See, e.g. Panel Reports, *Egypt – Steel Rebar*, para. 7.310; and *Mexico – Anti-Dumping Measures on Rice*, para. 7.200. See also Panel Report, *China – Broiler Products*, para. 7.555.

7.3.6.3 The third administrative review (POR3)

7.3.6.3.1 Introduction

7.410. For the POR3 proceedings, Korea challenges the USDOC's use of facts available in respect of four issues concerning HHI's reporting of (a) service-related revenues; (b) home-market prices; (c) accessories; and (d) certain sales documentation.[1267] Korea claims that the USDOC erred in resorting to the use of facts available for each of the four issues[1268], as well as in its subsequent selection of the replacement facts.[1269] The United States requests us to reject Korea's claims, and maintains that this is not an instance of "collective failure" where the "USDOC found that Hyundai failed with respect to specific issues that, 'on their own' may not warrant facts available with an adverse inference, but 'taken as a whole,' do"; rather, for the United States, the USDOC properly resorted to facts available for each specific issue.[1270]

7.411. We first address Korea's claims of inconsistency under Article 6.8 and Annex II of the Anti-Dumping Agreement concerning the USDOC's resort to facts available with respect to each of the four issues. For each issue, we describe the factual background and summarize the main arguments of the parties, before examining whether the USDOC erred in resorting to facts available. In light of the USDOC's application of "total facts available with an adverse inference"[1271], we then examine Korea's claims pertaining to the USDOC's selection of the replacement facts.

7.3.6.3.2 The USDOC's resort to facts available

7.3.6.3.2.1 Service-related revenues

Factual background

7.412. In its initial questionnaire, the USDOC requested HHI to "report revenue in separate fields (e.g., ocean freight revenue, inland freight revenue, oil revenue, installation, etc.) and identify the related expense(s) for each revenue".[1272] HHI responded that, in view of its understanding of the USDOC's reporting requirements for services in the original investigation, it did not have separate revenues for services.[1273] The USDOC issued a supplemental questionnaire seeking clarity as to whether HHI "received revenue related to international freight, inland freight, oil, installation, or any other expenses" for home market and US sales.[1274] HHI responded that it did not receive any such revenues, "[i]n accordance with the [USDOC]'s review and treatment of [HHI]'s sales documentation in prior segments of this proceeding".[1275] HHI argued that, as its information in this review was essentially the same as in the prior segments of this proceeding – and the USDOC had previously found that there was no indication of improper reporting – the reporting of its home-market and US gross unit prices was appropriate.[1276]

[1267] Korea's first written submission, paras. 775-797 and 838-840.
[1268] Korea's first written submission, para. 775.
[1269] Korea's first written submission, paras. 767 and 855.
[1270] United States' first written submission, para. 254; response to Panel question No. 37.
[1271] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 4.
[1272] LPT POR3 initial questionnaire, (Exhibit KOR-209), p. B-1.
[1273] LPT POR3 Sections B-C questionnaire response, (Exhibit KOR-122 (BCI)), pp. B-3-B-4. HHI explained in detail its reporting methodology:

> Following the [USDOC]'s analysis in the I&D Memo [accompanying the original final determination], [HHI] has reported, since the first administrative review, separate revenue and expenses where the customer issues a separate purchase order for services that are not part of the original term of sale. Specifically, in the U.S. sales list, [HHI] has reported the sales amount from additional purchase orders in the ADDPOPRU field and the associated additional expenses under the separate purchase order in the ADDPOEXPU field. [HHI] did not receive additional purchase orders for home market sales during the POR.

(Ibid.).
[1274] LPT POR3 supplemental Sections B-C questionnaire, (Exhibit KOR-124 (BCI)), pp. 6.
[1275] First part of LPT POR3 supplemental Sections A-D questionnaire response, (Exhibit KOR-125 (BCI)), p. 11.
[1276] First part of LPT POR3 supplemental Sections A-D questionnaire response, (Exhibit KOR-125 (BCI)), pp. 11-12.

7.413. In its preliminary decision memorandum, the USDOC did not take issue with HHI's reporting of service-related revenues.[1277] Subsequently, the USDOC issued a supplemental questionnaire, requesting HHI to "provide complete sales and expenses documentation (including *all* sales and expenses related documentation generated in the sales process) for **all** U.S. SEQUs".[1278] It further asked HHI to revise its US sales database to report in separate fields all expenses and revenues for separately-negotiated services and non-subject merchandise for the sales identified as SEQUs [[***]].[1279] In the event that HHI considered that there were no such additional expenses or revenues, the USDOC requested HHI to comment on the corresponding assertions of the petitioner.[1280] HHI responded to the USDOC's request and provided "worksheet listing on a category basis the values listed anywhere in the sales documentation for the breakdowns of the price of the LPTs and the corresponding expenses", while insisting that there were no "separate" revenues for services.[1281]

7.414. In its final determination issues and decision memorandum, the USDOC noted that:

> Although we requested that [HHI] report separately service-related revenues (e.g., freight, installation, and supervision) from the associated expenses in prior segments of this proceeding, we did not require [HHI] to do so in the previous segments because [HHI] stated that such services were required under the terms of sale and that these revenues were not separately invoiced to the customers. However, record evidence in the prior review shows that [HHI]'s U.S. price could be inflated by the inclusion of service-related revenues, thereby affecting the [USDOC]'s ability to calculate an accurate antidumping margin. Given these concerns, at the onset of this instant review, we requested that [HHI] separately report such revenues and related expenses so that, per our practice, we could cap such revenues by the related expenses.[1282]

The USDOC further observed that in the second part of HHI's response to the supplemental questionnaire, certain documents identified separate service line items with the corresponding prices/revenues listed were higher than the expenses reported for this sale.[1283] According to the USDOC, "[t]his finding affirmed [its] concerns regarding the methodology [HHI] used to report gross unit price".[1284] In addition, the USDOC noted that the revised US sales database submitted by HHI in its supplemental response had purchase orders or invoices for many US sales containing separate line items for services, thus confirming that "while revenues from such services may not have been *separately* invoiced to the customers, [HHI] and its customers separately assigned prices for the related services and identified these amounts as separate line items on invoices, separate from the price of the subject merchandise".[1285]

[1277] LPT POR3 decision memorandum for preliminary results, (Exhibits KOR-127 (BCI), KOR-135 (public version)).

[1278] LPT POR3 HHI third supplemental questionnaire, (Exhibit KOR-128 (BCI)), p. 5. (emphasis original)

[1279] LPT POR3 HHI third supplemental questionnaire, (Exhibit KOR-128 (BCI)), p. 6.

[1280] LPT POR3 HHI third supplemental questionnaire, (Exhibit KOR-128 (BCI)), p. 6.

[1281] LPT POR3 HHI third supplemental questions 13 and 17 response, (Exhibit KOR-119 (BCI)), p. 23 and exhibit 3S-46.

[1282] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 18. The USDOC stated that it had requested three times the separate reporting of these revenues, that is in its 3 December 2015 initial questionnaire, in its 27 July 2016 supplemental questionnaire, and in its 7 October 2016 supplemental questionnaire. (Ibid. pp. 18-20 and 24).

[1283] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 20 (referring to Second part of LPT POR3 supplemental Sections A-D questionnaire response, (Exhibit KOR-126 (BCI))).

[1284] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 20.

[1285] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 21 (emphasis original). In detail, the USDOC explained:

> Although these services are required under the terms of sale and are invoiced on a lump-sum basis, as [HHI] argued, we find that [HHI]'s sales documentation specifically indicates that these sales-related services could be negotiable, apart from subject merchandise, since each service is shown/listed with the corresponding amount in purchase orders and/or invoices. In other words, if customers do not like [HHI]'s price for a certain service, they can procure/arrange such service on their own without using [HHI]'s service. That is, we cannot conclude that such service is non-negotiable and that customers cannot opt out of the service prior to accepting the offer just because a specific service is included in the selling price under the terms of sale. Similarly, we cannot conclude, as [HHI] suggests, that such service-related revenue should always be part of

7.415. Finally, the USDOC stated that the worksheet submitted by HHI was incomplete and cast serious doubts on the reliability of such information.[1286] According to the USDOC, it would have had the time to verify the issues raised, had HHI submitted this information earlier on in the review, but "[w]hat key information [HHI] finally provided came in very late in the process, thereby negating [its] ability to [check] … that the data provided are accurate and reliable, and to develop deficiency questionnaires".[1287]

Main arguments of the parties

7.416. Korea claims that the USDOC resorted to facts available in violation of Article 6.8 of the Anti-Dumping Agreement as HHI did not "refuse[] access to", or otherwise fail to provide, "necessary" information, nor did it "significantly impede[]" the proceedings.[1288] Korea takes issue with the USDOC's determination in the final results of POR3, which, in its view, "directly contradicts" the USDOC's position in the final results of POR2 and the preliminary results of POR3; that HHI did not need to separately report revenues for services that were performed under the terms of sale of LPTs.[1289] According to Korea, the POR3 administrative review marks the first instance when the USDOC requested HHI to report such expenses and revenues relating to "separately-negotiated services and non-subject merchandise", that is, "based on whether such revenues were separately listed on a sales document".[1290] Korea describes this shift in "accepted definition" as a "significant extra burden" on HHI, and states that even so, HHI submitted data in accordance with the "redefined" service-related revenues in a timely manner.[1291]

7.417. Korea also claims that the USDOC acted inconsistently with paragraphs 3 and 5 of Annex II to the Anti-Dumping Agreement by rejecting verifiable and substantiated information that HHI submitted in a timely fashion.[1292] Korea contends that the USDOC did not explain how many sales were affected by the alleged error in the submitted worksheet for determining whether the entirety of the information was tainted or unusable.[1293] Nor was the USDOC justified in rejecting this data on the basis of untimeliness, given that it had imposed unreasonable and untimely demands, and given that it refused to take any further action even though the information was submitted over four months before the issuance of the final results.[1294] According to Korea, the United States' statement that HHI provided the information requested "nearly a year after" the USDOC had requested it is "entirely disingenuous", given that the USDOC had accepted HHI's initial reporting in the preliminary determination without expressing any concerns.[1295] Korea asserts that HHI cooperated "to the best of its ability" by submitting the requested data and that the USDOC was not justified to reject it based on the allegation that it was imperfect.[1296]

7.418. According to the United States, "necessary" information was missing from the record, despite multiple requests by the USDOC which served to notify HHI of the USDOC's reporting requirements.[1297] The United States submits that HHI had multiple opportunities to submit the requested data, but it chose to "ignore or defy" the USDOC's definitions and instructions, resulting in inaccurate and flawed reporting.[1298] The United States also asserts that, because HHI's information did not meet the criteria under paragraph 3 of Annex II, it is not afforded the

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> the gross unit price just because a service is not arranged separately. Therefore, given the record evidence, we find that service-related revenues for the sale of subject merchandise should not be considered as a component of the gross unit price.

(Ibid.).

[1286] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 21.
[1287] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 22.
[1288] Korea's first written submission, paras. 775-776.
[1289] Korea's first written submission, paras. 697-698.
[1290] Korea's first written submission, para. 702. (quoting LPT POR3 HHI third supplemental questionnaire, (Exhibit KOR-128 (BCI)), p. 6).
[1291] Korea's first written submission, paras. 776-777 (referring to LPT POR3 HHI third supplemental questions 13 and 17 response, (Exhibit KOR-119 (BCI)), p. 23 and exhibit 3S-46).
[1292] Korea's first written submission, para. 838.
[1293] Korea's second written submission, para. 305.
[1294] Korea's first written submission, para. 779.
[1295] Korea's second written submission, para. 303.
[1296] Korea's first written submission, para. 778.
[1297] United States' first written submission, para. 253.
[1298] United States' first written submission, para. 255.

protections of paragraph 5, and in any event, HHI did not act "to the best of its ability" in responding to the USDOC's requests for information.[1299]

Evaluation by the Panel

7.419. Korea claims that the USDOC acted inconsistently with Article 6.8 and paragraphs 3 and 5 of Annex II of the Anti-Dumping Agreement in resorting to the use of facts available in respect of HHI's reporting of service-related revenues in POR3.

7.420. We have discussed a similar issue concerning the reporting of service-related revenues as part of our analysis for POR2 above. The essential facts relating to the alleged "change" in the USDOC's methodology or definition remain the same for both the POR3 final determination and the POR2 redetermination. One crucial difference, however, is that in POR3, the USDOC appears to have provided HHI with an opportunity to report service-related revenues when deciding that it was necessary to apply its "capping methodology". Accordingly, Korea confines its claims of inconsistency to paragraphs 3 and 5 of Annex II, and to Article 6.8. As with the POR2 remand proceedings, we do not understand Korea to be taking issue with the USDOC's ability to apply its "capping methodology".[1300] Rather, the question before us is whether the USDOC acted in a WTO-consistent manner in rejecting the information submitted by HHI.

7.421. We recall that, in its preliminary decision memorandum dated 26 August 2016, the USDOC did not take issue with HHI's reporting of service-related revenues.[1301] Thus, as of the preliminary determination, there was no reason for HHI to suspect that its reporting and the basis thereof were somehow deficient for purposes of the USDOC's determination. Following its preliminary determination, the USDOC issued a third supplemental questionnaire on 7 October 2016, requesting HHI to "provide complete sales and expenses documentation (including *all* sales and expenses related documentation generated in the sales process) for **all** U.S. SEQUs".[1302] The USDOC noted the petitioner's assertion that "HHI incurred expenses and obtained revenues for separately-negotiated services and non-subject merchandise for the sales identified as SEQUs [[***]]", and on this basis asked HHI to "revise [its] U.S. sales database to report all such expenses and revenues for these sales in separate fields".[1303] In the event that HHI considered that there were no such additional expenses or revenues, the USDOC requested HHI to comment on the corresponding assertions of the petitioner.[1304]

7.422. Given that the USDOC did not take issue with HHI's reporting of service-related revenues in its preliminary determination, the third supplemental questionnaire is the first instance when HHI was notified that the USDOC was not satisfied with its reporting of service-related revenues. HHI responded to the USDOC's third supplemental questionnaire on 10 November 2016 – within the deadline established by the USDOC – and provided a "worksheet listing on a category basis the values listed anywhere in the sales documentation for the breakdowns of the price of the LPTs and the corresponding expenses", stressing however that there were no "separate" revenues for services.[1305]

7.423. In its final determination, the USDOC rejected this information and found that the "worksheet provided is incomplete and casts serious doubt on the reliability of such information".[1306] By way of reasoning, the USDOC referred to an example offered by the petitioner:

> For example, as Petitioner noted, the worksheet appears to be missing information for multiple U.S. sales (*i.e.,* it is missing the related expenses for its claimed revenues).[1307]

[1299] United States' first written submission, para. 262.
[1300] Korea's response to Panel question No. 35, pp. 31-32.
[1301] LPT POR3 decision memorandum for preliminary results, (Exhibits KOR-127 (BCI), KOR-135 (public version)).
[1302] LPT POR3 HHI third supplemental questionnaire, (Exhibit KOR-128 (BCI)), p. 5. (emphasis original)
[1303] LPT POR3 HHI third supplemental questionnaire, (Exhibit KOR-128 (BCI)), p. 6.
[1304] LPT POR3 HHI third supplemental questionnaire, (Exhibit KOR-128 (BCI)), p. 6.
[1305] LPT POR3 HHI third supplemental questions 13 and 17 response, (Exhibit KOR-119 (BCI)), p. 23 and exhibit 3S-46.
[1306] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 21.
[1307] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 21.

The USDOC did not provide any further explanation concerning the alleged deficiencies in HHI's worksheet. The USDOC acknowledged that HHI in its rebuttal brief "attempted to explain the reason for the missing information" by stating that: "(1) such items relate to the manufacture of the transformer and the costs are, therefore, included in the reported cost of production; and (2) there are no separate sales expenses for these production costs".[1308] The USDOC did not examine these explanations, but instead provided the following explanation:

> [W]e cannot examine the validity of [HHI]'s reporting at this late stage of the review. What key information [HHI] finally provided came in very late in the process, thereby negating our ability to satisfy ourselves that the data provided are accurate and reliable, and to develop deficiency questionnaires, as needed.[1309]

7.424. Paragraph 3 of Annex II to the Anti-Dumping Agreement requires an investigating authority to "take into account" all information that is "verifiable", "appropriately submitted so that it can be used in the investigation without undue difficulties", and "supplied in a timely fashion". Information that satisfies these criteria cannot, therefore, be rejected by investigating authorities.[1310]

7.425. We note that the reason provided by the USDOC for its finding that the "worksheet provided is incomplete" was that, as the "[p]etitioner noted, the worksheet appears to be missing information for multiple U.S. sales".[1311] The petitioner's case brief reveals that the "multiple U.S. sales" pertain to [[***]] SEQUs.[1312] The USDOC acknowledges that HHI "attempted to explain the reason for the missing information" in its rebuttal brief. However, the USDOC stated that it could not "examine the validity of [HHI]'s reporting at this late stage of the review" as the "key information [HHI] finally provided came in very late in the process".[1313] Thus, as we see it, the main reason provided by the USDOC for disregarding the worksheet provided by HHI and its explanations relating thereto concerned the timeliness of HHI's responses. We must therefore determine whether the information provided by HHI was supplied within a "timely fashion", within the meaning of paragraph 3 of Annex II.

7.426. We note that HHI provided the worksheet at issue in response to the USDOC's third supplemental questionnaire on 10 November 2016, thus within the deadlines established by the USDOC for that purpose.[1314] The issue of timeliness of HHI's submission therefore does not relate to whether HHI responded within the prescribed time-limit. Rather, the USDOC's concern relates to the "late stage of the review process" when the information was submitted.[1315] According to the USDOC, because the worksheet "came in very late in the process" it was unable to check the accuracy and reliability of the information, and develop deficiency questionnaires, as needed.[1316] Our understanding is confirmed by the USDOC's observation that HHI should have separately reported service-related revenues and related expenses "early on (*i.e.,* in [HHI's] January 27, 2016, Sections B and C Questionnaire Response or even in [HHI's] August 10, 2016, Supplemental Questionnaire Response)".[1317]

7.427. Although the USDOC requested information relating to service-related revenues and expenses as part of its initial and supplemental questionnaires, it did not take issue with HHI's responses in its preliminary determination dated 26 August 2016.[1318] It was only as part of its third supplemental questionnaire, issued on 7 October 2016, that the USDOC noted the petitioner's concerns and sought revised information from HHI. Thus, irrespective of the scope of its initial queries, the USDOC accepted the information originally reported by HHI, until 7 October 2016 – when the USDOC issued its third supplemental questionnaire seeking a revised database. As HHI could not have been aware of any deficiencies in its responses before the third supplemental

[1308] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), pp. 21-22 (referring to LPT POR3 HHI rebuttal brief, (Exhibit KOR-270 (BCI)), p. 17).
[1309] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 22.
[1310] See para. 7.138 above.
[1311] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 21.
[1312] LPT POR3 petitioner's case brief, (Exhibit KOR-129 (BCI)), pp. 21-22.
[1313] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 22.
[1314] LPT POR3 HHI supplemental questionnaire response, (Exhibit KOR-136 (BCI)), p. 15.
[1315] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 22.
[1316] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 22.
[1317] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 22.
[1318] LPT POR3 decision memorandum for preliminary results, (Exhibits KOR-127 (BCI), KOR-135 (public version)).

questionnaire, we are not persuaded by the United States' argument that HHI provided the information "nearly a year after [the] USDOC first requested that HHI report separately service-related revenues and associated expenses".[1319]

7.428. As the USDOC did not raise any concerns with respect to HHI's initial responses, we do not consider that these responses constituted opportunities for HHI to appropriately report service-related revenues earlier in the review process. We therefore disagree with the United States that the USDOC, by requesting such information "multiple times" from HHI, "ensured that HHI was aware of its reporting requirements".[1320] Furthermore, HHI submitted the revised worksheet on 10 November 2016, which, as Korea points out, was over four months before the final determination dated 13 March 2017.[1321] In these circumstances, we are not convinced that the worksheet was submitted so late in the process that the USDOC was unable to assess its accuracy and reliability.[1322] Indeed, if the USDOC did not intend to assess the accuracy and reliability of the data submitted in response to its third supplemental questionnaire, it is unclear for what purpose the USDOC issued that questionnaire. For purposes of paragraph 3, therefore, we find that the worksheet submitted by HHI on 10 November 2016 was "supplied in a timely fashion".

7.429. We also note the USDOC's finding that the "worksheet provided is incomplete and casts serious doubt on the reliability of such information".[1323] One reason offered by the USDOC for this finding is that, "as Petitioner noted, the worksheet appears to be missing information for multiple U.S. sales (*i.e.,* it is missing the related expenses for its claimed revenues)".[1324] We note however that HHI in its rebuttal brief "attempted to explain the reason for the missing information".[1325] The USDOC did not examine these explanations, because "[w]hat key information [HHI] finally provided came in very late in the process, thereby negating [its] ability [to check] that the data provided are accurate and reliable, and to develop deficiency questionnaires, as needed".[1326]

7.430. Thus, any finding by the USDOC concerning the unreliability or incompleteness of the information – based on the petitioner's observations – is premised on its finding that the worksheet was submitted at a late stage of the proceedings, and on its decision to not examine the explanations provided by HHI for that reason. We have, however, found that the worksheet submitted by HHI was provided in a "timely fashion" for purposes of paragraph 3. The USDOC does not provide any other reasons as to why the information was not "verifiable" or could not be taken into account "without undue difficulties". Korea asserts that the information submitted was unquestionably verifiable.[1327] For the reasons set out above, we are not convinced by the United States' argument that the information submitted was not verifiable in light of the difficulties faced by the USDOC in obtaining the information despite multiple requests.[1328] Insofar as the USDOC considered any "undue difficulties" to be related to the incomplete nature of the information, we find that this issue is also grounded, ultimately, on the USDOC's erroneous finding of untimeliness of HHI's responses.

7.431. For these reasons, we find that the USDOC acted inconsistently with the first sentence of paragraph 3 of Annex II to the Anti-Dumping Agreement by not "tak[ing] into account" the information concerning service-related revenues that was submitted by HHI in accordance with that provision. Given that paragraph 3 of Annex II serves as a precondition for an investigating authority's proper resort to facts available under Article 6.8 of the Anti-Dumping Agreement[1329], we find that the USDOC also acted inconsistently with that provision in resorting to facts available. In light of our findings of WTO-inconsistency, we do not consider it necessary to rule upon

[1319] United States' first written submission, paras. 237-238.
[1320] United States' first written submission, para. 253.
[1321] Korea's first written submission, para. 779.
[1322] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 22.
[1323] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 21.
[1324] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 21.
[1325] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 21 (referring to LPT POR3 HHI rebuttal brief, (Exhibit KOR-270 (BCI)), p. 17).
[1326] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 22.
[1327] Korea's second written submission, para. 301.
[1328] United States' first written submission, para. 252.
[1329] Panel Reports, *China – GOES*, para. 7.385; *US – Steel Plate*, paras. 7.55-7.56 and 7.79.

Korea's claims under paragraph 5 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us.[1330]

7.3.6.3.2.2 Alleged understatement of home-market prices

Factual background

7.432. In its initial questionnaire, the USDOC requested HHI to "separately report the price and cost for 'spare parts' and 'accessories' to ensure that product matches are based on accurate physical characteristics of the LPTs".[1331] In response, HHI submitted documentation identifying [[***]] as "non-subject merchandise".[1332] Citing the USDOC's definition of subject merchandise and the issues and decisions memorandum from the original investigation, HHI reported separately the price and cost for spare parts, but not for "[t]ransformer parts that [are] physically attached to an LPT [and therefore] are within the definition of the scope of subject merchandise".[1333]

7.433. In its supplemental questionnaire, the USDOC requested complete sales documentation for home market sequence numbers (SEQHs) [[***]] and [[***]] relating to home market sales.[1334] In its additional supplemental questionnaire, the USDOC further asked HHI to provide for the same SEQHs "any supporting documentation of [the] sales negotiation process (i.e., internal documents, e-mails, etc.) and all reported expenses (i.e., freight request from HHI to the freight provider, freight invoice from the freight provider)".[1335] HHI submitted information in response to both these requests.[1336]

7.434. Commenting on HHI's questionnaire responses[1337], the petitioner stated that "an examination of the limited documents submitted by [HHI] confirms that [HHI] has employed a methodology that understated the reported gross unit price (GRSUPRH) for home market sales" (namely SEQHs [[***]]).[1338] The petitioner explained that HHI "wrongly identified integral parts of subject transformers" and, as a result, "[t]hose parts were not included in the reported gross unit price, which was therefore understated".[1339] Specifically, the petitioner argued that the identification and reporting of these parts was erroneous, as documents submitted in HHI's 27 October 2016 additional supplemental questionnaire response treated these parts as integral parts of LPTs, and thus as "subject merchandise".[1340] Furthermore, according to the petitioner, "[HHI] appear[ed] to have employed the same methodology across all home market sales reported, resulting in a portion of the gross unit price being incorrectly excluded from the price reported to the [USDOC]".[1341] Thus, in the petitioner's view, by failing to report the full value of the subject merchandise, HHI had understated the home market gross unit price, and, in turn, the dumping margin.[1342]

7.435. HHI responded that the petitioner raised its objection three months after the submission of the concerned document, and argued that:

> At this stage of this review, [HHI] is not permitted to submit rebuttal information to respond to [the petitioner's] argument and is limited to documents on record. With this limitation, the record is ambiguous and does not allow a definitive conclusion regarding whether the items in question are properly included in the gross unit price. In light of

[1330] See, e.g. Panel Reports, *EC – Salmon (Norway)*, para. 7.387; and *Morocco – Hot-Rolled Steel (Turkey)*, paras. 7.105-7.106.
[1331] LPT POR3 initial questionnaire, (Exhibit KOR-209), p. D-1.
[1332] Second part of LPT POR3 supplemental Sections A-D questionnaire response, (Exhibit KOR-126 (BCI)), attachment 2S-17.
[1333] LPT POR3 Section D questionnaire response, (Exhibit KOR-134 (BCI)), pp. D-2-D-3.
[1334] Second part of LPT POR3 supplemental Sections A-D questionnaire response, (Exhibit KOR-126 (BCI)), attachment 2S-17.
[1335] LPT POR3 HHI third supplemental questionnaire, (Exhibit KOR-128 (BCI)), p. 5.
[1336] LPT POR3 HHI supplemental questionnaire response, (Exhibit KOR-136 (BCI)), p. 8 and attachment 3S-7.
[1337] In particular, the petitioner's comments addressed the data submitted by HHI in response to the USDOC's questionnaires of 27 July 2016 and 7 October 2016.
[1338] LPT POR3 petitioner's comments, (Exhibit KOR-252 (BCI)), p. 10.
[1339] LPT POR3 petitioner's comments, (Exhibit KOR-252 (BCI)), p. 10.
[1340] LPT POR3 petitioner's comments, (Exhibit KOR-252 (BCI)), pp. 10-12.
[1341] LPT POR3 petitioner's comments, (Exhibit KOR-252 (BCI)), p. 12.
[1342] LPT POR3 petitioner's comments, (Exhibit KOR-252 (BCI)), pp. 12-13.

> this ambiguity, [HHI] provides in Exhibit 2 a revised price calculation worksheet, which treats the items in [*sic*] as transformer components.[1343]

7.436. In the final determination, the USDOC found that HHI had incorrectly reported its home market price despite its knowledge that "(1) parts that are physically attached to, imported with, or invoiced with active parts of a LPT; or (2) parts that are required to assemble an incomplete LPT, are also subject merchandise/foreign like product, and that they should be included in its reported gross unit price".[1344] According to the USDOC, HHI failed to "include properly a particular part in its reported home market gross unit prices" until this issue was identified by the USDOC, despite having three opportunities to do so.[1345] The USDOC further noted that while HHI had failed to include this specific part in its home market sales, it had included it in the gross unit prices for its US sales, which rendered the US price and the home-market price incomparable.[1346] The USDOC found that "the vast majority of the reported gross unit prices provided by [HHI], pursuant to the [USDOC's] request for full documentation for a limited number of sample sales … display the understatement of such reported prices".[1347] Thus, the USDOC found that HHI had impeded the review proceedings and its reported home market prices were, in their entirety, unreliable.[1348]

Main arguments of the parties

7.437. Korea claims that the USDOC resorted to facts available in violation of Article 6.8 of the Anti-Dumping Agreement as HHI did not "refuse[] access to", or otherwise fail to provide, "necessary" information, nor did it "significantly impede[]" the proceedings.[1349] Korea explains that, in response to the USDOC's request for complete sales documentation for certain home market sales (SEQHs [[***]] and [[***]]), HHI inadvertently identified certain [[***]] as non-subject merchandise in one of the contracts submitted.[1350] This error concerned a single contract ([[***]]), which was submitted in the sales documentation for SEQH [[***]] and covered multiple transformers, under SEQHs [[***]].[1351] Korea argues that the misreported information could not in good faith be considered as "necessary", as it concerned a small amount of data about an isolated home market sale consisting of four LPTs.[1352] According to Korea, "[t]his isolated information could not objectively be viewed as casting doubt on *all of the sales and related data* reported in the home-market sales database".[1353]

7.438. Furthermore, Korea argues that there was no need to apply facts available in order to overcome the absence of information, as HHI's inadvertent error was immediately corrected and full information was provided that allowed the USDOC to make its determination.[1354] Specifically, Korea refers to the worksheet submitted by HHI supporting the gross unit price as originally calculated (i.e. without the part that was identified as non-subject merchandise), as well as a revised price calculation worksheet (i.e. including the revenue for that part in the gross unit price).[1355] In addition, there was sufficient time for the USDOC to take into account HHI's revisions as they were provided more than two months before the final results, and thus within a reasonable time.[1356] Korea notes that the USDOC, instead of treating this deficiency as an isolated issue, "added this to the other issues to construct a rationale for disregarding all of HHI's data and applying total AFA".[1357]

7.439. Korea also claims that the USDOC acted inconsistently with paragraphs 3 and 5 of Annex II to the Anti-Dumping Agreement by rejecting verifiable and substantiated information that was submitted by HHI in a timely fashion.[1358] Korea contends that HHI had provided verifiable

[1343] LPT POR3 HHI case brief, (Exhibit KOR-130 (BCI)), p. 21. (emphasis omitted)
[1344] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), pp. 23-24.
[1345] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 24.
[1346] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 25.
[1347] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), pp. 25-26.
[1348] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 26.
[1349] Korea's first written submission, paras. 780 and 783.
[1350] Korea's first written submission, paras. 705-707.
[1351] Korea's response to Panel question No. 86, para. 104.
[1352] Korea's first written submission, para. 780.
[1353] Korea's response to Panel question No. 88, para. 107. (emphasis original)
[1354] Korea's first written submission, para. 781.
[1355] Korea's first written submission, para. 707.
[1356] Korea's second written submission, para. 309.
[1357] Korea's second written submission, para. 308.
[1358] Korea's first written submission, para. 838.

information regarding the reporting of a single part, which enabled the USDOC to establish the normal value of the four LPTs in the one transaction at issue, but the USDOC chose to disregard such information.[1359] According to Korea, even if the USDOC considered this information as not being ideal, this was not a sufficient reason to disregard it, and the appropriate response would have been to issue an additional supplemental questionnaire to HHI.[1360]

7.440. The United States responds that HHI failed to provide all the required information and to act to the best of its ability.[1361] According to the United States, HHI's home-market database failed its "reliability check" as [[***]] out of the [[***]] sales for which the USDOC requested supporting documentation in order to check the accuracy of the whole database demonstrated that HHI had engaged in improper reporting of data.[1362] The United States contends that the USDOC did not have sufficient time to verify the accuracy of HHI's subsequent correction.[1363] Finally, the United States notes that HHI corrected the home-market gross unit prices for the few sales for which the USDOC had requested supporting documentation, however, it did not "restore the integrity of the unexamined home market sales".[1364]

Evaluation by the Panel

7.441. Korea claims that the USDOC acted inconsistently with Article 6.8 and paragraphs 3 and 5 of Annex II of the Anti-Dumping Agreement in resorting to the use of facts available in respect of HHI's reporting of an LPT part as non-subject merchandise.

7.442. At the outset, we note that Korea does not dispute that the part at issue was initially misreported by HHI. Nor did HHI dispute the petitioner's claim of misreporting before the USDOC.[1365] There is also no disagreement between the parties on the appropriate reporting requirements in light of the USDOC's definition of "subject merchandise".[1366] Rather, Korea characterizes the misreporting of [[***]] as non-subject merchandise as an "inadvertent error" by HHI.[1367]

7.443. We recall that the USDOC took issue with the improper reporting of a particular LPT part in the gross unit prices of certain home market sales. The USDOC referred to the petitioner's claim concerning certain documentation submitted for SEQH [[***]] in HHI's 27 October 2016 questionnaire response. According to the petitioner, this documentation demonstrated the understatement of the reported gross unit prices (field GRSUPRH) for specific home market sales (SEQHs [[***]]), due to the mischaracterization of certain [[***]] as non-subject merchandise.[1368] In response, HHI submitted with its case brief a revised worksheet which treated the LPT part at issue as subject merchandise, thus including it in the gross unit price.[1369] In the final determination, the USDOC found that HHI had incorrectly reported the gross unit prices for these home market sales, even though it was fully aware of what constituted "subject merchandise".[1370] The USDOC found:

[1359] Korea's first written submission, para. 838.
[1360] Korea's first written submission, paras. 838-839.
[1361] United States' first written submission, para. 260.
[1362] United States' response to Panel question No. 88, para. 148.
[1363] United States' response to Panel question No. 88, para. 150.
[1364] United States' response to Panel question No. 88, para. 149.
[1365] See also LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 25.
[1366] The agreed definition of the "subject merchandise" is found in Appendix III of the USDOC's initial questionnaire:

> The scope of this order covers large liquid dielectric power transformers (LPTs) having a top power handling capacity greater than or equal to 60,000 kilovolt amperes (60 megavolt amperes), whether assembled or unassembled, complete or incomplete.
> Incomplete LPTs are subassemblies consisting of the active part and any other parts attached to, imported with or invoiced with the active parts of LPTs. The "active part" of the transformer consists of one or more of the following when attached to or otherwise assembled with one another: the steel core or shell, the windings, electrical insulation between the windings, the mechanical frame for an LPT.

(LPT POR3 initial questionnaire, (Exhibit KOR-209), appendix III)
[1367] Korea's first written submission, paras. 705-707.
[1368] LPT POR3 petitioner's comments, (Exhibit KOR-252 (BCI)), p. 10.
[1369] LPT POR3 HHI case brief, (Exhibit KOR-130 (BCI)), p. 21.
[1370] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), pp. 23-24.

> In addition, even though [HHI] provided the "revised" gross unit prices for such sales in its case brief, which show increased gross unit prices for those sales identified by the [USDOC] in its review of [HHI]'s October 27, 2016, Supplemental Questionnaire Response, we have no time to confirm or verify the validity of these revisions. For example, *we cannot confirm whether other parts, which* [HHI] *listed as "non-subject merchandise" (i.e. non-foreign like product) in the same document referred to above, are, in fact, non-foreign like product*. To confirm the accuracy of [HHI]'s reporting as a whole, we requested full sales and expenses documentation for a very limited number of sample home market sales. The fact that a certain document exhibits a consistent pattern of understating the reported home market prices for the requested sale and other covered sales, for which we did not request full documentation, *calls into question the reliability* of [HHI]'s reported home market prices.
>
> …
>
> *To verify the accuracy of* [HHI]*'s reporting*, we requested full documentation for certain home market sales, only to determine, at such a late stage in the review, that there is a *significant issue which could be related to* [HHI]*'s entire reporting of home market gross unit prices*.[1371]

7.444. We note that although HHI's misreporting affected multiple ([[***]]) SEQHs, this was due to a single error, namely, the consistent characterization of a single part (i.e. [[***]], within the same contract as non-subject merchandise. The USDOC acknowledged that only "a certain document" exhibited this error.[1372] Thus, the record evidence indicates that the misreporting concerned a single part in a single document – out of multiple documents that were submitted in response to the USDOC's complete documentation request – for one of the two sampled sales.

7.445. Moreover, while the USDOC acknowledged that HHI provided the revised gross unit prices for the misreported sales as part of its case brief – which showed "increased gross unit prices for those sales identified by the [USDOC] in its review of [HHI]'s October 27, 2016 Supplemental Questionnaire Response" – the USDOC stated that it had "no time to confirm or verify the validity of these revisions".[1373] As an "example", the USDOC stated that it could not "confirm whether *other parts*, which [HHI] listed as 'non-subject merchandise' (*i.e.,* non-foreign like product) in the same document referred to above, are, in fact, non-foreign like product".[1374] Observing that HHI's "U.S. sales database indicates that [it] included *such parts* in the reported gross unit prices for the U.S. sales", the USDOC stated that "[i]ncluding *such parts* in U.S. price, but not in home market price, is a serious issue because it renders U.S. price and normal value incomparable".[1375]

7.446. We have no reason to doubt the "seriousness" of the issue flagged by the USDOC. Nonetheless, we note that the USDOC's statements appear to suggest that the discrepancies at issue related to multiple "parts" and represented a "systematic" understatement of home market sales. However, the USDOC found that HHI misreported only a single "part" as a non-foreign like product.[1376] Thus, the USDOC's finding of discrepancies between the US sales and home market sales concerned a single part that was misreported in one document. Insofar as this discrepancy was concerned, the USDOC also appears to have considered the revised gross unit prices for the misreported home market sales that HHI provided as part of its case brief.[1377] In any event, although the inclusion of the single part in the US price, but not in the home market price, may well render the US price and the normal value "incomparable", the "seriousness" of this issue does not, without more, establish a "pattern" of systematic misreporting by HHI for all of its home market sales. While we acknowledge the USDOC's explanation that the documents requested for the sample sales were aimed at checking the accuracy of the home market sales as a whole, we note that the USDOC provided no explanation as to how the misreporting of one LPT part in relation to one of the

[1371] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 25. (fn omitted; emphasis added)
[1372] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 25.
[1373] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 25.
[1374] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 25. (emphasis added)
[1375] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 25. (emphasis added)
[1376] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 25 (finding that the "record evidence demonstrates that the excluded part is required to assemble a complete LPT. As a result, this part should have been treated as foreign like product" (fn omitted)). (Ibid.).
[1377] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 25.

two sampled SEQHs undermined the reliability of the whole database.[1378] Even though this misreporting may have affected multiple ([[***]]) SEQHs, this was due to the mischaracterization of this one part – the [[***]] – within the *same contract* as non-subject merchandise. In our view, such misreporting of a single part in one document cannot amount to a "pattern" of misreporting.

7.447. In such a situation, an objective and unbiased investigating authority would not have found an existence of a "pattern" of misreporting suggesting that HHI's "reported home market prices in their entirety are unreliable".[1379] We agree with Korea's argument that, in the circumstances of this case, "[t]his isolated information could not objectively be viewed as casting doubt on *all of the sales and related data* reported in the home-market sales database".[1380] We note that the petitioner asserted – without, however, providing any further explanation – that HHI had "employed the same methodology across all home market sales reported".[1381] Likewise, the USDOC – despite referring to discrepancies relating to multiple "parts" – made no attempts to ascertain whether HHI had misreported other parts as non-foreign like products. Indeed, the USDOC found only that HHI's misreporting "*could be* related to [its] entire reporting of home market gross unit prices".[1382] A finding that HHI "systematically" understated the prices for its home market sales cannot be based solely on the wrong classification of a single part in one document, and the mere possibility that other such errors could also exist.

7.448. For the above reasons, we find that the USDOC acted inconsistently with Article 6.8 of the Anti-Dumping Agreement in resorting to facts available with respect to HHI's reporting of an LPT part as non-subject merchandise.[1383] In light of our finding of WTO-inconsistency, we do not consider it necessary to address Korea's claims under paragraphs 3 and 5 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us.[1384]

7.3.6.3.2.3 Accessories

Factual background

7.449. In its initial questionnaire, the USDOC instructed HHI to "separately report the price and cost for 'spare parts' and 'accessories' to ensure that product matches are based on accurate physical characteristics of the LPTs".[1385] HHI stated that, while it had separately reported the price and cost for "spare parts", there was no definition for "accessories".[1386] In its preliminary determination, the USDOC did not refer to the cost of "accessories".[1387] In an additional

[1378] The United States submits that HHI's home-market database failed the USDOC's "reliability check" as "the [[***]] out of the [[***]] sales for which [the USDOC] requested specific documentary support demonstrated that HHI had improperly reported the particular part". (United States' response to Panel question No. 88, para. 148). The USDOC requested sales documentation for two home market sales (SEQHs [[***]] and [[***]]) and the misreporting that was later identified concerned the first of the two samples sales. The fact that three additional SEQHs indicated the same misreporting does not mean that these sales were included in the spectrum of sampled sales for which the USDOC requested specific documentary support.

[1379] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), pp. 25-26.

[1380] Korea's response to Panel question No. 88, para. 107. (emphasis original)

[1381] LPT POR3 petitioner's comments, (Exhibit KOR-252 (BCI)), p. 12.

[1382] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 25. (emphasis added)

[1383] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 26.

[1384] See, e.g. Panel Reports, *EC – Salmon (Norway)*, para. 7.387; and *Morocco – Hot-Rolled Steel (Turkey)*, paras. 7.105-7.106.

[1385] LPT POR3 initial questionnaire, (Exhibit KOR-209), p. D-1.

[1386] LPT POR3 Section D questionnaire response, (Exhibit KOR-134 (BCI)), pp. D-2-D-3 (referring to LPT POR3 initial questionnaire, (Exhibit KOR-209), appendix III). We recall the USDOC's definition of the subject merchandise:

> The scope of this order covers large liquid dielectric power transformers (LPTs) having a top power handling capacity greater than or equal to 60,000 kilovolt amperes (60 megavolt amperes), whether assembled or unassembled, complete or incomplete. Incomplete LPTs are subassemblies consisting of the active part and any other parts attached to, imported with or invoiced with the active parts of LPTs. The 'active part' of the transformer consists of one or more of the following when attached to or otherwise assembled with one another: the steel core or shell, the windings, electrical insulation between the windings, the mechanical frame for an LPT.

(LPT POR3 initial questionnaire, (Exhibit KOR-209), appendix III)

[1387] LPT POR3 decision memorandum for preliminary results, (Exhibits KOR-127 (BCI), KOR-135 (public version)), pp. 3-14.

supplemental questionnaire, the USDOC asked HHI to confirm that its product-specific costs did not include the costs of spare parts and accessories, clarifying that it was referring to "non-subject merchandise".[1388]

7.450. In its final determination, the USDOC observed that it had requested HHI to report separately the price and costs of "accessories" of LPTs, "[f]or the purpose of determining whether the differences in costs between similar product matching control numbers (i.e., CONNUMs) reported by [HHI] were due to the differences in the physical characteristics of the products within the CONNUMs or were the result of factors other than the physical characteristics".[1389] The USDOC found that HHI knew what constituted an "accessory", since this term was found in sales documentation that it provided, however it "refused to provide such information".[1390] The USDOC stated that if HHI had questions regarding the definition of "accessories", it could have requested a clarification from the USDOC, but it failed to do so.[1391] The USDOC thus concluded that HHI "failed to provide information specifically requested", namely the separate prices and costs of accessories, and "impeded this review by failing to act the best of its ability".[1392]

Main arguments of the parties

7.451. Korea claims that the USDOC resorted to facts available in violation of Article 6.8 of the Anti-Dumping Agreement, as HHI did not "refuse[] access to", or otherwise fail to provide, "necessary" information.[1393] Korea argues that such information was not important, and that, in any event, the USDOC neither provided a definition of the term "accessories", nor any guidance on how the information regarding prices and costs of accessories should have been structured.[1394] Korea also claims that the USDOC acted inconsistently with paragraph 1 of Annex II to the Anti-Dumping Agreement by ignoring its obligation to be "precise in identifying the information that it needs" from a respondent.[1395] According to Korea, it was the responsibility of the USDOC to provide, as soon as possible, a definition of "accessories" to the extent that it had a bearing on the use of "necessary" information in the review.[1396] According to Korea, the only meaningful guidance provided by the USDOC was to equate "accessories" with "non-subject merchandise".[1397]

7.452. Korea further claims that the USDOC acted inconsistently with paragraphs 3 and 5 of Annex II by disregarding verifiable and substantiated information "simply because it was not considered ideal while it was simply unclear what would be 'ideal' information on the undefined concept of 'accessories'".[1398] Korea asserts that, in any event, HHI exerted its best efforts by submitting all the information requested, based on its consideration of the proper meaning of the term "accessories" and according to the approach taken by the USDOC.[1399] Korea also adds that "HHI did not in fact use the term 'accessories' as a term during the ordinary course of business", and it was used inconsistently only by a few customers.[1400]

7.453. The United States responds that the separate reporting of the prices and costs of "accessories" was "necessary" for the USDOC's determination of whether certain cost differences between similar product matching CONNUMs were the result of differences in physical characteristics or of other factors.[1401] The United States explains that, because the same parts had been treated by HHI as "optional or non-optional (*i.e.,* as accessories or not as accessories)", there was a serious danger of manipulation of the gross unit price, and ultimately, of the margin.[1402] The United States

[1388] LPT POR3 HHI third supplemental questionnaire, (Exhibit KOR-128 (BCI)), p. 8.
[1389] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 26.
[1390] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 27.
[1391] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 27.
[1392] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 27.
[1393] Korea's first written submission, paras. 771 and 784.
[1394] Korea's first written submission, paras. 709 and 784-788 (referring to LPT POR3 initial questionnaire, (Exhibit KOR-209), appendix III).
[1395] Korea's first written submission, para. 785 (quoting Panel Report, *Egypt – Steel Rebar*, para. 7.155).
[1396] Korea's response to Panel question No. 36, p. 33.
[1397] Korea's response to Panel question No. 36, p. 34.
[1398] Korea's first written submission, para. 838.
[1399] Korea's first written submission, para. 786; response to Panel question No. 36, p. 34.
[1400] Korea's first written submission, para. 788.
[1401] United States' first written submission, para. 251 (referring to LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 26); response to Panel question No. 90, paras. 151-152.
[1402] United States' response to Panel question No. 90, para. 152.

contends that the USDOC was justified in finding that that "HHI was responsible for determining what constituted an accessory", because "[i]t would be highly unusual for a company to sell a product that included accessories and use such term in its documents, but not be able to determine what it sold and what the term used in its own documents means".[1403] The United States also states that "the same request was made to the other respondent in POR3, Hyosung, also without the term being defined by [the] USDOC, and the company provided the requested information".[1404] Finally, the United States argues that because HHI's information did not meet the criteria of paragraph 3 of Annex II, HHI is not afforded the protections of paragraph 5 of Annex II, and in any event, HHI did not act "to the best of its ability" in responding to the USDOC's requests for information.[1405]

Evaluation by the Panel

7.454. Korea claims that the USDOC acted inconsistently with Article 6.8 and paragraphs 1, 3, and 5 of Annex II of the Anti-Dumping Agreement in resorting to the use of facts available in respect of HHI's reporting of "accessories".

7.455. Prior to the issuance of the USDOC's initial questionnaire, the petitioner urged the USDOC to request HHI to report separately the costs of "spare parts" and "accessories" in order to "provide the [USDOC] with necessary information that prevent inaccurate product concordances, making product matches based on accurate physical characteristics of the LPTs".[1406] HHI objected to this request, stating that, while there was a definition of "spare parts" and HHI had correctly reported such parts separately in previous stages of the investigation, there was no definition offered by the petitioner for the term "accessories".[1407] HHI argued that, "[t]o the extent that Petitioner's claim on 'accessories' relates to parts that are physically attached to an LPT, its claim is contrary to the definition of the scope of subject merchandise".[1408] Noting that "accessories" are "basic components of common transformers" and are viewed as "essential to the operations of LPTs", HHI asserted that "[t]here is simply no logic in trying to exclude from the sale price parts that are normally included within or attached to the LPT and are subject merchandise".[1409]

7.456. In its initial questionnaire, the USDOC instructed HHI to "separately report the price and cost for 'spare parts' and 'accessories' to ensure that product matches are based on accurate physical characteristics of the LPTs".[1410] Although HHI could find guidance on the meaning of "spare parts" in the definition given by the USDOC in its issues and decisions memorandum of the original determination[1411], at no stage did the USDOC provide a definition of the term "accessories". In response, HHI reiterated that, while it had separately reported the price and cost for "spare parts", there was no definition for "accessories", and recalled that, pursuant to the USDOC's questionnaire and the definition of subject merchandise, parts that are physically attached to an LPT fall within the scope of the subject merchandise.[1412] In the additional supplemental questionnaire, the USDOC

[1403] United States' response to Panel question No. 36, paras. 140-141.
[1404] United States' response to Panel question No. 36, para. 141.
[1405] United States' first written submission, para. 262.
[1406] LPT POR3 petitioner's comments on questionnaires to be issued, (Exhibit KOR-131), p. 2. The petitioner made this request in order to prevent distortions that might occur "when the product concordance matches otherwise physically dissimilar LPTs, or when the concordance disqualifies physically very similar LPTs from comparison, simply because the matching LPTs passed or failed the 20 percent difference-in-merchandise ('DIFMER') test as a result of inconsistent reporting of spare parts and accessories". (Ibid.).
[1407] LPT POR3 HHI response to petitioner's comments, (Exhibit KOR-132), p. 3. HHI understood the definition of "spare parts" as parts that are not needed to assemble an incomplete LPT, in accordance with the USDOC's statement in the issues and decision memorandum for its determination in the original investigation. (LPT issues and decision memorandum, (Exhibit KOR-145), p. 29; see also ibid. fn 4).
[1408] LPT POR3 HHI response to petitioner's comments, (Exhibit KOR-132), p. 3.
[1409] LPT POR3 HHI response to petitioner's comments, (Exhibit KOR-132), p. 4.
[1410] LPT POR3 initial questionnaire, (Exhibit KOR-209), p. D-1.
[1411] LPT POR3 HHI response to petitioner's comments, (Exhibit KOR-132), fn 4 (referring to LPT issues and decision memorandum, (Exhibit KOR-145), p. 29).
[1412] LPT POR3 Section D questionnaire response, (Exhibit KOR-134 (BCI)), pp. D-2-D-3 (referring to LPT POR3 initial questionnaire, (Exhibit KOR-209), appendix III). We recall the USDOC's definition of the subject merchandise:

> The scope of this order covers large liquid dielectric power transformers (LPTs) having a top power handling capacity greater than or equal to 60,000 kilovolt amperes (60 megavolt amperes), whether assembled or unassembled, complete or incomplete. Incomplete LPTs are subassemblies consisting of the active part and any other parts attached to, imported with or invoiced with the active parts of LPTs. The "active part" of the transformer consists of one or

asked HHI to confirm that its product-specific costs did not include the costs of spare parts and accessories, "*i.e.,* non-subject merchandise".[1413] HHI confirmed that the product-specific costs did not include "non-subject merchandise".[1414]

7.457. In its final determination, the USDOC found that HHI knew what constituted an "accessory", as this term was found in sales documentation that it provided, however it "refused to provide such information".[1415] The USDOC explained its view that "if [HHI] had questions related to the definition of 'accessories,' it could have contacted the [USDOC] to request clarification; it failed to do so, and instead refused to provide such information".[1416] The USDOC thus concluded that HHI "failed to provide information specifically requested" and "impeded this review by failing to act the best of its ability".[1417]

7.458. The above discussion reveals that even before the USDOC issued its initial questionnaire, HHI placed on record its concerns about the absence of a definition of "accessories".[1418] The USDOC did not provide any definition or further clarification on what constituted "accessories", but it simply reiterated the scope of subject merchandise as including any part "attached to, imported with or invoiced with the active parts of LPTs".[1419] As part of its initial request, the USDOC thus did not address or take into account the difficulties identified by HHI, including its assertions that there was no definition of "accessories" and that, in its view, "accessories" were "essential components" of LPTs, and thus fell within the definition of the "subject merchandise" in this investigation.[1420] HHI reiterated these concerns in its initial questionnaire response, however, the USDOC did not offer any further instructions or guidance as part of its supplemental questionnaire and noted only that the "accessories" for which separate reporting was required concerned "non-subject merchandise".[1421]

7.459. Paragraph 1 of Annex II to the Anti-Dumping Agreement stipulates that, "[a]s soon as possible after the initiation of the investigation", the investigating authorities shall "specify in detail the information required from any interested party, and the manner in which that information should be structured by the interested party in its response". As relevant context, we also note that Article 6.13 of the Anti-Dumping Agreement requires investigating authorities to "take due account of any difficulties experienced by interested parties … in supplying information requested" and to "provide any assistance practicable". We agree with the panel in *Morocco – Hot-Rolled Steel* that "[f]ailure by an interested party to cooperate only gives rise to the consequences envisaged by Article 6.8 if the investigating authority itself acted in a reasonable, objective, and impartial manner".[1422] An examination of whether an investigating authority has complied with paragraph 1 of Annex II must be carried out in the particular circumstances of each case.

7.460. Given the fact that HHI had, from the outset, expressed its concerns with respect to the definition of "accessories", we agree with Korea that, by not providing further guidance as to the meaning of "accessories", the USDOC failed to "specify in detail" the information required from HHI pursuant to paragraph 1 of Annex II. While we have no reason to doubt the United States' assertion that the separate reporting of "accessories" constituting "non-subject merchandise" was "necessary" for its accurate cost determination[1423], this does not, without more, absolve the USDOC from complying with paragraph 1 of Annex II. We are also not convinced that HHI should have been able to derive a definition of "accessories" based on its internal documents.[1424] We note that HHI had

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more of the following when attached to or otherwise assembled with one another: the steel core or shell, the windings, electrical insulation between the windings, the mechanical frame for an LPT.

(LPT POR3 initial questionnaire, (Exhibit KOR-209), appendix III)

[1413] LPT POR3 HHI third supplemental questionnaire, (Exhibit KOR-128 (BCI)), p. 8.
[1414] LPT POR3 HHI supplemental questionnaire response, (Exhibit KOR-136 (BCI)), p. 22.
[1415] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 27.
[1416] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 27.
[1417] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 27.
[1418] LPT POR3 HHI response to petitioner's comments, (Exhibit KOR-132), p. 3.
[1419] LPT POR3 initial questionnaire, (Exhibit KOR-209), appendix III.
[1420] LPT POR3 HHI response to petitioner's comments, (Exhibit KOR-132), pp. 3-4.
[1421] LPT POR3 HHI third supplemental questionnaire, (Exhibit KOR-128 (BCI)), p. 8.
[1422] Panel Report, *Morocco – Hot-Rolled Steel*, para. 7.92 (referring to Panel Report, *Guatemala – Cement II*, para. 8.251).
[1423] United States' first written submission, para. 251 (referring to LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 26); response to Panel question No. 90, para. 152.
[1424] United States' first written submission, para. 260; response to Panel question No. 36, para. 140.

explained why, in its view, "accessories" fell within the scope of subject merchandise, stating also that accessories were "viewed as essential to the operations of LPTs" by the USCIT and citing the petitioner's own "Transformer Handbook", which treated accessories as indispensable to LPTs.[1425] In these circumstances, we find that paragraph 1 of Annex II required the USDOC to clarify the definition of "accessories" for purposes of HHI's reporting obligations.

7.461. In any event, we note that the USDOC in its final determination did not establish that the requested information (regardless of the scope and clarity of its request) was, in fact, missing, as it did not identify any items which constituted "non-subject merchandise" and that should have been separately reported for this reason. The USDOC simply assumed that its cost determination would be inaccurate due to the failure to separately report certain "accessories". Nor did the petitioner identify any specific part as being misreported; rather, it simply urged the USDOC to require the separate reporting of "accessories".[1426] The United States argues that the USDOC's resort to facts available was reasonable since "the same parts *could have been* treated as optional or non-optional (*i.e.,* as accessories or not as accessories), there was a serious concern that certain parts *could* be selectively included/excluded from [HHI]'s home market and U.S. sales and reported gross unit prices at [HHI]'s discretion, which could have led to manipulation of the gross unit price".[1427] In our view, the United States' argument remains hypothetical, as it is unable to identify any particular instance where the USDOC, in fact, found such a "dual" classification of the same part.

7.462. Accordingly, in the circumstances of this case, we find that, by not providing further guidance as to the meaning of the term "accessories", the USDOC acted inconsistently with paragraph 1 of Annex II to the Anti-Dumping Agreement, as it failed to "specify in detail" the information required. Given that paragraph 1 of Annex II serves as a precondition for an investigating authority's proper resort to facts available under Article 6.8 of the Anti-Dumping Agreement[1428], we find that the USDOC also acted inconsistently with that provision in resorting to facts available. In light of our findings of WTO-inconsistency, we do not consider it necessary to rule upon Korea's claims under paragraphs 3 and 5 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us.[1429]

7.3.6.3.2.4 Certain sales documentation

Factual background

7.463. Following its preliminary determination, the USDOC, by way of a supplemental questionnaire, requested HHI to "provide complete sales and expenses documentation (including *all* sales and expenses related documentation generated in the sales process) for **all** U.S. SEQUs".[1430] In response, HHI submitted documentation totalling over 3,300 pages.[1431] In a communication with the petitioner, the USDOC noted that it was still considering the petitioner's request for an extension to submit case briefs, but clarified that it would not accept new information at such a late stage of the proceeding.[1432] In its case brief, the petitioner identified certain inconsistencies in the documentation submitted by Hyundai Steel[1433], with Hyundai Steel addressing these as part of its rebuttal brief.

7.464. In its final determination, the USDOC found that, in addition to the three other identified inconsistencies, "[HHI] has been systematically selective in providing various documents to the [USDOC], thereby impeding the course of the review".[1434] The USDOC mentioned as an "example" of selective reporting HHI's deficient response to its additional supplemental questionnaire in relation to the complete sales and expenses documentation for all US sales:

[1425] LPT POR3 HHI response to petitioner's comments, (Exhibit KOR-132), p. 4.
[1426] LPT POR3 petitioner's comments on questionnaires to be issued, (Exhibit KOR-131), p. 2.
[1427] United States' response to Panel question No. 90, para. 152. (emphasis added)
[1428] Panel Reports, *China – GOES*, paras. 7.384-7.385 and 7.393-7.394; *US – Steel Plate*, paras. 7.55-7.56.
[1429] See, e.g. Panel Reports, *EC – Salmon (Norway)*, para. 7.387; and *Morocco – Hot-Rolled Steel (Turkey)*, paras. 7.105-7.106.
[1430] LPT POR3 HHI third supplemental questionnaire, (Exhibit KOR-128 (BCI)), p. 5. (emphasis original)
[1431] LPT POR3 HHI third supplemental questions 13 and 17 response, (Exhibit KOR-119 (BCI)).
[1432] LPT POR3 petitioner call memorandum, (Exhibit KOR-137).
[1433] LPT POR3 petitioner case brief, (Exhibit KOR-269 (BCI)).
[1434] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 27.

> Rather than providing the requested documentation, [HHI] selectively reported what it considered "necessary" and "sufficient," thereby stripping the [USDOC] of its ability to determine what is, in fact, necessary and sufficient to calculate an accurate margin. Although we asked [HHI] to submit all related documents, [HHI] did not provide invoices for many expenses and instead justified its failure to provide those invoices by claiming that: (1) the [USDOC] did not ask for such documents specifically; and (2) the [USDOC] accepted [HHI]'s questionnaire response regarding the same question prior to the *Preliminary Results*. While [HHI] refuted the fact that it failed to provide certain requested documents (*i.e.,* invoices), this particular question asked for *complete sales and expenses documentation, including all sales and expenses related documentation generated in the sales process*. [HHI] cannot excuse itself from submitting all related documents, such as invoices, which are vital for the [USDOC] to verify a respondent's reporting. In other words, [HHI] was obligated to submit the requested information whether it agreed with the request or not; despite its obligation, it failed to provide the requested information.
>
> Furthermore, there are other discrepancies on the record (*e.g.,* the values of the international freight and marine insurance expenses, reported to CBP and to the [USDOC], respectively). There are also issues regarding certain expenses (*e.g.,* brokerage expenses) which [HHI] did not address in its rebuttal brief. As Petitioner noted, [HHI] did not correctly allocate the installation costs over the value of the transformer and spare parts in the home market. Collectively, these discrepancies and issues further undermine the reliability of [HHI]'s data.[1435]

Main arguments of the parties

7.465. Korea claims that the USDOC acted inconsistently with Article 6.8 in resorting to facts available as HHI did not "refuse[] access to", or otherwise fail to provide, "necessary" information.[1436] Korea points out that HHI submitted extensive documentation despite the USDOC's request being "highly unusual and burdensome due to [its] extremely broad scope and late timing".[1437] In addition, Korea argues that the USDOC simply rejected the documentation based on inconsistencies as claimed by the petitioner, without identifying any actual errors, and assumed the existence of systematic misreporting, without offering HHI an opportunity to respond, as required by paragraph 6 of Annex II.[1438] Korea maintains that if the USDOC considered this information to be "necessary", it should have requested clarifications as there was "ample time" to do so.[1439] Even if the USDOC considered the submitted information incomplete or imperfect, Korea argues that this was not sufficient to reject "summarily" the entire sales documentation.[1440] According to Korea, there was no information on the record demonstrating that HHI "materially" or "notably" impeded the investigation; to the contrary, HHI fully cooperated and responded to the extremely burdensome and late information request.[1441] Korea further claims that the USDOC acted inconsistently with paragraphs 3 and 5 of Annex II by failing to take into account verifiable information that was submitted in an appropriate and timely manner, and which, even if not ideal, was submitted by HHI acting to the best of its ability.[1442]

7.466. The United States responds that HHI selectively reported what it considered "necessary" and "sufficient" and it is not the right of the respondents to decide what information is "necessary" for the USDOC to make its determination.[1443]

[1435] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 28. (emphasis original)
[1436] Korea's first written submission, paras. 793 and 797.
[1437] Korea's first written submission, para. 793.
[1438] Korea's first written submission, para. 794.
[1439] Korea's first written submission, para. 795.
[1440] Korea's first written submission, paras. 796 and 838.
[1441] Korea's first written submission, para. 797.
[1442] Korea's first written submission, paras. 796 and 838-839; second written submission, para. 313.
[1443] United States' response to Panel question No. 91, para. 153.

Evaluation by the Panel

7.467. Korea claims that the USDOC acted inconsistently with Article 6.8 and paragraphs 3, 5, and 6 of Annex II of the Anti-Dumping Agreement in resorting to the use of facts available in respect of HHI's reporting of certain sales documentation.

7.468. We recall that, in its supplemental questionnaire, the USDOC asked HHI to "provide complete sales and expenses documentation (including *all* sales and expenses related documentation generated in the sales process) for **all** U.S. SEQUs".[1444] In response, HHI submitted over 3,300 pages of documentation.[1445] The petitioner raised certain inconsistencies regarding this documentation in its case brief, and while Hyundai Steel responded to these in its rebuttal brief, it was unable to submit new information in light of the USDOC's guidance.[1446]

7.469. In its final determination, the USDOC rejected the information submitted by HHI in its entirety on the basis that HHI was "systematically selective in providing various documents". The USDOC explained HHI's "pattern" of selective reporting by offering certain examples of missing documents, "such as invoices" "for many expenses".[1447] We note that the record demonstrates that the final determination marked the first instance when the USDOC addressed this issue and rejected HHI's response as "incomplete and unreliable".[1448] Before the final determination, only the petitioner in its case brief had alleged certain deficiencies in the information submitted by HHI.[1449] HHI responded to these arguments in its rebuttal brief.[1450]

7.470. The first sentence of paragraph 6 of Annex II requires that "[i]f evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefor, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation". The text of the provision thus envisages "due account being taken of the time-limits" for determining what constitutes a "reasonable period" for purposes of providing further explanations.[1451] That said, the time-limits of an investigation cannot be used to deprive an interested party of the opportunity to provide further explanations within the meaning of paragraph 6 of Annex II, provided that all other conditions under that provision are satisfied.

7.471. In the case at hand, it is clear that information that was requested by the USDOC in its supplemental questionnaire and provided by HHI was ultimately not accepted by the USDOC in its final determination. In such circumstances, paragraph 6 of Annex II required the USDOC to give an opportunity to HHI to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation. However, the USDOC never provided such an opportunity to HHI. We also note that although the petitioner, in its case brief submitted before the final determination, alleged certain deficiencies in the information submitted by HHI – that were addressed by HHI in its rebuttal brief – the petitioner's submission cannot substitute the conduct required on the part of the USDOC under paragraph 6 of Annex II.

7.472. Accordingly, in these circumstances, we find that the USDOC acted inconsistently with paragraph 6 of Annex II in resorting to facts available because – having "not accepted" the information provided by HHI – the USDOC subsequently failed to give an opportunity to HHI to "provide further explanations within a reasonable period". Given that paragraph 6 of Annex II serves as a precondition for an investigating authority's proper resort to facts available under Article 6.8 of the Anti-Dumping Agreement[1452], we find that the USDOC also acted inconsistently with that provision in resorting to facts available. In light of our findings of WTO-inconsistency, we do not

[1444] LPT POR3 HHI third supplemental questionnaire, (Exhibit KOR-128 (BCI)), p. 5. (emphasis original)
[1445] LPT POR3 HHI third supplemental questions 13 and 17 response, (Exhibit KOR-119 (BCI)).
[1446] LPT POR3 petitioner call memorandum, (Exhibit KOR-137).
[1447] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), pp. 27-28.
[1448] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 27.
[1449] LPT POR3 petitioner case brief, (Exhibit KOR-269 (BCI)).
[1450] LPT POR3 HHI rebuttal brief, (Exhibit KOR-270 (BCI)).
[1451] See, e.g. Panel Report, *Egypt – Steel Rebar*, para. 7.282.
[1452] Panel Reports, *China – GOES*, para. 7.385; *US – Steel Plate*, paras. 7.55-7.56; and *Mexico – Steel Pipes and Tubes*, para. 7.190.

consider it necessary to rule upon Korea's claims under paragraphs 3 and 5 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us.[1453]

7.3.6.3.3 The USDOC's selection of the replacement facts

7.3.6.3.3.1 Factual background

7.473. The USDOC found that HHI failed "to act to the best of its ability by not providing complete and accurate information, thereby raising issues as to whether [HHI]: (1) systematically overstated U.S. prices; and (2) systematically understated home market prices".[1454] The USDOC further found that HHI "failed to provide the [USDOC] with requested cost information, which prevented the [USDOC] from determining whether such costs are distorted by incomplete reporting", and that it engaged in "selective reporting".[1455] The USDOC applied the highest dumping margin alleged in the petition, 60.81%, as "total facts available with an adverse inference".[1456]

7.474. The USDOC noted that, in line with the US Tariff Act, "[b]ecause the AFA rate determined for [HHI] is derived from a rate in the Petition and, consequently, based upon secondary information, the [USDOC] must corroborate the rate to the extent practicable".[1457] The USDOC examined the evidence supporting the calculations in the petition to determine the probative value of the dumping margins.[1458] During its pre-initiation analysis, the USDOC also examined the "key elements" of the export price and normal value calculations, and "various independent sources" that "corroborate" the key elements of the export price and normal value calculations.[1459] The USDOC explained that, as part of its pre-initiation analysis, it "obtained no other information that calls into question the validity of the sources of information or the validity of the information supporting the export price and normal value calculations provided in the Petition".[1460] On this basis, the USDOC concluded the highest dumping margin alleged in the petition was "reliable" for the purposes of the review.[1461] The USDOC determined the highest dumping margin in the petition was "relevant" by examining the deductions and adjustments made by the petitioner in its application.[1462]

7.3.6.3.3.2 Main arguments of the parties

7.475. Korea claims that the USDOC acted inconsistently with Article 6.8 and paragraph 7 of Annex II of the Anti-Dumping Agreement in its selection of the replacement facts because it failed to engage in an "adequate process of reasoning an evaluation" as to how or why the adverse inferences it made were a reasonable replacement for all of the alleged pieces of missing information.[1463] Korea argues that the USDOC failed to corroborate the information, as required by paragraph 7 of Annex II.[1464] For Korea, an investigating authority's pre-initiation analysis of the information contained in a petition is not sufficient for the purposes of using that information in making a final determination.[1465] Korea asserts that the USDOC acted arbitrarily to punish HHI by applying AFA.[1466]

7.476. The United States responds that the USDOC considered the information contained in the petition, carefully selected a replacement, and corroborated it to the extent practicable using sources at its disposal.[1467] According to the United States, Korea has not suggested an alternative, and has

[1453] See, e.g. Panel Report, *EC – Salmon (Norway)*, para. 7.387; and *Morocco – Hot-Rolled Steel (Turkey)*, paras. 7.105-7.106.
[1454] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 4.
[1455] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 4.
[1456] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), pp. 4 and 6.
[1457] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 6. (fn omitted)
[1458] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 7.
[1459] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 7.
[1460] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 7.
[1461] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 7.
[1462] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 7.
[1463] Korea's first written submission, paras. 855 and 858-859.
[1464] Korea's first written submission, paras. 856-858.
[1465] Korea's first written submission, para. 859. See also Korea's response to Panel question No. 92, para. 111.
[1466] Korea's first written submission, para. 860.
[1467] United States' first written submission, paras. 265-268. See also United States' response to Panel question No. 92, paras. 156-157.

not demonstrated why the replacement was improper.[1468] The United States argues that, contrary to Korea's submission, the USDOC did not apply facts available with a view to ensure a punitive rate and the fact that the outcome is less favourable than Korea would have liked does not mean that the USDOC acted inconsistently with Article 6.8.[1469]

7.3.6.3.3.3 Evaluation by the Panel

7.477. We have already found that the USDOC erred in resorting to facts available for each of the four issues identified above. In these circumstances, we do not consider that making further findings on Korea's claims concerning the USDOC's selection of the replacement facts on the basis of the record used for the USDOC's WTO-inconsistent findings would assist in providing a positive solution to the dispute before us.[1470]

7.3.6.4 The fourth administrative review (POR4)

7.3.6.4.1 Introduction

7.478. For the POR4 proceedings, Korea claims that the USDOC acted inconsistently with Article 6.8 and Annex II of the Anti-Dumping Agreement in using "total AFA" for the two Korean producers/exporters of the subject merchandise that were selected as "mandatory respondents", namely, HHI and Hyosung.[1471] Korea also challenges the USDOC's determination of an "all others" rate for three Korean producers/exporters that were not selected for "individual examination" as being inconsistent with Article 9.4 of the Anti-Dumping Agreement.[1472]

7.479. We first examine Korea's claims challenging the USDOC's resort to facts available for HHI and Hyosung, respectively. In light of the USDOC's application of "total AFA" for both HHI and Hyosung[1473], we next address Korea's claim that the USDOC erred in its selection of the replacement facts for both the mandatory respondents. Finally, we address Korea's claim challenging the USDOC's calculation of the "all others" rate for the three non-selected Korean producers.

7.3.6.4.2 HHI

7.480. With respect to HHI, Korea challenges the USDOC's resort to facts available for three issues concerning (a) the reporting of accessories, (b) the reporting of gross unit price for certain home market sales, and (c) the non-disclosure of an allegedly affiliated US sales agent.[1474] We separately address Korea's claims pertaining to the USDOC's resort to facts available with respect to each of these three issues. For each issue, we begin by setting out the factual background, before summarizing the parties' main arguments, and examining Korea's claims under Article 6.8 and Annex II of the Anti-Dumping Agreement.

7.3.6.4.2.1 Accessories

Factual background

7.481. The USDOC in its initial questionnaire instructed HHI to "separately report the price and cost for 'spare parts' and 'accessories' to ensure that product matches are based on accurate physical characteristics of the LPTs".[1475] Noting that there was no definition of the term "accessories" in the USDOC's questionnaire, HHI submitted that its response was in line with the scope of the subject

[1468] United States' first written submission, para. 267.
[1469] United States' first written submission, para. 272.
[1470] See, e.g. Panel Reports, *Egypt – Steel Rebar*, para. 7.310; and *Mexico – Anti-Dumping Measures on Rice*, para. 7.200. See also Panel Report, *China – Broiler Products*, para. 7.555.
[1471] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), p. 2; Korea's first written submission, paras. 798-818 842-845, 819-832, and 846-850.
[1472] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), p. 2; Korea's first written submission, para. 872.
[1473] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), p. 3.
[1474] Korea's first written submission, paras. 798-818 and 842-845.
[1475] LPT POR4 Sections B-D questionnaire response, (Exhibit KOR-144 (BCI)), p. D-2.

merchandise, thus including costs of all parts that are "attached to, imported with or invoiced with the active parts of large power transformers".[1476]

7.482. HHI subsequently filed a request for clarification of the term "accessories", stating that "[f]rom the records of the previous segments of this proceeding, [HHI] has not been able to identify a fixed definition for the term 'accessories' as used by the [USDOC] in this question".[1477] HHI asked the USDOC to clarify whether HHI was required to report prices for the "accessories" when sales documents did not indicate separate prices for such items, and, if so, to identify the methodology for determining the "price".[1478] HHI also asked the USDOC to provide a methodology for calculating "costs", when these were not readily identifiable.[1479] Immediately following its request, HHI requested a meeting with the USDOC to discuss this issue. The USDOC asked to delay this meeting until after the issuance of the supplemental questionnaires, and HHI's responses thereto.[1480]

7.483. In its first supplemental sales questionnaire, the USDOC asked HHI to "explain in detail whether the sales documentation generated for U.S. and home market sales (including the RFQ [(request for quotation)], sales contract, initial and/or amended purchase order contract for the same transaction, invoices, or other sales documents) separately list or otherwise itemize the price/revenues for the main transformer body, spare parts, accessories and sales-related service revenues (e.g., freight, brokerage, installation and supervision)" and requested that "[a]ll such separate reporting of revenues in sales documentation should result in separate reporting of revenues and associated expenses in [HHI's] responses to sections B and C, per the [USDOC]'s instructions in the January 5, 2015, antidumping duty questionnaire".[1481] In its response of 3 May 2017, HHI submitted worksheets with the separate values as requested.[1482]

7.484. In its second supplemental sales questionnaire, the USDOC requested HHI – in light of its request for clarification – to "provide a definition of how [HHI] use[d] and/or underst[ood] the scope of the term 'accessories' when negotiating with [its] customers" and to "explain [its] basis for such usage and/or understanding in detail".[1483] It also requested HHI to "describe in detail what constitutes 'main bodies,' 'spare parts,' and 'accessories' that [HHI] sold in the U.S. and home markets in conjunction with sales of subject LPTs".[1484] The USDOC posed a number of additional questions which concerned "accessories" as part of LPTs. HHI responded by recalling that HHI had requested such a definition from the USDOC, as it did not have a particular understanding of the term in its use thereof internally or in its dealings with its customers,[1485] and reiterated its request for a meeting with the USDOC.[1486]

7.485. The USDOC issued an additional supplemental questionnaire, asking HHI to ensure that it had separately reported "accessories" in its revised Sections B-C sales files.[1487] HHI responded that, because the USDOC was still considering its definition of an "accessory", it was unclear whether some items would ultimately be considered as parts; in order to cover this possibility, it submitted

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[1476] LPT POR4 Sections B-D questionnaire response, (Exhibit KOR-144 (BCI)), pp. D-2-D-3 (emphasis omitted). We recall the definition of the subject merchandise given by the USDOC:

> The scope of this order covers large liquid dielectric power transformers … having a top power handling capacity greater than or equal to 60,000 kilovolt amperes (60 megavolt amperes), whether assembled or unassembled, complete or incomplete.
> Incomplete large power transformers are subassemblies consisting of the active part and any other parts attached to, imported with or invoiced with the active parts of large power transformers. The "active part" of the transformer consists of one or more of the following when attached to or otherwise assembled with one another: the steel core or shell, the windings, electrical insulation between the windings, the mechanical frame for a large power transformer.

(LPT POR3 initial questionnaire, (Exhibit KOR-209), appendix III)

[1477] LPT POR4 request for clarification, (Exhibit KOR-146 (BCI)), p. 5. HHI was referring to POR3, the final results of which were published on 13 March 2017.

[1478] LPT POR4 request for clarification, (Exhibit KOR-146 (BCI)), pp. 12-15.

[1479] LPT POR4 request for clarification, (Exhibit KOR-146 (BCI)), pp. 12-15.

[1480] LPT POR4 HHI case brief, (Exhibit KOR-149 (BCI)), p. 14.

[1481] LPT POR4 first supplemental sales questionnaire, (Exhibit USA-36 (BCI)), pp. 14-15.

[1482] LPT POR4 first supplemental sales questionnaire response, (Exhibit USA-37 (BCI)), p. 41.

[1483] LPT POR4 second supplemental questionnaire, (Exhibit KOR-147 (BCI)), p. 9.

[1484] LPT POR4 second supplemental questionnaire, (Exhibit KOR-147 (BCI)), pp. 9-10.

[1485] LPT POR4 second supplemental questionnaire response, (Exhibit KOR-148 (BCI)), pp. 10-11 and attachments 2nd SS-1-2nd SS-2.

[1486] LPT POR4 HHI request for meeting, (Exhibit KOR-212).

[1487] LPT POR4 supplemental questionnaire, (Exhibit USA-39 (BCI)), p. 4.

a complementary chart, including for each of these sales the revenue and the corresponding cost.[1488] In the meantime, a meeting was held between HHI and the USDOC, where the issue of defining "accessories" was raised again.[1489]

7.486. In its final determination, the USDOC found that HHI failed to report the price and cost of accessories, and this determination was part of the basis for the application of total AFA.[1490] The USDOC explained:

> Additionally, regarding [the USDOC]'s statutory obligation under section 782 of the Act to notify a party of a deficiency and to provide an opportunity to explain or remedy the deficiency, as detailed in our [preliminary decision memorandum] PDM, we made multiple attempts to obtain information regarding "accessories" from [HHI]. Despite our requests, [HHI] failed to provide the requested information and, instead, defaulted to the scope language and [the USDOC]'s historical treatment of "accessories." [HHI] claims it does not know what accessories are, yet claims it already reported accessories as subject merchandise. In light of this reporting strategy, we followed up with numerous supplemental questionnaires seeking further explanation, as detailed in the PDM. As evinced by these supplemental questionnaires, [the USDOC] satisfied its obligation to inform [HHI] of the nature of its deficiencies regarding its reporting of accessories and provided [HHI] with several opportunities to remedy or explain its deficient and conflicting responses. [HHI] failed to address which components in its reporting constitute the accessories [HHI] considers in its normal course of business, regardless of the scope language and [the USDOC]'s prior treatment of accessories, and despite repeated opportunities to do so. Accordingly, we find that [HHI]'s argument regarding [the USDOC]'s statutory obligation under section 782(d) is not supported.[1491]

Main arguments of the parties

7.487. Korea claims that the USDOC acted inconsistently with Article 6.8 of the Anti-Dumping Agreement because HHI did not "refuse[] access to", or otherwise fail to provide, "necessary" information, nor did it "significantly impede[]" the proceedings.[1492] Korea also claims that the USDOC acted inconsistently with paragraph 1 of Annex II by failing to provide a definition of "accessories" as soon as possible.[1493] According to Korea, in the absence of a definition of "accessories" by the USDOC, HHI did its "utmost" to provide in a timely manner the requested information and furnished all the data on "accessories" based on HHI's understanding of the term.[1494] Korea also claims that the USDOC acted inconsistently with paragraphs 3 and 5 of Annex II by failing to take into account the verifiable and substantiated information concerning "accessories", which, even if not perfect, was submitted by HHI acting to the best of its ability.[1495] Korea states that the data on accessories was provided based on the way that HHI interpreted and applied the term[1496], and the USDOC never took any issue with HHI's reporting, nor did it provide any guidance to the contrary despite HHI's repeated efforts to seek further clarifications.[1497]

7.488. The United States maintains that, despite the USDOC's repeated requests, HHI withheld "necessary" information and otherwise impeded the review.[1498] According to the United States, HHI bore the burden of defining the terms in respect to which information was required, in light of its obligation to respond to the best of its ability, and given that the company that uses the term is "by far in the best position" to understand how that term is used.[1499] Referring to the Hyosung's reporting

[1488] LPT POR4 supplemental questionnaire response, (Exhibit USA-41 (BCI)), p. 10.
[1489] LPT POR4 meeting memorandum, (Exhibit USA-40).
[1490] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), p. 11.
[1491] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), p. 11. (fns omitted)
[1492] Korea's first written submission, paras. 799-800.
[1493] Korea's first written submission, para. 808.
[1494] Korea's first written submission, paras. 800-801.
[1495] Korea's first written submission, paras. 803, 843, and 845.
[1496] Korea notes that the USDOC justified its decision to reject the information submitted relating to accessories based on the fact that some HHI sales documentation included the term "accessories", and thus it could not be considered undefined. However, Korea emphasizes that the term was used inconsistently across HHI's customers base. (Korea's first written submission, para. 806).
[1497] Korea's first written submission, paras. 801 and 805-806.
[1498] United States' first written submission, para. 286.
[1499] United States' second written submission, paras. 87-88.

and to the proposed definitions provided by the petitioner, the United States notes that HHI did not offer a definition of the term "accessories" even though it "had previously taken positions in its February response on sales of accessories" and "[w]hile acknowledging how other parties have attempted to define and report accessories".[1500] The United States argues that HHI's documentation reflected its awareness and understanding of the types of components that constituted accessories.[1501] The United States also points out that HHI requested a clarification of the term "accessories" months after the USDOC's initial request.[1502]

Evaluation by the Panel

7.489. Korea claims that the USDOC acted inconsistently with Article 6.8 and paragraph 1, 3, 5, and 6 of Annex II of the Anti-Dumping Agreement in resorting to the use of facts available in respect of HHI's reporting of "accessories" in POR4.

7.490. We recall that the issue concerning the reporting of "accessories" also arose in POR3. While the facts relating to this issue in POR4 are similar in many respects to the situation in POR3, we note that in POR3 HHI expressed its reporting concerns mainly through its questionnaire responses, and the USDOC finally determined that HHI had misreported "accessories" and that, in case of any doubts as to the meaning of the term, HHI should have sought a clarification from the USDOC.[1503] In POR4, HHI did, in fact, seek such a clarification and actively sought to meet with the USDOC to discuss this issue.[1504] We recall that paragraph 1 of Annex II to the Anti-Dumping Agreement requires an investigating authority to "specify in detail", "as soon as possible" after the initiation of the investigation, the information that is required and the manner in which such information should be structured.

7.491. HHI underscored the absence of a general definition of the term "accessories" on multiple occasions during the POR4 proceedings.[1505] The USDOC expressly disagreed with HHI that the USDOC was obliged to define the term "accessories".[1506] Indeed, the record does not demonstrate – nor does the United States contend – that a definition of "accessories" was, in fact, provided by the USDOC to HHI. Rather, the United States refutes Korea's claim under paragraph 1 of Annex II on the ground that HHI was in the best position to define "accessories" as it had used the term in its internal sales documents.[1507]

7.492. Although the term "accessories" appears in HHI's sales documentation, we note that HHI explained to the USDOC that it did not have a common internal definition of "accessories" and that term was not used in the same sense in documents pertaining to different sales or, in some cases, in different documents pertaining to a single sale.[1508] Neither the United States nor the USDOC explain why HHI could be considered to have had a particular or specific understanding of the term "accessories" notwithstanding the evidence presented by HHI showing that the term was not used consistently across its internal sales documentation. We therefore disagree with the United States that the USDOC was not required to define "accessories" merely because that term was used in HHI's internal documents.

[1500] United States' first written submission, para. 278 (referring to LPT POR4 request for clarification, (Exhibit KOR-146 (BCI)), pp. 5-12).
[1501] United States' first written submission, para. 286.
[1502] United States' first written submission, para. 278.
[1503] LPT POR3 issues and decision memorandum, (Exhibit KOR-121), p. 27.
[1504] LPT POR4 request for clarification, (Exhibit KOR-146 (BCI)), pp. 5-15.
[1505] LPT POR4 Sections B-D questionnaire response, (Exhibit KOR-144 (BCI)), p. D-2 (submitting that "there is no definition of what constitutes 'accessories'"); LPT POR4 request for clarification, (Exhibit KOR-146 (BCI)), p. 5 (submitting that "[HHI] has not been able to identify a fixed definition for the term 'accessories' as used by the [USDOC] in this question"); LPT POR4 second supplemental questionnaire response, (Exhibit KOR-148 (BCI)), p. 10 (submitting that "[i]nternally, [HHI] does not have a definition of 'accessories.' Moreover, there is no particular use of the term 'accessories' by [HHI]'s customers."); and LPT POR4 HHI request for meeting, (Exhibit KOR-212) (requesting a meeting with the USDOC to discuss the "'accessories' issue raised in HHI's responses and previous submissions").
[1506] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), p. 13.
[1507] United States' second written submission, para. 88; first written submission, paras. 278, 236, and 315.
[1508] LPT POR4 second supplemental questionnaire response, (Exhibit KOR-148 (BCI)), pp. 10-16.

7.493. In support of its position, the United States also points to the USDOC's observation that the other mandatory respondent, Hyosung, was "able to identify what an accessory is".[1509] In our view, the fact that Hyosung reported its understanding of the term "accessories" does not have a bearing on the validity or genuineness of HHI's explanation that it did not have a consistent or common understanding of that term in its own internal operations. We therefore consider that the United States' argument concerning Hyosung's reporting of its understanding of the term "accessories" is not relevant to the issue of whether the USDOC was required to provide a definition of "accessories" to HHI – a respondent that repeatedly informed the USDOC that it did not have a common understanding of that term across its operations.

7.494. The United States also argues that, had HHI reported its own understanding of the term "accessories", the USDOC could have further analysed whether that understanding was appropriate for the purpose of calculating a margin, and that HHI withheld necessary information and otherwise impeded the review by not providing such definition.[1510] We note in this regard that in its questionnaire dated 19 May 2017, the USDOC requested HHI to provide "a definition of how [HHI] use[s] and/or understand[s] the scope of the term 'accessories' when negotiating with [its] customers".[1511] In response, HHI clearly conveyed to the USDOC that it did not have any particular understanding of the term "accessories" in negotiating with its customers, as was allegedly reflected in the varying usage of the term within and across sales.[1512] We also note that HHI informed the USDOC in this response that it was reporting information regarding "accessories" based on the following definition:

> [HHI] will report any component that is not "attached to, imported with or invoiced with the active parts of LPTs" as an "accessory," and [HHI] will report any component that is "attached to, imported with or invoiced with the active parts of LPTs" as part of the transformer. Thus, under this definition, [HHI] would report any component that is procured for the customer and sent directly to the customer without being "attached to, imported with or invoiced with the active parts of LPTs" as an "accessory."[1513]

Thus, HHI also clearly indicated its reporting basis to the USDOC. However, the USDOC did not explain why HHI's proposed definition of the term "accessories" under the fourth administrative review was inappropriate for the purpose of calculating a dumping margin. Further, while the USDOC noted that the "record evidence suggests that [HHI] could have provided the ranges/types of components which it believes constitute accessories based on its technical knowledge and experience in the industry", this observation appears as an unsubstantiated assertion in the USDOC's final determination.[1514] The United States has neither identified record evidence that formed the basis of this observation by the USDOC, nor has it pointed us to any flaw in the evidence or the explanation provided by HHI that it had no consistent understanding of the term "accessories" as part of its internal operations.

7.495. The United States also points to an alleged inconsistency in HHI's submissions before the USDOC, asserting that, on the one hand, HHI claimed not to have a particular understanding of the term "accessories", while, on the other hand, HHI argued that it had properly reported accessories.[1515] We understand the United States to suggest that this alleged inconsistency reveals HHI's failure to properly define and submit information pertaining to "accessories" before the USDOC. While HHI denied having a consistent understanding of "accessories" in its internal operations and in its negotiations with customers, the understanding of this term that it offered in its submissions before the USDOC was tailored for the purpose of the POR4 proceedings. In other words, while HHI denied having a general understanding of the term "accessories" in the normal course of business, it did propose an understanding of the term for the purpose of the USDOC's investigation and reported the relevant information based on that understanding.[1516]

[1509] United States' first written submission, para. 315.
[1510] United States' first written submission, para. 286; second written submission, para. 88; and opening statement at the first meeting of the Panel, para. 112.
[1511] LPT POR4 second supplemental questionnaire, (Exhibit KOR-147 (BCI)), p. 9.
[1512] LPT POR4 second supplemental questionnaire response, (Exhibit KOR-148 (BCI)), p. 10.
[1513] LPT POR4 second supplemental questionnaire response, (Exhibit KOR-148 (BCI)), p. 16.
[1514] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), p. 14.
[1515] United States' first written submission, para. 286 (referring to LPT POR4 issues and decision memorandum, (Exhibit KOR-211), p. 10).
[1516] LPT POR4 HHI case brief, (Exhibit KOR-149 (BCI)), pp. 6-11.

Thus, contrary to the United States' argument, we see no inconsistency in HHI's submissions before the USDOC.[1517]

7.496. Accordingly, in the circumstances of this case, we find that, by not providing further guidance as to the meaning of the term "accessories", the USDOC acted inconsistently with paragraph 1 of Annex II to the Anti-Dumping Agreement, as it failed to "specify in detail" the information required. Given that paragraph 1 of Annex II serves as a precondition for an investigating authority's proper resort to facts available under Article 6.8 of the Anti-Dumping Agreement[1518], we find that the USDOC also acted inconsistently with that provision in resorting to facts available. In light of our findings of WTO-inconsistency, we do not consider it necessary to rule upon Korea's claims under paragraphs 3 and 5 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us.[1519]

7.3.6.4.2.2 Gross unit price for certain home market sales

Factual background

7.497. In its second supplemental questionnaire for the POR4 proceedings, the USDOC asked HHI to provide "complete sales and expenses documentation" for certain home-market and US sales (in particular SEQHs [[***]] and SEQUs [[***]]).[1520] Having reviewed the information provided by HHI for "one of the home-market sales requested" (SEQH [[***]]), in its preliminary determination the USDOC found that HHI had "improperly reported its home market gross unit prices for certain home market sales".[1521] The USDOC explained:

> Specifically, the record indicates that even though later-revised contracts identify different contract values, [HHI] continued to use the values from its initial contract to report its gross unit prices for certain sales, thereby understating its home market sales for certain home market sales. As a result, we preliminarily find that [HHI]'s reporting of its gross unit prices for its home market sales is not reliable. Therefore, we preliminarily determine that [HHI] failed to cooperate to [the] best of its ability to provide complete and accurate information, thereby preventing the [USDOC] from calculating an accurate margin and calling into question the accuracy of [HHI]'s reporting.[1522]

7.498. The USDOC provided a further explanation for its conclusion in its preliminary analysis memorandum, stating that "[HHI] improperly determined its home market gross unit price for [[***]] home market sales".[1523] The USDOC found that for one of the [[***]] home market sales for which it had requested complete documentation (SEQH [[***]]), HHI had reported the gross unit prices based on the original contract, while subsequent revisions of this contract reported increased prices. This contract and its revisions included gross unit prices also for SEQH [[***]], for which the USDOC had not requested complete documentation. The USDOC therefore preliminary determined that HHI had misreported SEQHs [[***]].

7.499. In its case brief submitted after the preliminary determination, HHI argued that it had not understated its home-market gross unit prices, as the changes that the USDOC observed in the

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[1517] The United States also points to HHI's reference to "accessories as a type of change that can occur after the initial purchase order" in HHI's questionnaire response dated 2 February 2017. (United States' first written submission, para. 277 (referring to (LPT POR4 Section A questionnaire response, (Exhibit KOR-150 (BCI)), p. A-29)). We note that while the term "accessories" does appear in the questionnaire response that the United States points to, this does not, in our view, contradict the evidence provided by HHI showing that this term was not used uniformly by HHI in its internal operations and across/within different sales.

[1518] Panel Reports, *China – GOES*, paras. 7.384-7.385 and 7.393-7.394; *US – Steel Plate*, paras. 7.55-7.56.

[1519] See, e.g. Panel Reports, *EC – Salmon (Norway)*, para. 7.387; and *Morocco – Hot-Rolled Steel (Turkey)*, paras. 7.105-7.106.

[1520] LPT POR4 second supplemental questionnaire, (Exhibit KOR-147 (BCI)), p. 13.

[1521] LPT POR4 decision memorandum (PDM), (Exhibit KOR-140), pp. 17-18.

[1522] LPT POR4 decision memorandum (PDM), (Exhibit KOR-140), p. 18.

[1523] LPT POR4 preliminary analysis memorandum, (Exhibit USA-43 (BCI)), pp. 2-3.

contract prices were related solely to non-subject merchandise, and thus there was no basis to find that HHI had not reported gross unit prices in an accurate manner.[1524]

7.500. In its final determination, the USDOC continued to find that the application of "adverse facts available" was warranted[1525] and addressed the petitioner's concerns as follows:

> The petitioner alleges that the initial contract for the home market sales at issue indicates that this certain part, which is supposed to be treated as a non-foreign like product, may be indeed a foreign like product. In particular, the petitioner argues that the initial contract for the home market sales at issue shows that this particular part (*i.e.,* the supposed non-foreign like product) is *included* within the contract under the "Main Transformer" description, which indicates that this supposed non-foreign like product may be indeed a foreign like product. This evidence contradicts [HHI]'s claims that the total contract value change between its initial contract and later-revised contracts is only related to a non-foreign like product. Other than [HHI]'s annotation claiming that this part is a non-foreign like product, the record does not demonstrate whether it is *indeed* non-foreign like product.
>
> Additionally, due to [HHI]'s failure to provide the requested information regarding accessories, as detailed in Comment 1 above, we are unable to determine whether this item would be an accessory. As explained above, other than [HHI]'s annotation which categorized this item as non-foreign like product in its contract, [HHI] did not provide any additional details concerning the nature of this item and how it interacts with merchandise under review. Therefore, we find that the record is ambiguous and there continues to be concern that the gross unit prices may be understated.[1526]

7.501. The USDOC concluded that: "(1) [HHI]'s reporting of nonforeign like products is inaccurate; (2) there is inconsistent treatment of a certain item in its home market sales; and (3) by excluding this item, this could lead to the understatement of the home market gross unit price for certain sales".[1527] The USDOC applied facts available with an "adverse inference" "because such inaccurate and incomplete reporting gives rise to concerns of the manipulation of gross unit prices, and [HHI]'s continued careless reporting".[1528]

Main arguments of the parties

7.502. Korea claims that the USDOC acted inconsistently with Article 6.8 of the Anti-Dumping Agreement in resorting to facts available because information about one home market sale cannot, in good faith, be considered "requisite, essential, needful" – and therefore is not "necessary" – for purposes of the USDOC's determination.[1529] Korea also asserts that HHI had submitted record evidence that, in any case, would have allowed the USDOC to decide whether to include or exclude the cost of this part in the gross unit price for the calculation of the normal value of these transactions.[1530] On this basis, Korea claims that the USDOC acted inconsistently with paragraphs 3 and 5 of Annex II by discarding verifiable and appropriately submitted information.[1531]

[1524] LPT POR4 HHI case brief, (Exhibit KOR-149 (BCI)), pp. 39-40.
[1525] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), p. 3.
[1526] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), pp. 15-16 (emphasis original). The USDOC was also concerned due to the different treatment of the same item in different home market sales: "[w]hile the item names between the two sales are not identical, they indicate that the item name appears in the second sale as merchandise within the scope (i.e., treated as a foreign like product in the second sale while its treated as non-subject merchandise in the first sale)".
[1527] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), p. 16.
[1528] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), p. 16.
[1529] Korea's first written submission, para. 811. Korea explains that the USDOC stated for the first time, in its preliminary determination, that the gross unit prices for certain home market sales were inappropriately reported as HHI used values from original contracts, although later-revised contracts showed different values. According to Korea, HHI explained in its subsequent case brief that the revisions concerned non-subject merchandise, and thus the gross-unit price was not affected. Korea notes that the USDOC finally determined that necessary information was missing, even though it only concluded that the "part" at issue *may* be subject merchandise, and not that it certainly was. (Korea's first written submission, paras. 736-737; second written submission, para. 328).
[1530] Korea's first written submission, para. 812. See also Korea's second written submission, para. 330.
[1531] Korea's first written submission, paras. 815 and 844.

Finally, Korea asserts that an investigating authority's internal deadlines do not justify the authority's failure to request additional information, as required by paragraph 6 of Annex II.[1532]

7.503. The United States maintains that HHI classified a particular component as "non-subject merchandise" even though this component was "always attached or assembled" to the LPT. The United Stated recalls that HHI reported gross unit prices for certain sales on the basis of values from the "initial purchase contract", while this contract had been modified twice.[1533] On this basis, the United States argues that HHI failed to accurately report gross-unit prices and thus the "USDOC was unable to accurately compare home market sales with export sales to the United States".[1534] The United States further refers to the USDOC's statement that it would have been impracticable to send another supplemental questionnaire as it would have had to cover and examine significantly more home market sales in order to determine if HHI had understated its gross unit prices.[1535]

Evaluation by the Panel

7.504. Korea claims that the USDOC acted inconsistently with Article 6.8 and paragraphs 3, 5, and 6 of Annex II of the Anti-Dumping Agreement in resorting to the use of facts available in respect of HHI's reporting of the gross unit prices for certain home market sales.

7.505. We recall that the USDOC preliminarily determined that HHI had understated the gross unit prices for SEQHs [[***]] and [[***]], because "even though later-revised contracts identif[ied] different contract values, [HHI] continued to use the values from its initial contract to report its gross unit prices" for these two home market sales.[1536] HHI responded in its case brief that the USDOC "correctly identified a change between the original and revised contracts of the sale in question … but that change concerned non-subject merchandise only".[1537] HHI based this assertion on the original purchase order and the revised order, which referred to the disputed "part" as "not attached" to the LPT, thus allegedly indicating that it was not subject merchandise.[1538] On this basis, HHI maintained that "the gross unit prices connected to the sale did not change" and that its reporting based on the original contract was accurate.[1539]

7.506. The USDOC in its final determination stated that HHI's assertion that the LPT part at issue was "non-subject merchandise" was contradicted by the fact that this part was included under the "Main Transformer" description of the contract.[1540] For the USDOC, "[o]ther than [HHI]'s annotation claiming that this part is a non-foreign like product, the record [did] not demonstrate whether it is *indeed* non-foreign like product", and "[HHI] did not provide any additional details concerning the nature of this item and how it interacts with merchandise under review".[1541] The USDOC also stated that the "concern that [HHI] might be understating its home market gross unit price" was exacerbated by the fact that HHI had not treated consistently the same item between different home market sales.[1542] As the record was "unclear" as to whether HHI's reporting was accurate, the USDOC concluded that HHI's reporting *could lead* to an understatement of the home market gross unit price for certain sales.[1543] The USDOC ultimately applied facts available with "adverse inferences" because of HHI's "inaccurate", "incomplete", and "careless" reporting.[1544]

7.507. As Korea points out, "the USDOC did not definitively conclude that the part was subject merchandise – only that it *may* be".[1545] Thus, in its final determination, the USDOC rejected the information provided by HHI as part of its case brief aimed at demonstrating that the discrepancy between the original and revised contracts concerned non-subject merchandise only. The USDOC

[1532] Korea's second written submission, para. 329.
[1533] United States' first written submission, para. 289.
[1534] United State' first written submission, para. 318.
[1535] United States' first written submission, paras. 288-290.
[1536] LPT POR4 decision memorandum (PDM), (Exhibit KOR-140), p. 18. See also LPT POR4 second supplemental questionnaire response, (Exhibit KOR-215 (BCI)), pp. 1-4.
[1537] LPT POR4 HHI case brief, (Exhibit KOR-149 (BCI)), pp. 39-40. (emphasis omitted)
[1538] LPT POR4 HHI case brief, (Exhibit KOR-149 (BCI)), p. 40.
[1539] LPT POR4 HHI case brief, (Exhibit KOR-149 (BCI)), pp. 39-40.
[1540] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), p. 15.
[1541] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), pp. 15-16. (emphasis original)
[1542] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), p. 16.
[1543] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), pp. 16-17.
[1544] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), p. 16.
[1545] Korea's second written submission, para. 328. (emphasis original)

however could not definitely conclude on the basis of the information before it as to whether the part at issue was, in fact, subject merchandise.

7.508. Paragraph 6 of Annex II requires, in the first sentence, that "[i]f evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefor, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation". As relevant context, we note that Article 6.2 of the Anti-Dumping Agreement provides that:

> 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.

7.509. In the case at hand, HHI in its case brief provided information allegedly demonstrating that the change between the original and revised contracts at issue concerned only non-subject merchandise.[1546] HHI also stated that "if any questions remain[ed] as to the sales responses and supplemental responses supplied by [HHI] – which are voluminous and complex – the [USDOC] should resolve them by reviewing the documentation on-site with the relevant company personnel at verification".[1547] HHI further asserted that the discrepancy identified by the USDOC was "amenable to an explanation" from HHI.[1548]

7.510. In its final determination, the USDOC considered the record to be "unclear" as to whether HHI's reporting was accurate, and for this reason it concluded that HHI's reporting *could lead* to an understatement of the home market gross unit price for certain sales.[1549] Moreover, the USDOC stated that it "discovered these discrepancies regarding conflicting treatment of certain LPT components late in the review stage", and "[a]t this point in time, in light of [the] statutory deadlines to complete the review, it became impracticable to send yet another supplemental questionnaire".[1550] Thus, the USDOC never provided an opportunity to HHI to furnish further explanations regarding the alleged deficiency in the information supplied by HHI to demonstrate that any change between the original and revised contracts of the sale at issue concerned non-subject merchandise.[1551]

7.511. From the above, it is clear that the USDOC did not accept the information and explanations provided by HHI in its case brief and did not provide an opportunity to HHI for furnishing further explanations *solely* on the basis that it would be "impracticable" in light of the "statutory deadlines".[1552] As discussed above, while paragraph 6 of Annex II allows "due account being taken of the time-limits of the investigation" for purposes of determining what constitutes a "reasonable period" for seeking further explanations, this does not without more mean that the time-limits of an investigation can be used to deprive an interested party of the opportunity to provide further explanations within the meaning of paragraph 6 of Annex II, provided that all other conditions under that provision are satisfied. We therefore disagree with the United States that the USDOC was justified in not seeking further explanations and information from HHI in light of the applicable statutory deadlines.[1553]

7.512. Accordingly, in the circumstances of this case, we find that the USDOC acted inconsistently with paragraph 6 of Annex II to the Anti-Dumping Agreement in resorting to facts available because – having "not accepted" the information provided by HHI as it was "unclear" – the USDOC did not subsequently give an opportunity to HHI to provide "further explanations within a reasonable period, due account being taken of the time-limits of the investigation". Given that paragraph 6 of

[1546] LPT POR4 HHI case brief, (Exhibit KOR-149 (BCI)), pp. 39-40.
[1547] LPT POR4 HHI case brief, (Exhibit KOR-149 (BCI)), p. 40.
[1548] LPT POR4 HHI case brief, (Exhibit KOR-149 (BCI)), p. 41. See also LPT POR4 HHI post preliminary comments, (Exhibit KOR-141 (BCI)), p. 2.
[1549] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), pp. 16-17.
[1550] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), p. 17.
[1551] LPT POR4 HHI case brief, (Exhibit KOR-149 (BCI)), pp. 39-40.
[1552] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), p. 17.
[1553] United States' first written submission, para. 290. Furthermore, we note that HHI's case brief was filed on 12 October 2017, while the USDOC's Final Determination was issued almost five months later on the 9 March 2018.

Annex II serves as a precondition for an investigating authority's proper resort to facts available under Article 6.8 of the Anti-Dumping Agreement[1554], we find that the USDOC also acted inconsistently with that provision in resorting to facts available with respect to HHI's reporting of gross unit prices for certain home market sales in POR4. In light of our findings of WTO-inconsistency, we do not consider it necessary to rule upon Korea's claims under paragraphs 3 and 5 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us.[1555]

7.3.6.4.2.3 US sales agent

7.513. The last issue raised with respect to HHI's reporting in POR4 pertains to its identification of an allegedly affiliated sales agent.

Factual background

7.514. In its initial Section A questionnaire, the USDOC made the following requests:

> b. Provide a list of all … sales office locations … involved in the development, production, sale and/or distribution of the merchandise under review operated by your company and its affiliates. Please briefly describe the purpose of each. Provide a complete address and telephone number for each of these plants, offices, and other facilities.[1556]

7.515. Following HHI's response[1557], the USDOC issued a supplemental questionnaire, instructing HHI to "provide a chart which includes a complete list of all of (1) HHI's subsidiaries and/or affiliates and (2) HHI's subsidiaries and/or offices that are related to sale and/or distribution of merchandise under review (please include addresses)", as well as "a detailed explanation of their specific sale and/or distribution activities for merchandise under review during the POR".[1558] Furthermore, the USDOC asked HHI to "describe in detail [its] relationship with each of its sales agents".[1559] Specifically, noting the petitioner's allegation "that publicly available information shows, for example, that commission agent [[***]] shares the same address and phone number with [[***]]", the USDOC asked HHI to explain its "relationship with this company and state whether there is any affiliation between [[***]] and any [HHI] entity".[1560] HHI noted that it had submitted all charts of its subsidiaries and affiliates in its initial section A response[1561] and submitted again the list of all its subsidiaries and affiliates[1562] while clarifying that it "is not affiliated with any of its sales agents", because it compensated them when they were able to arrange a sale.[1563] HHI also submitted evidence to demonstrate that, contrary to the petitioner's allegation "[[***]] is located in [[***]], not [[***]]".[1564]

7.516. In its preliminary determination and the accompanying analysis, the USDOC acknowledged HHI's response concerning the different locations of the sales agent and [[***]][1565], but nonetheless found that HHI was affiliated with the sales agent on the basis that this agent used an email address and a title and division that, in its view, "belong[ed]" to HHI.[1566] The USDOC found that by not identifying this sales agent as an affiliate, HHI prevented the USDOC from conducting an

[1554] Panel Reports, *China – GOES*, para. 7.385; *US – Steel Plate*, paras. 7.55-7.56; and *Mexico – Steel Pipes and Tubes*, para. 7.190.
[1555] See, e.g. Panel Reports, *EC – Salmon (Norway)*, para. 7.387; and *Morocco – Hot-Rolled Steel (Turkey)*, paras. 7.105-7.106.
[1556] LPT POR4 initial questionnaire, (Exhibit USA-35), p. A-4.
[1557] LPT POR4 Section A questionnaire response, (Exhibit KOR-150 (BCI)), pp. A-7-A-10.
[1558] LPT POR4 second supplemental questionnaire, (Exhibit KOR-147 (BCI)), p. 4.
[1559] LPT POR4 second supplemental questionnaire, (Exhibit KOR-147 (BCI)), p. 30.
[1560] LPT POR4 second supplemental questionnaire response, (Exhibit KOR-213 (BCI)), p. 81.
[1561] LPT POR4 Section A questionnaire response, (Exhibit KOR-150 (BCI)), attachments A-6, A-8, and A-9.
[1562] LPT POR4 second supplemental questionnaire response, (Exhibit KOR-213 (BCI)), p. 4.
[1563] LPT POR4 second supplemental questionnaire response, (Exhibit KOR-213 (BCI)), p. 81.
[1564] LPT POR4 second supplemental questionnaire response, (Exhibit KOR-213 (BCI)), p. 81.
[1565] LPT POR4 preliminary analysis memorandum, (Exhibit USA-43 (BCI)), p. 5.
[1566] LPT POR4 preliminary analysis memorandum, (Exhibit USA-43 (BCI)), p. 5.

arm's-length analysis and calculating an accurate margin, as the indirect selling expenses related to this agent could have been understated.[1567]

7.517. HHI subsequently submitted its post-preliminary comments, addressing, *inter alia*, the USDOC's "factual assertion" about the alleged US sales agent. The USDOC, however, rejected this submission in its entirety as it contained "new factual information" and noted that HHI would have a "full and fair opportunity" to present its arguments regarding the preliminary results, absent the new factual information, in its case and rebuttal briefs.[1568] HHI resubmitted its post-preliminary comments, having redacted all the "new factual information" identified by the USDOC.[1569] HHI urged the USDOC to conduct the previously-planned verification, in order to examine the independence of this agent.[1570] As part of its case brief, HHI asserted that the USDOC had not established that the relationship between the two entities satisfied the statutory definition of "affiliated persons" and that nothing indicated that HHI had failed to disclose some aspect of its relationship with the sales agent.[1571]

7.518. In its final determination, the USDOC continued to find that HHI was affiliated with this sales agent and that HHI had failed to report such affiliation, thereby preventing the USDOC from examining whether the selling expenses were reported accurately:

> Specifically, we find that the available record evidence, which is otherwise incomplete and unreliable for the reasons discussed above, demonstrates that [HHI] was affiliated with a certain sales agent in the United States based on the fact that this sales agent uses an email address and a title and a division that belongs to [HHI]. After examining parties' comments and the record evidence, we continue to find that [HHI] failed to provide complete and accurate information regarding its precise relationship with this sales agent as to whether this agent is affiliated. Therefore, [HHI] should have: (1) reported that its New Jersey sales agent office was involved in the sale of merchandise under review; and (2) included the associated selling expenses as part of its indirect selling expenses. By not disclosing the precise relationship between [HHI] and this sale agent, [HHI] failed to cooperate to the best of its ability to provide complete and accurate information regarding its affiliated parties.[1572]

Main arguments of the parties

7.519. Korea claims that the USDOC resorted to facts available inconsistently with Article 6.8 of the Anti-Dumping Agreement, as the information regarding the one sales agent at issue was not "necessary", and, in any event, HHI had submitted record evidence demonstrating that it "is not affiliated with any of its sales agents", thus no information was, in fact, "refuse[d] access to" or otherwise "not provide[d]", nor was the review process "significantly impede[d]".[1573] Korea claims that the USDOC also acted inconsistently with paragraphs 3 and 5 of Annex II by failing to take into account verifiable information that was submitted in an appropriate and timely manner, and which, even if not ideal, was submitted by HHI acting to the best of its ability.[1574] Furthermore, according to Korea, the USDOC failed to notify HHI of any specific deficiencies relating to the information concerning the sales agent and did not issue any follow-up requests, as required by the first sentence of paragraph 6 of Annex II.[1575]

7.520. The United States responds that the USDOC reasonably determined that HHI failed to provide complete information regarding its affiliated sales agent and properly rejected the new and unsolicited information that HHI attempted to submit in this regard.[1576] The United States

[1567] LPT POR4 decision memorandum (PDM), (Exhibit KOR-140), p. 18.
[1568] LPT POR4 USDOC Moses Y. Song memorandum, (Exhibit KOR-151).
[1569] LPT POR4 HHI post preliminary comments, (Exhibit KOR-141 (BCI)), p. 2.
[1570] LPT POR4 HHI post preliminary comments, (Exhibit KOR-141 (BCI)), p. 6.
[1571] LPT POR4 HHI case brief, (Exhibit KOR-149 (BCI)), pp. 43-46.
[1572] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), pp. 18-19. (fn omitted)
[1573] Korea's first written submission, paras. 814-816.
[1574] Korea's first written submission, paras. 815, 837, 842, and 845.
[1575] Korea's first written submission, para. 815.
[1576] United States' first written submission, paras. 321-322.

emphasizes that despite the multiple opportunities that the USDOC provided to HHI in order to report its affiliates, HHI still failed to report its relationship with the sales agent at issue.[1577]

Evaluation by the Panel

7.521. Korea claims that the USDOC acted inconsistently with Article 6.8 and paragraphs 3, 5, and 6 of Annex II of the Anti-Dumping Agreement in resorting to the use of facts available in respect of HHI's reporting of one US sales agent.

7.522. We note that, as part of its second supplemental response, HHI, based on supporting evidence, asserted that it "is not affiliated with any of its sales agents".[1578] In its preliminary determination, the USDOC found that HHI was affiliated with one of its sales agents on the basis that this agent used an email address and a title and division that, in its view, belonged to HHI.[1579] In its final determination, the USDOC continued to find that HHI was affiliated with the sales agent for the same reasons.[1580] The USDOC concluded that HHI "failed to provide *complete* and *accurate* information regarding its precise relationship with this sales agent as to whether this agent is affiliated".[1581]

7.523. As discussed above, HHI attempted to respond to the USDOC's preliminary finding by way of post-preliminary comments; however, the USDOC rejected its submission on the ground that it contained "new factual information".[1582] HHI resubmitted its post-preliminary comments, having redacted all the "new factual information".[1583] HHI also urged the USDOC to conduct verification so as to "readily examine registration documentation for the e-mail address, employment records, and other records relating to the sales agent – demonstrating that he is independent of [HHI]".[1584] Similarly, as part of its case brief, HHI reiterated its request "to submit new factual information to rebut, correct, or clarify the [USDOC]'s erroneous factual statement regarding the sales agent's use of [HHI]'s email address"[1585], and also urged the USDOC to "invite it to refile its post-preliminary comments, including the new factual information" for this purpose.[1586] The record thus indicates that, following the preliminary determination, HHI made several attempts to explain that the email address identified by the USDOC did not belong to HHI, and that the title used by the sales agent did not indicate that it was affiliated with HHI. HHI repeatedly requested permission to submit evidence in support of its assertions, which was never granted by the USDOC.

7.524. The first sentence of paragraph 6 of Annex II requires that, "[i]f evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefor, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation". As relevant context, we note that Article 6.2 of the Anti-Dumping Agreement provides that:

> 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.

7.525. While the USDOC found in its preliminary determination that HHI was affiliated with the sales agent on the basis that this agent used an email address and a title and division that belonged to HHI, HHI presented arguments questioning the factual basis of the USDOC's preliminary findings in

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[1577] United States' first written submission, para. 296.
[1578] LPT POR4 second supplemental questionnaire response, (Exhibit KOR-213 (BCI)), p. 81.
[1579] LPT POR4 preliminary analysis memorandum, (Exhibit USA-43 (BCI)), p. 5.
[1580] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), pp. 18-19.
[1581] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), p. 19. (emphasis added)
[1582] LPT POR4 USDOC Moses Y. Song memorandum, (Exhibit KOR-151).
[1583] LPT POR4 HHI post preliminary comments, (Exhibit KOR-141 (BCI)), p. 2. The context surrounding the redacted comments indicates to us that the "new factual information" rejected by the USDOC pertained to demonstrating that the email address used by the sales agent did not belong to HHI. (LPT POR4 HHI post preliminary comments, (Exhibit KOR-141 (BCI)), p. 6).
[1584] LPT POR4 HHI post preliminary comments, (Exhibit KOR-141 (BCI)), p. 6.
[1585] LPT POR4 HHI case brief, (Exhibit KOR-149 (BCI)), p. 44.
[1586] LPT POR4 HHI case brief, (Exhibit KOR-149 (BCI)), p. 48.

its case and rebuttal briefs.[1587] It is clear that – despite repeated requests by HHI – the USDOC never allowed HHI to place on the record information allegedly demonstrating that the email address and title used by the sales agent at issue did not, in fact, belong to HHI. In light of the explanation provided by the USDOC, the fact that the sales agent used a particular email address and title, and the USDOC's inference that these *belonged* to HHI, constituted an important basis for the USDOC's findings. In these circumstances, we consider that "an opportunity to provide further explanations" for purposes of paragraph 6 of Annex II required more than a mere cursory rejection of the information supplied by HHI and ought to have allowed HHI to present information that, in its view, demonstrated that the email address and the title used by the sales agent at issue did not belong to HHI.

7.526. Accordingly, in the circumstances of this case, we find that the USDOC acted inconsistently with paragraph 6 of Annex II to the Anti-Dumping Agreement in resorting to facts available because – having not accepted HHI's submission that it was not affiliated with any of its sales agents – the USDOC did not subsequently give an opportunity to HHI to provide "further explanations within a reasonable period". Given that paragraph 6 of Annex II serves as a precondition for an investigating authority's proper resort to facts available under Article 6.8 of the Anti-Dumping Agreement[1588], we find that the USDOC also acted inconsistently with that provision in resorting to facts available with respect to HHI's reporting of a US sales agent in POR4. In light of our findings of WTO-inconsistency, we do not consider it necessary to address Korea's claims under paragraphs 3 and 5 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us.[1589]

7.3.6.4.3 Hyosung

7.527. With respect to Hyosung, Korea challenges the USDOC's resort to facts available for three issues concerning the reporting of (a) service-related revenues, (b) an overlapping invoice between two PORs, and (c) certain discounts and price adjustments.[1590] For each issue, we begin by setting out the factual background, before summarizing the parties' main arguments, and examining Korea's claims under Article 6.8 and Annex II of the Anti-Dumping Agreement.

7.3.6.4.3.1 Service-related revenues

Factual background

7.528. In its initial Section C questionnaire, the USDOC asked Hyosung to "report revenue in separate fields (e.g., ocean freight revenue, inland freight revenue, oil revenue, installation, etc.) and identify the related expense(s) for each revenue".[1591] Hyosung in its response explained the instances for which it reported separately service-related revenues, based on whether Hyosung/HICO America was responsible for the provision and was assuming the risk of the calculation of the cost for this service, or such costs were itemized and separately negotiated.[1592]

7.529. In its supplemental Section A questionnaire, the USDOC requested Hyosung to provide the order of acknowledgement forms (OAFs) issued by HICO America for all the [[***]] sales that occurred during the POR.[1593] Hyosung had initially reported that such OAFs were supplied to Hyosung by HICO America upon the receipt of a purchase order or contract of a customer.[1594] Hyosung complied with the USDOC's supplemental query.[1595] The USDOC subsequently issued a Sections B-C supplemental questionnaire that included a number of questions related to service-related

[1587] LPT POR4 USDOC Moses Y. Song memorandum, (Exhibit KOR-151).
[1588] Panel Reports, *China – GOES*, para. 7.385; *US – Steel Plate*, paras. 7.55-7.56; and *Mexico – Steel Pipes and Tubes*, para. 7.190.
[1589] See, e.g. Panel Reports, *EC – Salmon (Norway)*, para. 7.387; and *Morocco – Hot-Rolled Steel (Turkey)*, paras. 7.105-7.106.
[1590] Korea's first written submission, paras. 819-832 and 846-850.
[1591] LPT POR4 initial questionnaire, (Exhibit USA-35), p. C-1.
[1592] LPT POR4 Hyosung Sections B-D questionnaire response, (Exhibit KOR-153 (BCI)), pp. C-23-C-24.
[1593] LPT POR4 Hyosung supplemental Section A questionnaire response, (Exhibit KOR-154 (BCI)), p. S-21 and exhibit S-18.
[1594] LPT POR4 Hyosung Section A questionnaire response, (Exhibit KOR-152 (BCI)), p. A-18.
[1595] LPT POR4 Hyosung supplemental Section A questionnaire response, (Exhibit KOR-154 (BCI)), p. S-21 and exhibit S-18.

revenues.[1596] Specifically, the USDOC asked Hyosung to "explain in detail whether the sales documentation generated for both sales in Korea and in the United States separately list, or otherwise itemize, the prices and/or revenues for the main transformer body, spare parts, accessories, and/or sales-related service revenues (e.g., freight, brokerage, installation, and supervision)".[1597] Hyosung responded that for US sales it had reported separate revenues in instances where the HICO invoice, upon request of the customer, identified such revenues in separate line items.[1598] For home market sales, Hyosung noted that the tax invoices did not itemize revenues or prices separately.[1599]

7.530. In addition, for each of the reported net price variables for both home-market and US sales, Hyosung was instructed to describe how it calculated the service-related revenues.[1600] In particular, for US sales, the USDOC asked Hyosung to ensure that, if the ocean freight revenue was separately identified on any *sales documents*, Hyosung should identify such documents and provide copies of those documents; and if the reported value was based upon an allocation, to explain that methodology.[1601] Hyosung responded that it had reported all ocean freight revenue based on the information contained in the *commercial invoice* issued to the customer, and that it had not reported separately such revenues when they were not specified in a separate line in the invoice.[1602] Hyosung also submitted complete sales and expenses documentation for certain US and home market sales[1603] as requested by the USDOC.[1604]

7.531. The petitioner in its pre-preliminary comments identified certain deficiencies in Hyosung's supplemental responses[1605], and Hyosung responded to these comments.[1606] In its preliminary determination, the USDOC noted that the majority of the OAFs submitted were illegible, and further found that service-related revenues exceeded the relevant expenses, thus distorting the net US price and the calculation of the antidumping margin:

> However, an examination of the few legible, partial OAFs submitted by Hyosung indicates that HICO America dedicates a portion of the sales price charged to its U.S. customers to cover service-related expenses. An analysis of the reported service-related expenses as compared to the allocations by Hyosung of revenues to cover these expenses demonstrates that the service-related revenues exceed the expenses, and that Hyosung did not reduce the price charged to the customer for the revenues in excess of the services provided. The allocation of revenues, as shown in the OAFs, are not reflected in the section C sales database/chart in Exhibit SBC-32(1). Therefore, service-related revenues exceed the underlying service-related expenses and Hyosung neither reduced the revenues collected from its U.S. customers for these expenses nor reported them separately so that the [USDOC] could cap the revenues, thus distorting the [USDOC]'s calculation of the antidumping duty margin by artificially increasing the net U.S. price, and thereby artificially decreasing the margin of dumping.[1607]

7.532. The USDOC noted that because most of the information in OAFs was illegible, it could not conclude that all the "necessary" requested information was on the record.[1608] The USDOC concluded that Hyosung failed to provide the service-related revenues information requested even though such information was available, as demonstrated by the few legible OAFs, and thus prevented the USDOC from applying its "capping methodology" and impeded the review proceeding.[1609]

[1596] LPT POR4 Hyosung third supplemental questionnaire, (Exhibit KOR-155).
[1597] LPT POR4 Hyosung third supplemental questionnaire, (Exhibit KOR-155), p. 5.
[1598] LPT POR4 Hyosung third supplemental questionnaire response, (Exhibit KOR-156 (BCI)), p. 9.
[1599] LPT POR4 Hyosung third supplemental questionnaire response, (Exhibit KOR-156 (BCI)), p. 9.
[1600] LPT POR4 Hyosung third supplemental questionnaire, (Exhibit KOR-155), pp. 6-8.
[1601] LPT POR4 Hyosung third supplemental questionnaire, (Exhibit KOR-155), p. 9.
[1602] LPT POR4 Hyosung third supplemental questionnaire response, (Exhibit KOR-156 (BCI)), p. 27.
[1603] LPT POR4 Hyosung third supplemental questionnaire, (Exhibit KOR-155), p. 13.
[1604] LPT POR4 Hyosung third supplemental questionnaire response, (Exhibit KOR-156 (BCI)), p. 41 and exhibit SBC-66.
[1605] LPT POR4 petitioner pre-preliminary comments, (Exhibit KOR-158 (BCI)).
[1606] LPT POR4 Hyosung response to comments by petitioner, (Exhibit KOR-159 (BCI)).
[1607] LPT POR4 decision memorandum (PDM), (Exhibit KOR-140), pp. 8-9. (fns omitted)
[1608] LPT POR4 decision memorandum (PDM), (Exhibit KOR-140), p. 9.
[1609] LPT POR4 decision memorandum (PDM), (Exhibit KOR-140), p. 9.

7.533. In its case brief, Hyosung argued that in its responses it had relied on the sales invoice for the revenue reporting, and that the USDOC at no point prior to the preliminary determination took issue with this manner of reporting.[1610] Nor did the USDOC indicate that the OAF may be an appropriate basis for Hyosung to report its service-related revenues.[1611] Hyosung stated that, in any event, any deficiencies could be resolved with a supplemental questionnaire or upon verification.[1612]

7.534. In its final determination, the USDOC maintained that Hyosung had failed to respond accurately and completely with respect to the service-related revenues.[1613] The USDOC disagreed with Hyosung that its questions were based on the premise that reporting revenues on the basis of invoices was the correct methodology:

> However, if that were true, [the USDOC] would have no need to ask the further questions that it asked of Hyosung with respect to this issue. [The USDOC]'s questionnaire does not direct a respondent to create separate fields for additional charges only if they appear on the invoice. Indeed, included in the question is a statement that "all price adjustments granted, including discounts and rebates, should be reported in these fields. The gross unit price less price adjustments should equal the net amount of revenue received from the sale." It is clear that [the USDOC] requests that a respondent report all price adjustments, whether or not they appear on an invoice to a customer.[1614]

The USDOC also explained why it considered that an OAF, despite being an internal document, contained sales information that would have allowed Hyosung to calculate service-related revenues.[1615]

Main arguments of the parties

7.535. Korea claims that the USDOC acted inconsistently with Article 6.8 of the Anti-Dumping Agreement in resorting to facts available as Hyosung did not "refuse[] access to", or otherwise fail to provide, "necessary" information; nor did it "significantly impede[]" the proceedings.[1616] Korea argues that there was no missing information that was "necessary" in the sense of being "requisite, essential, needful" for the USDOC's determination, as "[t]he USDOC did not issue any follow-up questionnaires or notify Hyosung of any deficiencies in its reporting of service-related revenue thereafter, nor [did it] make any explicit requests or express any concerns regarding the OAFs submitted by Hyosung".[1617] Korea claims that the USDOC also acted inconsistently with paragraphs 3 and 5 of Annex II by failing to take into account verifiable information that was submitted in an appropriate and timely manner, and which, even if not ideal, was submitted by Hyosung acting to the best of its ability.[1618] Korea asserts that there was no basis to conclude that Hyosung had failed to cooperate, given that it had reported the service-related revenues on the basis of the invoices, as indicated in the USDOC's questioning.[1619] Furthermore, Korea asserts that the USDOC was not justified in resorting to facts available as it failed to inform Hyosung of any deficiencies in its reporting and to request any further explanations regarding the information submitted by Hyosung, as required under the first sentence of paragraph 6 of Annex II.[1620]

7.536. The United States focuses on the USDOC's explanation as to why the OAFs for all US sales were necessary for the investigation.[1621] The United States recalls that the OAFs submitted were incomplete and only partially legible, and thus the record was lacking information "necessary" to

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[1610] LPT POR4 Hyosung case brief, (Exhibit KOR-157 (BCI)), pp. 15 and 18.
[1611] LPT POR4 Hyosung case brief, (Exhibit KOR-157 (BCI)), pp. 15 and 19.
[1612] LPT POR4 Hyosung case brief, (Exhibit KOR-157 (BCI)), p. 21.
[1613] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), p. 26.
[1614] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), p. 27 (referring to LPT POR4 initial questionnaire, (Exhibit USA-35), p. C-18). (fn omitted)
[1615] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), pp. 27-28.
[1616] Korea's first written submission, para. 820.
[1617] Korea's first written submission, para. 822.
[1618] Korea's first written submission, paras. 846-847.
[1619] Korea's first written submission, para. 823.
[1620] Korea's first written submission, para. 822.
[1621] United States' first written submission, paras. 301-302.

complete the service-related revenue calculations.[1622] The United States also argues that the USDOC had provided to Hyosung "three separate opportunities to specifically report the relevant revenue-related information and Hyosung failed to do so", and for this reason the USDOC found that Hyosung had significantly impeded the investigation.[1623] In response to Korea's argument that the USDOC did not specifically request the reporting of service-related revenues based on OAFs, the United States asserts that "[t]he issue is not whether a specific type of documentation was identified, but rather whether [the USDOC] requested Hyosung to report specific information", and since the requested information was contained in the OAFs, HHI should have reported the service-related revenues in light of these documents.[1624]

Evaluation by the Panel

7.537. Korea claims that the USDOC acted inconsistently with Article 6.8 and paragraphs 3, 5, and 6 of Annex II of the Anti-Dumping Agreement in resorting to the use of facts available in respect of Hyosung's reporting of service-related revenues.

7.538. In its final determination, having found that OAFs were relevant to the examination of services-related revenues and expenses, and having noted that Hyosung did not report service-related revenues which did not appear on the invoice, the USDOC resorted to facts available on the ground that the USDOC was "unsure as to whether the submitted OAFs are complete, and because the [OAFs] submitted [were] partially illegible".[1625] Korea argues that the USDOC did not make specific requests of Hyosung to report information concerning service-related revenues based on OAFs or to submit more legible copies of the OAFs.[1626] In response, the United States contends that the USDOC issued "multiple supplemental questionnaires" to Hyosung, providing multiple opportunities to Hyosung to cure the deficiencies.[1627]

7.539. Paragraph 6 of Annex II requires, in relevant part, that "[i]f evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefor, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation". As relevant context, we note that Article 6.2 of the Anti-Dumping Agreement provides that:

> 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.

7.540. We note that none of the "multiple supplemental questionnaires" that the United States points to specifically described the basis on which the USDOC rejected information concerning services-related revenues supplied by Hyosung, namely that Hyosung did not report pertinent information contained in the OAFs and that the OAFs supplied by Hyosung were illegible.[1628] Neither did these questionnaires ask Hyosung to address these particular deficiencies. Thus, we do not consider that the USDOC fulfilled its obligations under paragraph 6 of Annex II to the Anti-Dumping Agreement to inform Hyosung of the reasons for not accepting the information that had been submitted and to provide Hyosung an opportunity to furnish further explanations.

7.541. Furthermore, the record before us demonstrates that the USDOC first identified deficiencies regarding the reporting of service-related revenues in its preliminary determination. Although the USDOC noted in its final determination that it had issued "multiple supplemental questionnaires" to Hyosung, we note that these questionnaires were issued prior to the USDOC's preliminary determination wherein it first found Hyosung to have not properly reported service-related revenues. As we see it, an "opportunity to provide further explanations" within the meaning of paragraph 6

[1622] United States' first written submission, para. 329.
[1623] United States' first written submission, para. 331.
[1624] United States' responses to Panel question Nos. 100 and 101.
[1625] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), p. 29. (fn omitted)
[1626] Korea's first written submission, paras. 749, 822, and 847; opening statement at the first meeting of the Panel, paras. 123-124 and 127; and second written submission, paras. 273 and 341.
[1627] United States' first written submission, para. 330.
[1628] United States' first written submission, paras. 297-301.

can only be provided once "evidence or information is not accepted". In this case, the USDOC did not provide any such opportunity to Hyosung following its rejection of the information submitted by Hyosung in its preliminary determination.[1629]

7.542. Accordingly, in the circumstances of this case – and irrespective of whether the USDOC's analysis regarding the relevance of the OAFs for its determination of Hyosung's service-related revenues was appropriate – we find that the USDOC acted inconsistently with paragraph 6 of Annex II to the Anti-Dumping Agreement, because it did not inform Hyosung "forthwith" of the reasons for not accepting the information that had been submitted and did not give Hyosung an opportunity to provide "further explanations within a reasonable period of time". Given that paragraph 6 of Annex II serves as a precondition for an investigating authority's proper resort to facts available under Article 6.8 of the Anti-Dumping Agreement[1630], we find that the USDOC also acted inconsistently with that provision. In light of our findings of WTO-inconsistency, we do not consider it necessary to address Korea's claims under paragraphs 3 and 5 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us.[1631]

7.3.6.4.3.2 Invoice covering multiple US sales

Factual background

7.543. In its initial Sections B-D response, Hyosung reported the invoice number for each US sale as instructed by the USDOC.[1632] In its supplemental questionnaire, the USDOC requested a clarification concerning the quantity and value of LPTs for US sales.[1633] Hyosung reported that, when preparing its response to one of the USDOC's questions concerning the reconciliation of the products sold and entered into the United States during the POR, it discovered that the total US sales value erroneously included values of certain LPTs that had entered into the United States outside the POR and reflected non-final invoice amounts in some instances.[1634] Hyosung therefore submitted a revised quantity and value chart reflecting these revisions.[1635]

7.544. In its preliminary determination, the USDOC identified a deficiency in Hyosung's reporting of the invoices for US sales. The USDOC observed that Hyosung had reported the same invoice number for multiple sales, and also that one of the multiple sales covered by this invoice concerned the previous review period.[1636] The USDOC concluded that "Hyosung's failure to explain how one invoice could involve multiple sales over multiple periods of review raises concerns as to the accuracy and reliability of the quantity and value of sales reported to the [USDOC]".[1637]

7.545. Hyosung commented on this finding in its case brief, asserting that "[t]he record fully explains the basis of Hyosung's reporting with respect to these sales, and should the [USDOC] require any further factual support, the [USDOC] should request that information prior to using this

[1629] We also note that in its post-preliminary determination case brief, Hyosung stated that it was able and willing to provide information that would address the concerns expressed by the USDOC in the preliminary determination regarding the information on services-related revenues that Hyosung had submitted in response to the USDOC's questionnaires. Hyosung noted that such concerns could be cured if the USDOC would offer Hyosung an opportunity to provide further explanations through a supplemental questionnaire. Hyosung argued to the extent that there were issues with the OAFs, that was "the result of a technical production error, which the [USDOC] was required by law to allow Hyosung the opportunity to remedy", adding that such an opportunity "would not delay the [USDOC]'s analysis or be a departure from standard investigative procedures". As noted above, however, the USDOC did not provide such an opportunity to Hyosung. (LPT POR4 Hyosung case brief, (Exhibit KOR-157 (BCI)), pp. 18-19 and 21-22).

[1630] Panel Reports, *China – GOES*, para. 7.385; *US – Steel Plate*, paras. 7.55-7.56; and *Mexico – Steel Pipes and Tubes*, para. 7.190.

[1631] See, e.g. Panel Reports, *EC – Salmon (Norway)*, para. 7.387; and *Morocco – Hot-Rolled Steel (Turkey)*, paras. 7.105-7.106.

[1632] LPT POR4 Hyosung Sections B-D questionnaire response, (Exhibit KOR-153 (BCI)), p. C-16.

[1633] LPT POR4 Hyosung supplemental Section A questionnaire response, (Exhibit KOR-154 (BCI)), p. S-1.

[1634] LPT POR4 Hyosung supplemental Section A questionnaire response, (Exhibit KOR-154 (BCI)), pp. S-1-S-2.

[1635] LPT POR4 Hyosung supplemental Section A questionnaire response, (Exhibit KOR-154 (BCI)), pp. S-1-S-2, and exhibit S-2.

[1636] LPT POR4 decision memorandum (PDM), (Exhibit KOR-140), p. 10.

[1637] LPT POR4 decision memorandum (PDM), (Exhibit KOR-140), p. 10.

invoice as a basis for total AFA".[1638] According to Hyosung, the USDOC's standard questionnaire instructed Hyosung to report "each U.S. sale of merchandise entered for consumption during the POR", and, in that instance, the unit on the invoice had entered the United States in a different POR.[1639] According to Hyosung, it is not uncommon for shipment dates to differ for units covered by the same invoice, and "[t]he mere fact that the shipment of the units listed on the invoice for SEQUs [[***]] also contained a unit shipped during the prior POR is of no significance, and certainly not grounds for the [USDOC] to default to total AFA".[1640]

7.546. In its final determination, the USDOC found that, given Hyosung's description of its sales process, it remained unclear how multiple sales could be covered by the same invoice:

> Our examination of the invoice and record evidence leaves us unclear as to the number of sales covered, as well as why this invoice would be used to cover multiple sales. In its section A response to [the USDOC]'s antidumping duty questionnaire, Hyosung states that "HICO America issues the invoice to the unaffiliated customer when the merchandise is delivered and/or site test is completed."[1641]

The USDOC concluded that "the record [was] incomplete and the lack of explanation regarding this invoice render[ed] Hyosung's reporting unreliable".[1642]

Main arguments of the parties

7.547. Korea claims that the USDOC acted inconsistently with Article 6.8 of the Anti-Dumping Agreement in resorting to facts available as Hyosung did not "refuse[] access to", or otherwise fail to provide, "necessary" information; nor did it "significantly impede[]" the proceedings.[1643] Korea argues that Hyosung submitted the correct information in a timely manner and its reporting was fully in line with the USDOC's instructions.[1644] Korea also claims that, by failing to use the verifiable information that was appropriately and timely submitted by Hyosung, the USDOC acted inconsistently with paragraphs 3 and 5 of Annex II.[1645] Further, Korea claims that the USDOC acted inconsistently with paragraph 6 of Annex II to the Anti-Dumping Agreement by failing to issue any follow-up questions or notifying Hyosung of any deficiencies regarding the invoice at issue.[1646]

7.548. According to the United States, "Hyosung did not explain why one invoice could cover multiple sales in the current review period, as well as a sale in the previous review period".[1647] This explanation was necessary to support the accuracy of the data reported, which was necessary to the USDOC's calculation of the dumping margin.[1648]

Evaluation by the Panel

7.549. Korea claims that the USDOC acted inconsistently with Article 6.8 and paragraphs 3, 5, and 6 of Annex II of the Anti-Dumping Agreement in resorting to the use of facts available in respect of Hyosung's reporting of an invoice covering multiple sales.

7.550. In its preliminary determination, the USDOC noted for the first time that Hyosung had reported the same invoice submitted in this POR also for a sale to the United States made during the previous POR, and concluded that "Hyosung's failure to explain how one invoice could involve multiple sales over multiple periods of review raises concerns as to the accuracy and reliability of

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[1638] LPT POR4 Hyosung case brief, (Exhibit KOR-157 (BCI)), p. 23.
[1639] LPT POR4 Hyosung case brief, (Exhibit KOR-157 (BCI)), p. 23.
[1640] LPT POR4 Hyosung case brief, (Exhibit KOR-157 (BCI)), p. 24.
[1641] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), p. 30 (referring to LPT POR4 Hyosung Section A questionnaire response, (Exhibit KOR-152 (BCI)), p. A-38).
[1642] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), p. 31.
[1643] Korea's first written submission, para. 825.
[1644] Korea's first written submission, para. 826.
[1645] Korea's first written submission, para. 848.
[1646] Korea's first written submission, para. 827; opening statement at the first meeting of the Panel, para. 131.
[1647] United States' first written submission, para. 304.
[1648] United States' first written submission, para. 333.

the quantity and value of sales reported to the [USDOC]".[1649] On this basis, the USDOC preliminarily determined that Hyosung impeded the investigation. The USDOC did not issue any supplemental questionnaire seeking further explanations on this issue. In its case brief, Hyosung explained that, following the USDOC's instructions to report "each U.S. sale of merchandise entered for consumption during the POR", "while a single invoice may relate to multiple entries, the relevant question for identifying the reportable transactions for each administrative review is the timing of the entry into the United States".[1650] In its final determination, the USDOC stated that it remained unclear as to "why this invoice would be used to cover multiple sales" given Hyosung's statement in its questionnaire response that "HICO America issues the invoice to the unaffiliated customer when the merchandise is delivered and/or site test is completed".[1651] The USDOC determined that the application of facts available was therefore warranted, as the record was incomplete, and because the lack of explanation regarding the invoices rendered Hyosung's reporting unreliable.[1652]

7.551. Paragraph 6 of Annex II requires, in relevant part, that "[i]f evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefor, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation". As relevant context, we note that Article 6.2 of the Anti-Dumping Agreement provides that:

> 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.

7.552. In the case at hand, the USDOC resorted to facts available based on an alleged "discrepancy" in an invoice that covered multiple US sales.[1653] The specific discrepancy that the USDOC referred to in the final determination was that the record evidence was "unclear" as to the number of sales covered in the invoice, as well as to how one invoice could cover multiple sales given that Hyosung explained that it "issues the invoice to the unaffiliated customer when the merchandise is delivered and/or site test is completed".[1654] Korea argues that the USDOC did not notify Hyosung of this alleged deficiency in the invoice at issue.[1655] The United States is unable to point to anything on the record indicating that the USDOC informed Hyosung about this deficiency for the invoice at issue, or offered Hyosung an opportunity to provide further explanations in this regard. We also note that the alleged tension between Hyosung's statement that an invoice could cover multiple sales and its explanation that an invoice for US sales is issued upon completion of the delivery or site test was not set out as the basis for the USDOC's rejection of the invoice in question in the preliminary determination. This implies that Hyosung could not have provided further explanations in this regard in its post-preliminary submissions.

7.553. Accordingly, in the circumstances of this case, we find that the USDOC acted inconsistently with paragraph 6 of Annex II to the Anti-Dumping Agreement, because it did not inform Hyosung "forthwith" about the alleged deficiency in the invoice at issue that was "not accepted" and because it did not give Hyosung an opportunity to provide "further explanations within a reasonable period". Given that paragraph 6 of Annex II serves as a precondition for an investigating authority's proper resort to facts available under Article 6.8 of the Anti-Dumping Agreement[1656], we find that the USDOC also acted inconsistently with that provision. In light of our findings of WTO-inconsistency,

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[1649] LPT POR4 decision memorandum (PDM), (Exhibit KOR-140), p. 10.
[1650] LPT POR4 Hyosung case brief, (Exhibit KOR-157 (BCI)), p. 23.
[1651] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), p. 30 (referring to LPT POR4 Hyosung Section A questionnaire response, (Exhibit KOR-152 (BCI)), p. A-38).
[1652] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), p. 31.
[1653] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), pp. 30-31.
[1654] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), p. 30. We note that in response to the USDOC's finding in the preliminary determination that Hyosung did not explain why one invoice could cover sales in two review periods, Hyosung explained in its post-preliminary determination case brief that "while a single invoice may relate to multiple entries, the relevant question for identifying the reportable transactions for each administrative review is the timing of the entry into the United States". (LPT POR4 Hyosung case brief, (Exhibit KOR-157 (BCI)), p. 23).
[1655] Korea's first written submission, para. 754.
[1656] Panel Reports, *China – GOES*, para. 7.385; *US – Steel Plate*, paras. 7.55-7.56; and *Mexico – Steel Pipes and Tubes*, para. 7.190.

we do not consider it necessary to address Korea's claims under paragraphs 3 and 5 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us.[1657]

7.3.6.4.3.3 Discounts and price adjustments

Factual background

7.554. In its initial questionnaire, the USDOC asked Hyosung to report all price adjustments, including discounts and rebates, when reporting the information concerning the quantity and price for each transaction (i.e. in fields 16 through 21).[1658] Hyosung responded to these requests.[1659] In its supplemental questionnaire, the USDOC referred to a US sale for which it had previously requested sample documentation, and asked Hyosung to submit "any documents referenced in, or attached to, the sales documents provided in the sample sale which were not otherwise included".[1660] Hyosung submitted the requested sales documentation for these sales.[1661]

7.555. In its pre-preliminary comments, the petitioner asserted that certain information from the supplemental response contradicted Hyosung's assertion in its "Section C Response that it did not provide 'any early payment discounts,' 'any quantity discounts' or 'any other discounts on U.S. sales of LPTs during the POR'".[1662] Specifically, the petitioner referred to certain SEQUs, for which the commercial invoices reflected a type of discount that was not reported or explained by Hyosung. In response, Hyosung explained that for SEQU [[***]] "[t]he term [[***]]" and it did "not have [[***]]".[1663] Similarly, for SEQUs [[***]], Hyosung explained that the line item of the commercial invoice related to "[[***]]" and "this [[***]]".[1664]

7.556. In its preliminary determination, the USDOC stated that it was unconvinced by Hyosung's assertion that the discounts did not fit the USDOC's definition, as they were the result of negotiations with the customer at the time of the purchase order.[1665] The USDOC noted that the price negotiations at the time of the purchase order are not controlling if the material terms of sale change after that date and necessitate the use of the shipment date as the date of sale.[1666] In its case brief, Hyosung reiterated its arguments from its response to the petitioner's comments and added that, for the SEQUs concerned, the record confirmed that Hyosung reported the full invoice amount in the gross unit price field taking into account the "discount" and Hyosung's reporting therefore had "absolutely no impact" and was "immaterial" to the USDOC's analysis.[1667] Hyosung argued that "[w]hether there was a separate line item on one of the invoices, the fact remains that Hyosung's reporting captured the full amount charged to, and due from, the customer".[1668]

7.557. In its final determination, the USDOC stated that it "does not request that respondents report net prices as the initial basis for our dumping calculations", and that "the instructions in the antidumping duty questionnaire specifically state that a respondent should report discounts and rebates".[1669] The USDOC also explained that "[r]eporting all such adjustments to the gross unit price allows [the USDOC] to examine the veracity of each claimed adjustment, and the validity of the reported price, as well as examine the level of trade between the respondent and its customers".[1670]

[1657] See, e.g. Panel Reports, *EC – Salmon (Norway)*, para. 7.387; and *Morocco – Hot-Rolled Steel (Turkey)*, paras. 7.105-7.106.
[1658] LPT POR4 Hyosung Sections B-D questionnaire response, (Exhibit KOR-153 (BCI)), p. C-19.
[1659] LPT POR4 Hyosung Sections B-D questionnaire response, (Exhibit KOR-153 (BCI)), pp. C-19-C-26.
[1660] LPT POR4 Hyosung supplemental Section A questionnaire response, (Exhibit KOR-154 (BCI)), p. S-34.
[1661] LPT POR4 Hyosung supplemental Section A questionnaire response, (Exhibit KOR-154 (BCI)), p. S-34 and exhibit S-32.
[1662] LPT POR4 petitioner pre-preliminary comments, (Exhibit KOR-158 (BCI)), pp. 28-29.
[1663] LPT POR4 Hyosung response to comments by petitioner, (Exhibit KOR-159 (BCI)), p. 24.
[1664] LPT POR4 Hyosung response to comments by petitioner, (Exhibit KOR-159 (BCI)), p. 24.
[1665] LPT POR4 decision memorandum (PDM), (Exhibit KOR-140), p. 11.
[1666] LPT POR4 decision memorandum (PDM), (Exhibit KOR-140), p. 11.
[1667] LPT POR4 Hyosung case brief, (Exhibit KOR-157 (BCI)), pp. 25-26.
[1668] LPT POR4 Hyosung case brief, (Exhibit KOR-157 (BCI)), p. 25.
[1669] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), pp. 31-32.
[1670] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), p. 32.

The USDOC found that the failure to report such adjustments calls into question the accuracy of the reported prices and of the sales process.[1671]

Main arguments of the parties

7.558. Korea claims that the USDOC acted inconsistently with Article 6.8 of the Anti-Dumping Agreement in resorting to facts available as Hyosung did not "refuse[] access to", or otherwise fail to provide, "necessary" information; nor did it "significantly impede[]" the proceedings.[1672] Korea contends that Hyosung properly reported all applicable discounts and price adjustments in the initial and supplemental questionnaire responses.[1673] Korea focuses on the fact that the total amount shown on the invoice, net of all discounts, was consistent with Hyosung's reported gross unit prices.[1674] Korea also claims that by failing to take into account verifiable information, the USDOC acted inconsistently with Article 6.8 and paragraphs 3 and 5 of Annex II of the Anti-Dumping Agreement.[1675] Finally, Korea claims that by failing to issue any follow-up inquiries or supplemental questionnaires regarding alleged deficiencies in the information supplied by Hyosung, the USDOC acted inconsistently with paragraph 6 of Annex II to the Anti-Dumping Agreement.[1676]

7.559. The United States responds that Hyosung did not report adjustments in accordance with the USDOC's instructions for certain sales during the POR.[1677] According to the United States, the USDOC provided opportunities to Hyosung to report the price adjustments in its initial and supplemental questionnaires.[1678] The United States also submits that "Hyosung failed to put forth its maximum efforts to comply with requests for information, thereby failing to cooperate … to the best of its ability".[1679]

Evaluation by the Panel

7.560. Korea claims that the USDOC acted inconsistently with Article 6.8 and paragraphs 3, 5, and 6 of Annex II of the Anti-Dumping Agreement in resorting to the use of facts available in respect of Hyosung's reporting of certain discounts and price adjustments.

7.561. We recall that, in its preliminary determination, the USDOC found that Hyosung failed to properly submit information regarding price adjustments and discounts for US sales on the ground that Hyosung did not report certain price adjustments that were made in price negotiations with customers at the time of the purchase order.[1680] While Hyosung argued that such adjustments did not fit the description of "price adjustments" as defined by the USDOC, the USDOC was "not persuaded that Hyosung was excused from reporting and explaining these adjustments".[1681] In the final determination, the USDOC also found that Hyosung had failed to report adjustments for interest revenue that it received from certain customers.[1682]

7.562. Paragraph 6 of Annex II requires, in relevant part, that "[i]f evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefor, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation". As relevant context, we note that Article 6.2 of the Anti-Dumping Agreement provides that:

> 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

[1671] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), p. 32.
[1672] Korea's first written submission, para. 829.
[1673] Korea's first written submission, para. 830.
[1674] Korea's first written submission, para. 830.
[1675] Korea's first written submission, para. 850.
[1676] Korea's first written submission, para. 849.
[1677] United States' first written submission, paras. 306-307.
[1678] United States' first written submission, para. 336.
[1679] United States' first written submission, para. 345.
[1680] LPT POR4 decision memorandum (PDM), (Exhibit KOR-140), p. 11.
[1681] LPT POR4 decision memorandum (PDM), (Exhibit KOR-140), p. 11.
[1682] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), p. 32.

adverse interests, so that opposing views may be presented and rebuttal arguments offered.

7.563. Korea asserts that, in Hyosung's case brief responding to the USDOC's preliminary finding that Hyosung failed to properly submit information regarding price adjustments made pursuant to negotiations with customers, Hyosung informed the USDOC that it had reported the full amount invoiced to the customer, accounting for all discounts.[1683] Korea also states that, in respect of the USDOC's concerns regarding reporting of the interest amounts, Hyosung explained to the USDOC that Hyosung had reported the actual amount that the customer was required to pay.[1684] Korea claims that the USDOC improperly resorted to facts available in the final determination without sending Hyosung any follow-up enquiries after receiving the abovementioned clarifications by Hyosung.[1685] The United States responds by arguing that the USDOC had provided Hyosung the opportunity to report all price adjustments through its initial and supplementary questionnaires.[1686] We note that in its preliminary determination, where it first addressed this issue, the USDOC stated that it was not convinced by Hyosung's argument that the discounts at issue did not fit the definition of discounts in the USDOC's questionnaires. However, the USDOC did not request further explanations from Hyosung, nor did it request revised information after its rejection of Hyosung's understanding of "discounts".

7.564. As to the United States' argument that the USDOC provided Hyosung the opportunity to report all price adjustments through its initial and supplementary questionnaires[1687], we note that these questionnaires invited Hyosung to submit certain information relating to price adjustment and sales documentation, but they did not address the specific clarifications offered by Hyosung as to why its reporting of price adjustments and interest amounts was adequate. Thus, we do not consider that the USDOC informed Hyosung forthwith of any alleged deficiencies in the clarifications that it provided in its case brief; nor did it give Hyosung an opportunity to provide any further explanation regarding such alleged deficiencies. We consider it relevant that in its post-preliminary determination case brief, Hyosung expressly indicated its openness to further questions from the USDOC regarding the basis on which Hyosung had reported prices adjustments negotiated with customers at the time of the purchase orders, as well as Hyosung's reporting of interest revenues.[1688] Insofar as the USDOC had doubts about the accuracy of the "sales process" due to Hyosung's reporting, the USDOC never raised this issue through a supplemental questionnaire or other such means, and did not seek any further explanations from Hyosung on this matter.

7.565. Accordingly, in the circumstances of this case, we find that the USDOC acted inconsistently with paragraph 6 of Annex II to the Anti-Dumping Agreement in resorting to facts available, because the USDOC failed to inform Hyosung of any alleged deficiencies in the clarifications that were provided in Hyosung's case brief, and because it did not give Hyosung an opportunity to provide "further explanations within a reasonable period". Given that paragraph 6 of Annex II serves as a precondition for an investigating authority's proper resort to facts available under Article 6.8 of the Anti-Dumping Agreement[1689], we find that the USDOC also acted inconsistently with that provision in resorting to facts available with respect to Hyosung's reporting of discounts and price adjustments. In light of our findings of WTO-inconsistency, we do not consider it necessary to address Korea's claims under paragraphs 3 and 5 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us.[1690]

[1683] Korea's first written submission, para. 850; opening statement at the first meeting of the Panel, para. 135 (referring to LPT POR4 Hyosung case brief, (Exhibit KOR-157 (BCI)), pp. 25-26).

[1684] Korea's first written submission, para. 850; opening statement at the first meeting of the Panel, para. 135 (referring to LPT POR4 Hyosung case brief, (Exhibit KOR-157 (BCI)), p. 26).

[1685] Korea's opening statement at the first meeting of the Panel, para. 136; second written submission, paras. 273-274.

[1686] United States' first written submission, paras. 335-336 (referring to Hyosung initial anti-dumping questionnaire, (Exhibit USA-46 (BCI)), p. C-18; and LPT POR4 Hyosung third supplemental questionnaire, (Exhibit KOR-155), pp. 13-14, question 66).

[1687] United States' first written submission, paras. 335-336 (referring to LPT POR4 Hyosung third supplemental questionnaire, (Exhibit KOR-155), pp. 13-14 question 66; and Hyosung initial anti-dumping questionnaire, (Exhibit USA-46 (BCI)), p. C-18).

[1688] LPT POR4 Hyosung case brief, (Exhibit KOR-157 (BCI)), pp. 25-26.

[1689] Panel Reports, *China – GOES*, para. 7.385; *US – Steel Plate*, paras. 7.55-7.56; and *Mexico – Steel Pipes and Tubes*, para. 7.190.

[1690] See, e.g. Panel Reports, *EC – Salmon (Norway)*, para. 7.387; and *Morocco – Hot-Rolled Steel (Turkey)*, paras. 7.105-7.106.

7.3.6.4.4 The USDOC's selection of the replacement facts for HHI and Hyosung

7.3.6.4.4.1 Factual background

7.566. In the POR4 final results, the USDOC applied to both HHI and Hyosung the rate of 60.81%, which was the rate used for HHI in the POR3 final results.[1691] The USDOC explained that because the rate was corroborated in the previous review, it did not require corroboration in the current review.[1692] Consistent with its findings in the previous review, the USDOC found that the rate was sufficiently adverse, without being punitive or aberrational, to ensure that the uncooperative parties do not obtain a more favourable result by failing to cooperate than if they had fully cooperated.[1693]

7.3.6.4.4.2 Main arguments of the parties

7.567. Korea claims that the USDOC acted inconsistently with Article 6.8 and paragraph 7 of Annex II of the Anti-Dumping Agreement.[1694] Korea argues that the USDOC, in selecting facts available in POR4, "simply built further on the error of POR3". According to Korea, the USDOC "did nothing" to corroborate the use of the highest dumping margin in the petition.[1695] In addition, Korea contends that there was no individual corroboration with respect to Hyosung, as it was not subject to the application of AFA in POR3.[1696] Finally, Korea argues that the USDOC did not select the best information available to render an accurate determination, but rather selected "particularly adverse information available effectively to punish HHI and Hyosung."[1697]

7.568. The United States responds that Korea has not demonstrated that the USDOC did not use the "best available information" to replace the missing information.[1698] According to the United States, the USDOC's selection of the replacement facts was not punitive because the USDOC used a relevant and reliable rate to replace HHI's and Hyosung's unreliable information.[1699] The United States contends that because the dumping margin had been properly corroborated in the third administrative review, there is no obligation under Annex II to corroborate an already-used rate for a second time.[1700] According to the United States, the USDOC explained that it considered the record evidence of the review when determining the "probative value" of the selected rate.[1701]

7.3.6.4.4.3 Evaluation by the Panel

7.569. We have already found that the USDOC erred in resorting to facts available with respect to both HHI and Hyosung for all of the issues discussed above. In these circumstances, we do not consider that making further findings on Korea's claims concerning the USDOC's selection of the replacement facts on the basis of the record used for the USDOC's WTO-inconsistent findings would assist in providing a positive solution to the dispute before us.[1702]

7.3.6.4.5 The USDOC's selection of an "all others" rate

7.3.6.4.5.1 Factual background

7.570. POR4 covered five "producers/exporters of the subject merchandise", namely, Hyosung, HHI, Iljin, Iljin Electric Co., Ltd. (Iljin Electric), and LSIS Co., Ltd. (LSIS).[1703] The USDOC selected Hyosung and HHI as "mandatory respondents" whereas "Iljin, Iljin Electric, and LSIS" were not

[1691] LPT POR4 decision memorandum (PDM), (Exhibit KOR-140), p. 6; LPT POR4 issues and decision memorandum, (Exhibit KOR-211), pp. 3 and 21.
[1692] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), p. 21.
[1693] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), p. 22.
[1694] Korea's first written submission, para. 864.
[1695] Korea's first written submission, para. 862.
[1696] Korea's first written submission, para. 862.
[1697] Korea's first written submission, para. 863.
[1698] United States' first written submission, para. 348.
[1699] United States' first written submission, para. 348.
[1700] United States' first written submission, para. 350.
[1701] United States' first written submission, para. 351 (referring to LPT POR4 decision memorandum (PDM), (Exhibit KOR-140), p. 6).
[1702] See, e.g. Panel Reports, *Egypt – Steel Rebar*, para. 7.310; and *Mexico – Anti-Dumping Measures on Rice*, para. 7.200. See also Panel Report, *China – Broiler Products*, para. 7.555.
[1703] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), p. 2.

selected for "individual examination".[1704] In its preliminary determination, the USDOC "determined that a reasonable method for determining the rate for the non-selected companies is to use the rate applied to the mandatory respondents (i.e., Hyosung and [HHI]) in this administrative review".[1705] The USDOC thus assigned to Iljin, Iljin Electric, and LSIS the dumping margin of 60.81%, i.e. "the only rate determined in this review for individual respondents".[1706] In its final determination, the USDOC rejected comments by Iljin, objecting to the assigned margin, and agreed with the petitioner that the USDOC "may use the average of two AFA margins in assigning the rate to non-selected respondents" and that the USDOC is allowed "to use AFA rates in calculating a margin for a non-selected company".[1707]

7.3.6.4.5.2 Main arguments of the parties

7.571. Korea argues that, by determining the "all others" rate for three non-selected respondents (Iljin, Iljin Electric, and LSIS) based on the "AFA rates" selected for HHI and Hyosung, the USDOC acted inconsistently with Article 9.4 of the Anti-Dumping Agreement.[1708] For Korea, the fact that the Anti-Dumping Agreement is silent when all margins are either *de minimis* or based on facts available[1709] does not mean that the "prohibition" under Article 9.4 no longer applies.[1710] According to Korea, any methodology that is used for determining the all others rate must still respect the rule under Article 9.4 and not be based on margins established using facts available.[1711] Korea points out that the USDOC failed to ensure that the non-selected producers were not prejudiced by the alleged failure of the mandatory respondents to provide certain "necessary" information, thus violating Article 9.4.[1712] Korea contends that the fact that the margin was lower than the aberrational margin that the USDOC had identified for one of the selected exporters does not affect its conclusion, and that alternative methodologies were available to the USDOC, such as, for example, relying on the margins assigned to these producers in prior reviews.[1713] Korea argues that the application of the rate established for HHI and Hyosung using facts available to the non-investigated producers prejudiced the due process rights of the non-investigated producers.[1714]

7.572. The United States argues that Korea fails to establish a *prima facie* case, as it "has not even alleged what the cap was in that review, which is a pre-requisite to establishing that the all others rate exceeded the cap" for purposes of Article 9.4.[1715] According to the United States, "there would be no rates left once rates based on facts available are disregarded".[1716] The United States also urges the Panel to not rule upon this issue because, to the extent that this gap exists in Article 9.4, only WTO Members are permitted to address it pursuant to Article 3.2 of the DSU and they have not done so.[1717]

7.3.6.4.5.3 Evaluation by the Panel

7.573. Korea claims that the USDOC acted inconsistently with Article 9.4 of the Anti-Dumping Agreement by assigning the margin established for HHI and Hyosung pursuant to Article 6.8 as the "all others" rate for the non-selected Korean exporters.[1718] The United States argues that in the circumstances of this case, Article 9.4 of the Anti-Dumping Agreement is "inoperative", and therefore Korea's claim fails.[1719]

[1704] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), p. 2.
[1705] LPT POR4 decision memorandum (PDM), (Exhibit KOR-140), p. 19.
[1706] LPT POR4 decision memorandum (PDM), (Exhibit KOR-140), p. 19.
[1707] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), p. 35.
[1708] Korea's first written submission, para. 872.
[1709] Korea's first written submission, para. 869.
[1710] Korea's first written submission, para. 869 (referring to Appellate Body Report, *US – Zeroing (Article 21.5 – EC)*, para. 453).
[1711] Korea's second written submission, para. 357.
[1712] Korea's first written submission, para. 870.
[1713] Korea's second written submission, paras. 357-358.
[1714] Korea's first written submission, para. 870; second written submission, para. 354.
[1715] United States' second written submission, para. 98.
[1716] United States' second written submission, para. 99.
[1717] United States' second written submission, para. 100.
[1718] Korea's first written submission, para. 872.
[1719] United States' second written submission, para. 100.

7.574. Before evaluating the merits of Korea's claim, we discuss the legal standard set out in Article 9.4 of the Anti-Dumping Agreement, which reads, in relevant part, as follows:

> When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:
>
> (i) the weighted average margin of dumping established with respect to the selected exporters or producers or,
>
> …
>
> provided that the authorities shall disregard for the purpose of this paragraph any zero and de minimis margins and margins established under the circumstances referred to in paragraph 8 of Article 6.

7.575. We note that Article 9.4 applies only in cases where investigating authorities have used "sampling", that is, where investigating authorities have, in accordance with Article 6.10 of the Anti-Dumping Agreement, limited their investigation to a select group of exporters or producers.[1720] In such cases, the anti-dumping duty rate applied by an investigating authority to those exporters and producers who were not included in the investigated sample is referred to as the "all others" rate.[1721] We also note that Article 9.4 does not prescribe a particular method that WTO Members must use to determine the "all others" rate; rather, it simply identifies a maximum limit, or ceiling, which investigating authorities "shall not exceed" in establishing an "all others" rate.[1722]

7.576. Subparagraph (i) of Article 9.4 sets out the general rule that the relevant ceiling is to be established by calculating a "weighted average margin of dumping established" with respect to those exporters or producers who were "selected" or investigated.[1723] However, this general rule is qualified by the proviso that, "for the purpose of this paragraph", investigating authorities "shall disregard", first, zero and *de minimis* margins and, second, "margins established under the circumstances referred to in paragraph 8 of Article 6".[1724] Thus, the provision constrains the discretion of investigating authorities in two ways: first, by imposing a ceiling that the "all others" rate "shall not exceed"; and, second, by requiring investigating authorities to disregard, for the purposes of that paragraph, any zero, *de minimis*, and "facts available" margins.[1725] By requiring investigating authorities to disregard "facts available" margins, Article 9.4 "seeks to prevent the exporters, who were not asked to cooperate in the investigation, from being prejudiced by gaps or shortcomings in the information supplied by the investigated exporters".[1726]

7.577. We recall that the USDOC assigned to Iljin, Iljin Electric, and LSIS the dumping margin of 60.81%[1727], which was based on "the average of two AFA margins" for Hyosung and HHI.[1728] The United States does not deny that the all others rate was based on the rate calculated by the USDOC in respect of HHI and Hyosung. Rather, the United States argues that in a situation where all margins are excluded, as was the case in LPT POR4 proceedings, no ceiling for the "all others" rate can be calculated pursuant to Article 9.4 and hence the provision becomes "inoperative".[1729]

7.578. We note that although Article 9.4 prohibits the use of certain margins in the calculation of the ceiling for the "all others" rate, "it does not expressly address the issue of *how* that ceiling should be calculated in the event that all margins are to be excluded from the calculation, under the prohibitions".[1730] However, nothing in the text of Article 9.4 indicates that the provision ceases to be applicable in a situation where all rates established by the investigating authority are either zero, *de minimis*, or based on facts available. In the absence of such a limitation in the text of Article 9.4,

[1720] Appellate Body Report, *US – Hot-Rolled Steel*, para. 115.
[1721] Appellate Body Report, *US – Hot-Rolled Steel*, para. 115.
[1722] Appellate Body Report, *US – Hot-Rolled Steel*, para. 115.
[1723] Appellate Body Report, *US – Hot-Rolled Steel*, para. 116.
[1724] Appellate Body Report, *US – Hot-Rolled Steel*, para. 116.
[1725] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 451.
[1726] Appellate Body Report, *US – Hot-Rolled Steel*, para. 123.
[1727] LPT POR4 decision memorandum (PDM), (Exhibit KOR-140), p. 19.
[1728] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), pp. 35 and 3.
[1729] United States' opening statement at the first meeting of the Panel, paras. 56-57.
[1730] Appellate Body Report, *US – Hot-Rolled Steel*, para. 126. (emphasis original)

Article 3.2 of the DSU prevents us from "add[ing] to or diminish[ing] the rights and obligations provided in the covered agreements". We therefore disagree with the United States that Article 9.4 of the Anti-Dumping Agreement is "inoperative" in light of the facts and circumstances of the present case.[1731]

7.579. We also note the United States' argument that Korea's claim fails because "Korea has not even alleged what the cap was" in the determination at issue.[1732] Nothing in the record suggests that the USDOC calculated a ceiling for the "all others" rate separately from the "all others" rate of 60.81 percent assigned to Iljin, Iljin Electric, and LSIS. Rather, we consider that the determination of the ceiling for the "all others" rate was implicit in the USDOC's determination of the "all others" rate to be applied.[1733] The issue before us is not whether the USDOC improperly exceeded the ceiling for the "all others" rate inconsistently with subparagraph (i) of Article 9.4, but, instead, whether the USDOC's determination of the ceiling for the "all others" rate is consistent with the proviso to Article 9.4 of the Anti-Dumping Agreement.

7.580. We also reject the United States argument that Korea has failed to make a prima facie case because it has not "proposed any alternative methodology for calculating the cap in Article 9.4".[1734] We note Korea's express suggestion that "alternative reasonable methodologies were available to the USDOC such as relying on the margins assigned to these producers in prior reviews".[1735] The United States does not respond to Korea's proposed alternative methodology.

7.581. Article 9.4 requires investigating authorities to "disregard for the purpose of this paragraph … margins established under the circumstances referred to in paragraph 8 of Article 6". Having rejected the United States' arguments above, we find the USDOC acted inconsistently with Article 9.4 of the Anti-Dumping Agreement because the USDOC determined the ceiling for the "all others" rate in respect of Iljin, Iljin Electric, and LSIS based on "the average of two AFA margins" for HHI and Hyosung"[1736], i.e. "margins established under the circumstances referred to in paragraph 8 of Article 6" of the Anti-Dumping Agreement.

7.3.6.5 Korea's claims under Articles 1, 9.3, and 18.1 of the Anti-Dumping Agreement

7.582. Korea further claims that, in the LPT AD investigation, the USDOC's use of facts available inconsistently with Article 6.8 and Annex II of the Anti-Dumping Agreement "led to an anti-dumping duty that was imposed and collected in excess of the margins of dumping in violation of Articles 1, 9.3, and 18.1 of the Anti-Dumping Agreement".[1737] According to Korea, because the margin of dumping was determined based on facts available in a manner inconsistent with Article 6.8 and Annex II, "the imposition of duties at the level of the margin of dumping automatically violated Article 9.3".[1738] Moreover, Korea asserts that the violation of Article 6.8 and Annex II also "automatically leads" to a violation of Articles 1 and 18.1 of the Anti-Dumping Agreement, as "this USDOC investigation and the measure taken were not in accordance with the Anti-Dumping Agreement".[1739]

7.583. The United States responds that Korea's claims under Articles 1, 9.3, and 18.1 are "entirely consequential" and "Korea offers no argument or evidence to support any independent breach of those provisions".[1740] According to the United States, were the Panel to uphold Korea's claims under Article 6.8 and Annex II, "there would be no basis to decide Korea's consequential claims".[1741]

[1731] See also Panel Report, *US – Supercalendered Paper*, para. 7.267.
[1732] United States' opening statement at the first meeting of the Panel, para. 55.
[1733] By finding the "all others" rate to be 60.81%, the USDOC impliedly found that the ceiling for the "all others" rate is equal to or greater than 60.81%. (Panel Report, *US – Shrimp (Viet Nam)*, fn 279. See also Panel Report, *Canada – Welded Pipe*, para. 7.32).
[1734] United States' opening statement at the first meeting of the Panel, para. 58.
[1735] Korea's first written submission, para. 871. We also note that, before the USDOC, Iljin stated that the USDOC "has information on the record of this review, and past reviews, concerning dumping rates calculated in prior reviews; however, [the USDOC] continues to use the six-year-old petition rate from the investigation as the AFA rate". (LPT POR4 issues and decision memorandum, (Exhibit KOR-211), p. 35).
[1736] LPT POR4 issues and decision memorandum, (Exhibit KOR-211), pp. 3 and 35.
[1737] Korea's first written submission, para. 875.
[1738] Korea's first written submission, para. 873.
[1739] Korea's first written submission, para. 874.
[1740] United States' first written submission, para. 356.
[1741] United States' first written submission, para. 358.

First, the United States "does not concede that such breaches are 'automatic'".[1742] Second, the United States submits that deciding such claims would be serve "no useful purpose", and would provide no "additional guidance that would be useful regarding implementation of any recommendations adopted by the DSB".[1743]

7.584. Korea does not present any independent bases for the alleged breaches of Articles 1, 9.3, and 18.1 of the Anti-Dumping Agreement; instead, its claims under these provisions are dependent entirely upon a finding that the United States acted inconsistently with Article 6.8 and Annex II of the Anti-Dumping Agreement.[1744] In these circumstances – and having already found that the United States acted inconsistently with Article 6.8 and certain provisions of Annex II – we do not consider it necessary to rule upon Korea's claims under Articles 1, 9.3, and 18.1 in order to resolve the dispute before us.[1745]

7.4 Korea's "as such" claim

7.4.1 Preliminary ruling

7.585. Korea challenges "as such" an unwritten measure allegedly adopted by the United States (the "alleged unwritten measure"). On 23 April 2019, the United States requested a preliminary ruling that this claim was outside the Panel's terms of reference because Korea had failed to "identify the specific measure[] at issue", as required by Article 6.2 of the DSU.[1746] The Panel issued its preliminary ruling on 2 July 2019 – before the first substantive meeting with the parties – and decided to provide the reasoning underlying its ruling as part of its Interim Report in accordance with paragraph 4.1(c) of the Working Procedures.[1747] The preliminary ruling and the underlying reasons are presented together below.

7.586. The Panel's preliminary ruling was as follows:

> Having carefully considered the arguments of the Parties and the Third Parties, the Panel declines to rule that Korea's "as such" claim concerning the alleged unwritten measure is outside its terms of reference. Rather, the Panel finds that, for purposes of Article 6.2 of the DSU, the alleged unwritten measure that is the object of Korea's "as such" challenge is properly identified in Section I.C of the Panel Request as follows:
>
> > ***C. Use of Adverse Facts Available As Ongoing Conduct, or a Rule or Norm of General and Prospective Application***
> >
> > This request also concerns the ongoing conduct or the practice of the USDOC of using "adverse facts available" as a rule or norm of general and prospective application when a producer or exporter is found to have failed to cooperate by not acting to the best of its ability. Under this ongoing conduct or norm, whenever the USDOC makes a finding that a producer or exporter has failed to cooperate by not acting to the best of its ability, it adopts adverse inferences and, in determining the duty rate for this producer or exporter, selects facts from the record that are adverse to the interests of this producer or exporter without establishing (i) that such inferences can reasonably be drawn in light of the degree of cooperation received, and (ii) that such facts are the "best information available" in the particular circumstances.[1][1748]
>
> [1] The use of adverse facts available has been consistently applied by the USDOC and is undertaken pursuant to: (i) Section 502 of the Trade Preferences Extension Act

[1742] United States' first written submission, para. 358.
[1743] United States' first written submission, paras. 358-359.
[1744] Korea's first written submission, paras. 873-874.
[1745] See, e.g. Panel Reports, *US – Differential Pricing Methodology*, paras. 7.114-7.115; *Argentina – Poultry Anti-Dumping Duties*, para. 7.369; *US – Steel Plate*, para. 7.103; and *EU – Footwear (China)*, para. 7.935.
[1746] See section 1.3.3 above.
[1747] Panel's preliminary ruling, para. 1.2.
[1748] Korea's panel request, para. 9 and fn 1.

> of 2015, Pub. L. No. 114-27; (ii) Section 776 of the Tariff Act of 1930, codified at 19 U.S.C. § 1677e; and (iii) the implementing regulations of the USDOC in 19 C.F.R. § 351, including in particular section 308.
>
> It is also evidenced, for example, by the manner in which facts available was used in the measures identified in Section I.A of this Request. A preliminary and non-exhaustive list of measures confirming the existence of this ongoing conduct or rule or norm of applying adverse facts available whenever a finding is made that a producer or exporter has failed to act to the best of its ability is attached as Annex I to illustrate the practice.

> The above preliminary ruling by the Panel is limited to the issue of its jurisdiction and is without prejudice to any substantive arguments concerning the existence or the precise content of the measure at issue that may be raised by the parties or third parties during the course of these proceedings.

We now provide the reasons underlying this preliminary ruling.

7.587. In its preliminary ruling request of 23 April 2019, the United States asserts that Korea's "as such" claim against an alleged unwritten measure is outside the Panel's jurisdiction because, while being directed at a "single unwritten measure", Korea's panel request contains "multiple inconsistent descriptions" of such an alleged unwritten measure.[1749] Moreover, according to the United States, the deficiency found in the Korea's panel request is "confirm[ed]" and "compound[ed]" in its first written submission, wherein Korea "switches between multiple different descriptions of the 'precise content' of the alleged unwritten measure".[1750] Having identified at least three such allegedly inconsistent descriptions in the panel request[1751], the United States contends that Korea fails to identify a "specific unwritten measure at issue", in accordance with Article 6.2 of the DSU.[1752]

7.588. Korea responds that the United States' preliminary ruling request is "entirely unfounded" and should be rejected by the Panel.[1753] According to Korea, in accordance with Article 6.2 of the DSU, the panel request properly identifies in section I the measures at issue, and provides a brief summary of the legal basis of the complaint in section II. Korea therefore considers unavailing the United States' identification of multiple allegedly conflicting descriptions from section II of its panel request, which "simply elaborate on the problematic aspects of the measure in order to provide the required brief summary of the legal basis, without however affecting the identification of the measure".[1754] In Korea's view, therefore, the United States improperly conflates the identification of the measure at issue in section I with the brief explanation of the legal basis in section II of its panel request.[1755]

7.589. We first summarize the relevant aspects of the legal standard under Article 6.2 of the DSU (section 7.4.1.1) and then examine whether Korea's panel request is consistent with that legal standard (section 7.4.1.2).

[1749] United States' request for a preliminary ruling, para. 2.
[1750] United States' s request for a preliminary ruling, para. 3.
[1751] United States' request for a preliminary ruling, paras. 10-12 (quoting Korea's panel request, paras. 9 and 33-34).
[1752] United States' request for a preliminary ruling, para. 4.
[1753] Korea's response to United States' request for a preliminary ruling, paras. 4 and 28.
[1754] Korea's response to United States' request for a preliminary ruling, para. 33.
[1755] Korea's response to United States' request for a preliminary ruling, para. 33. Korea also takes issue with the United States' assertion that the so-called "different descriptions" of the measure are "conflicting" or "inconsistent", arguing instead that, the "different descriptions", which are to be found only in section II of the panel request, merely refer to different aspects of the same unwritten measure that are deemed problematic in light of the relevant requirements under the Anti-Dumping Agreement and the SCM Agreement. (Korea's response to United States' request for a preliminary ruling, para. 42 (referring to United States' request for a preliminary ruling, para. 2)). Furthermore, Korea considers the United States' focus on the first written submission when examining the panel request to be "entirely misplaced" as the sufficiency of a panel request under Article 6.2 is to be determined on its face and not by reference to subsequent submissions. (Korea's response to United States' request for a preliminary ruling, para. 35).

7.4.1.1 Article 6.2 of the DSU

7.590. Article 6.2 of the DSU, entitled "Establishment of Panels", sets out the relevant requirements for panel requests in WTO dispute settlement proceedings and reads, in relevant part, as follows:

> The request for the establishment of a panel shall be made in writing. It shall indicate 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.

Besides requiring that panel requests shall be made in writing and must indicate whether consultations were held, Article 6.2 of the DSU sets out two additional and distinct requirements for a complainant: first, to "identify the specific measures at issue"; and second, to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly".[1756]

7.591. The "specific measure" to be identified in a panel request is the "object of the challenge", i.e. the measure that is alleged to be causing the violation of an obligation contained in a covered agreement.[1757] The specific measure at issue defines *what* is being challenged by a complainant. By contrast, the legal basis of the complaint, i.e. the "claim", pertains to the specific provision of the covered agreement that contains the obligation alleged to be infringed.[1758] Article 6.2 requires that the panel request set out "a brief summary" of the legal basis of the complaint that is "sufficient to present the problem clearly". In order to comply with this requirement, a panel request must "plainly connect" the challenged measure(s) with the provision(s) of the covered agreements that are alleged to have been violated.[1759]

7.592. Taken together, these two aspects – the "specific measures at issue" and "a brief summary of the legal basis of the complaint" – constitute the "matter referred to the DSB", which normally forms the basis of a panel's terms of reference under Article 7.1 of the DSU.[1760] In this manner, a panel request serves to define a panel's terms of reference and to delimit the scope of its jurisdiction.[1761] The requirements under Article 6.2 of the DSU are, therefore, "central" to the proper establishment of a panel's jurisdiction.[1762]

7.593. Given the fundamentally important role that a panel request plays in delimiting the jurisdiction of a panel from the outset of the proceedings, panels must, for purposes of Article 6.2, carefully scrutinize the specific panel request at issue, read as a whole, and on the basis of the precise text contained in that request.[1763] Moreover, compliance with the requirements of Article 6.2 must be assessed on the "face" of the panel request, as it existed at the time of filing.[1764] The examination under Article 6.2 envisages a limited of role for the parties' submissions that are made after the filing of the panel request. Such subsequent submissions cannot "cure" any existing defects in a panel request, and may only be consulted to the extent that they "confirm" or "clarify" the meaning of the text used in the panel request.[1765]

[1756] Appellate Body Reports, *Argentina – Import Measures*, para. 5.39.
[1757] Appellate Body Report, *EC – Selected Customs Matters*, para. 130.
[1758] Appellate Body Report, *EC – Selected Customs Matters*, para. 130.
[1759] Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, paras. 5.6-5.7. See also Appellate Body Reports, *China – Raw Materials*, para. 220; and *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.12.
[1760] Appellate Body Reports, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.6; *Argentina – Import Measures*, para. 5.39.
[1761] Appellate Body Reports, *Korea – Pneumatic Valves (Japan)*, para. 5.4; *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.12. By defining the jurisdiction of the panel, the panel request also fulfils the due process objective of providing the respondent and third parties with notice regarding the essential nature of the complainant's case. This "due process objective is not constitutive of, but rather follows from, the proper establishment of a panel's jurisdiction". (Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 640. See also Appellate Body Reports, *Korea – Pneumatic Valves (Japan)*, para. 5.4; and *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.7).
[1762] Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.8.
[1763] See, e.g. Appellate Body Report, *Russia – Railway Equipment*, para. 5.29.
[1764] See, e.g. Appellate Body Reports, *Russia – Railway Equipment*, para. 5.29; and *Indonesia – Iron or Steel Products*, para. 5.79.
[1765] See, e.g. Appellate Body Reports, *Russia – Railway Equipment*, para. 5.29; and *Indonesia – Iron or Steel Products*, para. 5.79.

7.4.1.2 Whether Korea's panel request is consistent with Article 6.2 of the DSU

7.594. The United States asserts that Korea's "as such" claim is outside the Panel's jurisdiction because the panel request contains "multiple inconsistent descriptions" of the alleged unwritten measure that is challenged by Korea.[1766] Having identified at least three such allegedly inconsistent descriptions in the panel request[1767], the United States submits that Article 6.2 of the DSU "does not allow for this level of uncertainty".[1768] The United States also alleges that Korea's first written submission confirms that its panel request does not adequately identify the alleged unwritten measure and, instead, compounds the deficiency.[1769]

7.595. We note that the introduction of the panel request explains that, "[p]ursuant to Article 6.2 of the DSU, Korea proceeds below to identify the specific measures at issue and to provide a brief summary of the legal basis of the complaint".[1770] Consistent with this introduction, the panel request then sets out two parts entitled "Identification of the Measures" and "Legal Basis", respectively.

7.596. Part I of the panel request, entitled "Identification of the Measures", is divided into three sections that identify three categories of measures, namely:

A. "Certain Definitive Anti-Dumping and Countervailing Duty Measures"[1771];

B. "Section 776 of the Tariff Act of 1930 (19 U.S.C. §1677e as amended by Section 502 of the Trade Preferences Extension Act of 2015, and its implementing regulations"[1772]; and

C. "Use of Adverse Facts Available As Ongoing Conduct, or a Rule or Norm of General and Prospective Application".[1773]

7.597. The description of the alleged unwritten measure in Section I.C – set out in paragraph 7.586 above – is the *only* description of that measure set out in Part I of Korea's panel request.

7.598. Part II of the panel request, entitled "Legal Basis", is divided into three sections that set out the "legal basis" for the claims corresponding to each of the categories of measures identified in Part I, namely:

A. "As Applied Challenge to Certain Definitive Anti-Dumping and Countervailing Duty Measures"[1774];

B. "As Such Challenge to Section 776 of the Tariff Act of 1930 (19 U.S.C. § 1677e) as amended by Section 502 of the Trade Preferences Extension Act of 2015, and its implementing regulations"[1775]; and

C. "As such Challenge to the USDOC's Use of Adverse Facts Available As an Ongoing Conduct or Rule or Norm of General and Prospective Application".[1776]

7.599. Section II.C sets out multiple allegations as to why the alleged unwritten measure is inconsistent with the United States' obligations under the covered agreements.

7.600. We disagree with the United States that Korea's panel request contains "multiple inconsistent descriptions" of the alleged unwritten measure at issue. Part I is aimed expressly at identifying the specific measures at issue and contains *one* description of the alleged unwritten

[1766] United States' request for a preliminary ruling, para. 2.
[1767] United States' request for a preliminary ruling, paras. 10-12 (quoting Korea's panel request, paras. 9 and 33-34).
[1768] United States' request for a preliminary ruling, para. 13.
[1769] United States' request for a preliminary ruling, para. 14.
[1770] Korea's panel request, para. 4.
[1771] Korea's panel request, section I.A.
[1772] Korea's panel request, section I.B.
[1773] Korea's panel request, section I.C.
[1774] Korea's panel request, section II.A.
[1775] Korea's panel request, section II.B.
[1776] Korea's panel request, section II.C.

measure being challenged. Part II of the panel request sets out a brief summary of the legal basis for each challenge. In doing so, Section II.C also refers to the alleged unwritten measure identified in Section I.C by using slightly different explanations, including the two allegedly "conflicting" descriptions identified by the United States as the primary basis for its jurisdictional challenge.[1777]

7.601. Article 6.2 treats *measures* and *claims* as distinct and sets out separate requirements that must each be satisfied in a panel request in order for a "matter" to be within a panel's terms of reference.[1778] In our view, the structure of Korea's panel request clearly reflects this distinction between the specific measures at issue, which are identified in Part I, and the corresponding claims of WTO-inconsistency, which are set out in Part II.[1779]

7.602. It is the description of the alleged unwritten measure in Part I, and not the formulations used by Korea as part of describing its claims in Part II, that ought to be tested against the requirement under Article 6.2 of the DSU to identify the "specific" measure at issue. In this regard, we note that the United States does not argue that the description of the alleged unwritten measure contained in Section I.C of the panel request is, *in and of itself*, deficient, or otherwise lacks the requisite degree of specificity under Article 6.2 of the DSU. For jurisdictional purposes under Article 6.2 of the DSU, we find that Section I.C of Korea's panel request properly identifies the alleged unwritten measure.[1780] In light of this finding, we see no reason to consult Korea's first written submission – as urged by the United States – for purposes of our preliminary ruling.

7.4.1.3 Conclusion

7.603. Our assessment – based upon an objective examination of the precise text and the overall structure of Korea's panel request at the time it was filed – leads us to conclude that, for purposes of Article 6.2 of the DSU, the alleged unwritten measure that is the object of Korea's "as such" challenge is identified properly in Section I.C of its panel request.

7.604. Our preliminary ruling remains limited to the issue of our jurisdiction and is without prejudice to any substantive arguments concerning the existence or the precise content of the alleged unwritten measure that may be raised by the parties during the course of these proceedings.[1781] We address these issues below.

7.4.2 "As such" claim against the alleged unwritten measure

7.605. Korea challenges, on an "as such" basis, the USDOC's use of "adverse facts available" as an unwritten measure (the "AFA measure" or the "alleged unwritten measure"). Arguing that the measure is a "rule or norm of general and prospective application"[1782] or, in the alternative, constitutes "ongoing conduct"[1783], Korea offers several pieces of evidence – including provisions of US domestic law, the USDOC Anti-Dumping Manual, US domestic court rulings, and USDOC determinations – to establish its existence.[1784] According to Korea, the AFA rule or norm, or, in the

[1777] United States' request for a preliminary ruling, paras. 10-12.
[1778] Appellate Body Report, *Australia – Apples*, para. 421. See also Appellate Body Report, *EC – Selected Customs Matters*, para. 131.
[1779] Korea's panel request, para. 4. ("*Pursuant to Article 6.2 of the DSU*, Korea proceeds below to identify the specific measures at issue *and* to provide a brief summary of the legal basis of the complaint" (emphasis added)). We note Canada's statement that it is "reasonable to assume that a description of how the measure allegedly violates the covered agreements would involve different wording and more detail than the mere identification of the measure". (Canada's third-party submission, para. 33).
[1780] We are mindful, in this regard, that a complaining Member enjoys a "certain discretion" in the identification of the specific measure at issue and, "[a]s long as the specificity requirements of Article 6.2 are met, [there is] no reason why a Member should be precluded from setting out in a panel request 'any act or omission' attributable to another Member as the measure at issue". (Appellate Body Report, *Australia – Apples*, para. 423 (quoting Appellate Body Report, *EC – Selected Customs Matters*, paras. 133 and 149)).
[1781] Panel's preliminary ruling, para. 2.2. See also Appellate Body Report, *US – Continued Zeroing*, para. 169 (noting that "the *identification* of the specific measures at issue, pursuant to Article 6.2, is different from a demonstration of the *existence* of such measures" (emphasis added)).
[1782] See section 7.4.5 below.
[1783] See section 7.4.6 below.
[1784] Korea's response to Panel question No. 104, para. 143.

alternative, the AFA "ongoing conduct", is inconsistent with the United States' obligations under Article 6.8 and Annex II of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement.[1785]

7.606. From the outset of the proceedings[1786], the United States maintains that Korea has failed to establish the existence of the alleged unwritten measure. According to the United States, such failure results from the lack of "clarity" in Korea's identification of the measure[1787], as well as its flawed attempts at establishing the various elements of the alleged measure, including its precise content.[1788] For the United States, the possibility of "ongoing conduct" constituting a measure "is ultimately moot in the context of this dispute", because Korea, in attempting to prove the existence of "ongoing conduct", has not identified any elements different from those necessary to prove the existence of a "rule or norm". Therefore, if Korea fails to prove the latter, its alternative also fails.[1789]

7.607. We first examine how Korea identifies the alleged unwritten measure and describes its precise content. Next, we address Korea's reliance upon prior WTO disputes involving allegedly similar measures. We then review the arguments and evidence to determine whether Korea has established that the unwritten measure with the precise content alleged by it, in fact, exists and, if it does, whether that measure is "as such" inconsistent with the covered agreements.

7.4.3 The measure at issue

7.4.3.1 Introduction

7.608. An "as such" challenge can, in principle, be brought against a measure that is not expressed in the form of a written document under both the Anti-Dumping Agreement and the SCM Agreement.[1790] That said, when a challenge is brought against a measure that is not expressed in written form, the very existence of the challenged measure may be uncertain[1791] – as is the United States' position in the present proceedings. "As such" challenges are "serious challenges" and their implications "are obviously more far-reaching than 'as applied' claims", as they seek to prevent Members *ex ante* from engaging in certain conduct.[1792]

7.609. Panels are well advised to "*not lightly assume* the existence of a 'rule or norm' constituting a measure of general and prospective application, especially when it is not expressed in the form of a written document".[1793] Instead, in order to make an "objective assessment" under Article 11 of the DSU, "*[p]articular rigour* is required on the part of a panel to support a conclusion as to the existence of a 'rule or norm' that is not expressed in the form of a written document".[1794] In particular, a panel "must carefully examine the concrete instrumentalities that evidence the existence of the purported 'rule or norm' in order to conclude that such 'rule or norm' can be challenged, as such".[1795] This does not, however, mean "that a *mere abstract principle* would qualify as a 'rule or norm' that can be challenged, as such".[1796]

7.610. We note that the "specific measure at issue, whether it is written or unwritten, and *how it is described, characterized, and challenged by a complainant*", are important aspects that "inform the

[1785] Korea's first written submission, para. 1035; panel request, para. 34. See also Korea's response to Panel question No. 105, paras. 144 and 146.
[1786] United States' request for a preliminary ruling, paras. 18-23.
[1787] United States' first written submission, para. 432 ("Korea's failure to identify a specific measure with even any level of clarity … also makes it impossible to identify precisely which additional elements Korea would need to prove.")
[1788] United States' first written submission, paras. 439-467.
[1789] United States' first written submission, para. 436.
[1790] Appellate Body Report, *US – Zeroing (EC)*, para. 193.
[1791] Appellate Body Report, *US – Zeroing (EC)*, para. 197.
[1792] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 172.
[1793] Appellate Body Report, *US – Zeroing (EC)*, para. 196. (emphasis added)
[1794] Appellate Body Report, *US – Zeroing (EC)*, para. 198. (original emphasis omitted; emphasis added)
[1795] Appellate Body Report, *US – Zeroing (EC)*, para. 198.
[1796] Appellate Body Report, *US – Zeroing (EC)*, fn 342. (emphasis added)

kind of evidence a complainant is required to submit and the elements that it must prove in order to establish the existence of the measure challenged".[1797]

7.611. Mindful of the seriousness of "as such" claims and the uncertainty inherent in challenges against unwritten measures, we begin by examining how Korea – as the complainant – identifies and describes the alleged unwritten measure challenged in these proceedings.

7.4.3.2 The precise content of the alleged unwritten measure

7.612. Korea's panel request identifies the alleged unwritten measure as set out in paragraph 7.586 above. It contains two sentences and a footnote. Given the terms of the panel request, as confirmed by our preliminary ruling, this is the *only* alleged unwritten measure that is within the Panel's terms of reference.

7.613. Korea explains that the description in the panel request "involves several interlinked aspects of the measure, which together form the single measure challenged".[1798] According to Korea's description, the first aspect of the measure is that it applies "whenever the USDOC makes a finding that a producer or exporter has failed to cooperate by not acting to the best of its ability".[1799] Korea explains that its "challenge focuses on the selection of the facts available in a situation where a finding of non-cooperation has been made".[1800] According to Korea, its "'as such' claim is *agnostic* about the justified nature or not of the finding of non-cooperation by the USDOC in these cases".[1801] We agree with Korea that one of the "interlinked aspects" of the measure is the USDOC's finding of non-cooperation that serves as the "trigger"[1802] and delimits the universe within which the alleged unwritten measure applies.

7.614. The next aspect of Korea's description relates to the "consequence" that follows the "trigger".[1803] According to Korea's description, the USDOC "adopts adverse inferences" whenever it makes a finding of non-cooperation.[1804] Korea explains that "the term 'adverse inferences' does not actually cover the use of AFA as it suggests that the USDOC draws certain inferences from the relevant factual circumstances of each proceeding when assessing the totality of the fact[s] and evidence before it".[1805] Rather, Korea explains that an "adverse inference" means that "the duty will be determined based on facts that are adverse to the interests of the party concerned".[1806]

7.615. The third aspect of the measure relates to the selection of the particular facts available due to the adoption of adverse inferences. According to Korea's description, "in determining the duty rate for this producer or exporter, [the USDOC] selects facts from the record that are adverse to the interests of this producer or exporter".[1807] In its first written submission, Korea explains that the USDOC "selects from among the facts available those facts that would lead to a result that would certainly be not more favorable than that where the foreign producer or exporter in question had cooperated fully".[1808]

7.616. Korea explains that the "precise content" of what it means to apply "adverse facts available" or adopt "adverse inferences" is "foreshadowed" in the remainder of the description in its panel request, which "gives meaning and color to the label AFA".[1809] According to this description in the second sentence of paragraph 9 of Korea's panel request, as part of the measure, the USDOC *does not* establish "(i) that such inferences can reasonably be drawn in light of the degree of cooperation received, and (ii) that such facts are the 'best information available' in the particular

[1797] Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.123 (referring to Appellate Body Reports, *Argentina – Import Measures*, paras. 5.108 and 5.110 (emphasis added)); see also Appellate Body Report, *US – Supercalendered Paper*, fn 65.
[1798] Korea's response to preliminary ruling request, para. 31.
[1799] Korea's panel request, para. 9.
[1800] Korea's response to Panel question No. 43.
[1801] Korea's response to Panel question No. 40(b). (emphasis added)
[1802] Korea's response to United States' preliminary ruling request, para. 31.
[1803] Korea's response to United States' preliminary ruling request, para. 31.
[1804] Korea's panel request, para. 9.
[1805] Korea's response to Panel question No. 43.
[1806] Korea's response to Panel question No. 104, para. 139.
[1807] Korea's panel request, para. 9.
[1808] Korea's first written submission, para. 923.
[1809] Korea's response to Panel question No. 104, paras. 133 and 139.

circumstances".[1810] We understand "such inferences" to be the "adverse inferences" that comprise the second aspect of the measure. Similarly, "such facts" are the adverse facts available that are selected as part of the third aspect of the measure. Consequently, we agree with Korea that the description in the panel request defines the measure by reference to both what the USDOC does do (i.e. the first, second, and third aspects), as well as what the USDOC does not do (i.e. the precise meaning of the second and the third aspects).[1811] These positive and negative aspects of the USDOC's conduct are important elements of the precise content of Korea's alleged unwritten measure.

7.617. Neither the term "adverse inferences" nor the term "adverse facts available" is defined in Article 6.8 and Annex II of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement.[1812] We therefore consider important Korea's explanation that the second sentence of paragraph 9 of its panel request describes "the precise content of the AFA Norm and salient aspects of what the label 'AFA' means".[1813] Insofar as it explains and clarifies Korea's use of the terms "adverse facts available" and "adverse inferences", the additional "meaning" or "colour" imparted by the remainder of Korea's description is a crucial and important feature of the precise content of the unwritten measure alleged to exist.[1814] In this sense, we agree with the United States that "Korea's panel request cannot be read as challenging the use of adverse inferences broadly".[1815]

7.618. As to the linkage between the different aspects of the alleged unwritten measure, Korea explains that, "*whenever* the USDOC makes a determination that an interested party has failed to cooperate to the best of its abilities, it *automatically* resorts to the use of AFA".[1816] In response to questioning by the Panel at the first substantive meeting, Korea similarly refers to the "*automatic relationship* between a finding of non-cooperation and the use of AFA".[1817] As part of its

[1810] Korea's panel request, para. 9.

[1811] Korea's response to Panel question No. 104, para. 140.

[1812] Annex V of the SCM Agreement contains a reference to the drawing of "adverse inferences" by a panel in cases concerning "serious prejudice".

[1813] Korea's response to Panel question No. 104, para. 139.

[1814] We note Korea's argument that, "[i]n light of recent case law clarifying the limited obligation of a complainant, Korea could actually have stopped with the description in the first sentence [of paragraph 9 of its panel request] that plainly connects the measure with the provision of the covered Agreements claimed to have been infringed, and foregone the additional coloring in the second sentence as complainants". (Korea's response to Panel question No. 104, para. 141). We disagree with Korea that the first sentence of paragraph 9 serves to "plainly connect the measure with the provision of the covered Agreement claimed to have been infringed". As Korea acknowledges, and as found by the Panel in its preliminary ruling, paragraph 9 of Korea's panel request, in its entirety, identifies the specific unwritten measure at issue, while section II.C of Korea's panel request sets out the legal basis of the complaint by "plainly connecting" the unwritten measure to the treaty provisions alleged to be infringed. Furthermore, as Korea notes, the second sentence of paragraph 9 of its panel request describes "the precise content of the AFA Norm and salient aspects of what the label 'AFA' means". The "precise content" and "meaning" of "AFA" provided by Korea – the complainant – are important because the measure challenged is unwritten and because the term "AFA" is not defined under the covered agreements. (See Panel's preliminary ruling, para. 2.1; Korea's response to United States' preliminary ruling request, para. 33 (stating that, "[i]n arguing that Korea's panel request provides multiple descriptions of the identified 'as such' measure, the United States improperly compares the correct identification of the measure in Section I with the brief explanation of the legal basis in Section II"); and Korea's response to Panel question No. 104, para. 139).

[1815] United States' second written submission, para. 144. See also Appellate Body Report, *US – Zeroing (EC)*, fn 342 (expressing doubt "that a *mere abstract principle* would qualify as a 'rule or norm' that can be challenged, as such" (emphasis added)). Given the manner in which Korea identifies its measure, the Panel is not called upon to address the extent to which inferences that happen to be "adverse" to the non-cooperating party are permissible under the covered Agreements. We note, in this regard, arguments made by two of the third parties in this dispute. The European Union "agrees … that the use of adverse inferences is not necessarily inconsistent, in all circumstances, with Article 6.8 of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement" and "that the use of adverse inferences … would be justified in cases of fraud or total lack of cooperation by the producer or exporter in question". (European Union's third-party submission, para. 81). Pointing out that "Annex II of the Anti-Dumping Agreement contemplates the possibility that the use of facts available may result in a less favourable outcome for an interested party", Canada submits that this "d[oes] not preclude the use of adverse inferences in all situations". (Canada's third-party submission, para. 18).

[1816] Korea's response to Panel question No. 104, para. 128 (emphasis added). See also Korea's first written submission, para. 1034.

[1817] Korea's response to Panel question No. 45 (emphasis added). See also response to question No. 43 ("whenever it makes a finding of non-cooperation, that door closes and another door opens that is based on

second written submission, Korea explains that the USDOC applies "AFA … *solely based on the finding that the party failed to cooperate* to the best of its ability" and that the USDOC's "selection of the facts available is *based solely* on their adverse nature".[1818] In a similar fashion, in response to questioning by the Panel at the second substantive meeting, Korea explains that "[t]he *sole* procedural circumstance of non-cooperation cannot be *the basis* for the selection of the information to replace the allegedly missing information"[1819] and that "the unwritten measure that Korea is challenging is the *automatic link* between a finding of non-cooperation and the application of AFA".[1820] Korea therefore emphasizes the "automatic link" between the first aspect of the measure (i.e. the finding of non-cooperation) and the second and third aspects (i.e. the adoption of "adverse inferences" and the selection of "adverse facts available").[1821]

7.619. As discussed, the positive and negative aspects of Korea's definition of "adverse inferences" and "adverse facts available", working together, constitute important features of the precise content of the alleged unwritten measure. Korea must demonstrate both these aspects in order to establish the "automatic link" between a finding of non-cooperation and the USDOC's use of "adverse inferences" or "adverse facts available" that it takes issue with. Showing merely that whenever the USDOC makes a finding of non-cooperation, it uses the labels of "adverse inference" or "adverse facts available" or selects those replacement facts that happen to be "adverse to the interests" of the non-cooperating party is not sufficient to establish the "automaticity" that Korea emphasizes. Rather, Korea must also demonstrate the negative aspect of the USDOC's conduct that forms an important feature of the alleged unwritten measure. This understanding of the positive and negative aspects of "adverse inferences" identified in Korea's panel request is also confirmed by its subsequent statements and submissions to the Panel.[1822]

7.620. Based on the above, we understand the crux of Korea's concern to be an alleged lack of evaluation by the USDOC between the finding of non-cooperation and the adoption of adverse inferences and the selection of adverse facts available. The nature and the extent of the evaluation that is allegedly lacking in the unwritten measure is, however, not entirely clear to us from Korea's submissions. On the one hand, Korea's repeated statements in its submissions to the Panel that the selection of adverse facts available is "automatic" and based *solely* on a finding of non-cooperation implies that the USDOC does not engage in any other evaluation. On the other hand, the negative aspects of the alleged unwritten measure identified in Korea's panel request imply that the USDOC conducts an *inadequate* evaluation, because it uses "adverse inferences" or "adverse facts available" without taking into account the "degree of cooperation" received and without establishing that the replacement facts selected by it "are the 'best information available' in the particular circumstances".[1823] In its subsequent submissions, Korea also explains this as a failure to engage in a "comparative evaluation to arrive at an accurate determination"[1824] and asserts that "[t]he AFA Rule or Norm, or the AFA Ongoing Conduct, does not" allow a proper drawing of inferences because it does not take "differences in the factual circumstances of the situation into account".[1825] In other words, instead of claiming that the USDOC necessarily fails to engage in any other evaluation after a finding of non-cooperation, Korea asserts that the USDOC does not engage in the kind of search

finding facts that are sufficiently adverse to the interests of the interested party in question *without any process* of reasoning or evaluation to determine whether these facts reasonably replace the missing information or lead to an accurate determination, and without consideration of the specific reasons that led to the finding of non-cooperation" (emphasis added)).

[1818] Korea's second written submission, paras. 409-410 (emphasis added). See also ibid. para. 412: "each time the USDOC found such non-cooperation, it automatically applied AFA without engaging in the required comparative process of reasoning and evaluation to make an accurate determination"; and Korea's request for interim review, para. 69 ("[t]he use of AFA means that the sole procedural circumstance of non-cooperation is the basis for the selection of the facts available that are adverse to the interest of the producer rather than the most accurate").

[1819] Korea's response to Panel question No. 50, para. 16. (emphasis added)

[1820] Korea's response to Panel question No. 107, para. 155. (emphasis added)

[1821] We note that the term "whenever" – signifying the "automatic" link between a finding of non-cooperation and the consequences that follow – is found only in the second sentence of Korea's description of the alleged unwritten measure in paragraph 9 of its panel request, thereby underscoring the importance of this sentence. (Korea's request for interim review, paras. 69 and 72 (quoting Korea's response to Panel question No. 104)).

[1822] See, e.g. Korea's second written submission, para. 422; responses to Panel question Nos. 43 and 104; and request for interim review, para. 69.

[1823] Korea's panel request, para. 9.

[1824] Korea's first written submission, para. 924.

[1825] Korea's second written submission, para. 419.

for reasonable replacements for the missing information that is required under the covered agreements. Given the lack of clarity in Korea's submissions on this issue, we address both these different understandings as part of our analysis below.[1826]

7.4.3.3 The legal characterization of the alleged unwritten measure

7.621. Korea makes clear that it challenges the alleged unwritten measure on an "as such" basis.[1827] We agree that "the distinction between 'as such' and 'as applied' challenges neither governs the definition of a measure for purposes of WTO dispute settlement, nor defines exhaustively the types of measures susceptible to challenge".[1828] Nonetheless, we note that "this distinction serves as an analytical tool to facilitate the understanding of the nature of a measure at issue".[1829] In the case at hand, the fact that Korea characterizes its challenge as an "as such" claim helps us, at the very least, understand that it seeks to prevent the United States from "engaging in certain conduct in general and in the future, as opposed to addressing particular instances of application that are occurring or have occurred".[1830]

7.622. Korea characterizes the unwritten measure in two alternative ways. First, it argues that the measure is a "rule or norm of general and prospective application" (the "AFA rule or norm").[1831] In the event the Panel considers that "the use of AFA does not meet the criteria for being a rule or norm of general and prospective application", Korea claims that "it in any case constitutes a form of 'ongoing conduct'" (the "AFA ongoing conduct").[1832] Thus, Korea's characterization of the alleged unwritten measure as ongoing conduct is presented only in the alternative to its arguments demonstrating the existence of a "rule or a norm". We follow this order for purposes of our analysis, bearing in mind that, "*[i]n every WTO dispute,* a complainant must establish … the *precise content* of that challenged measure".[1833] Thus, in whatever legal form it chooses to characterize the alleged unwritten measure, Korea bears the burden of establishing that the unwritten measure with the precise content identified by it, in fact, exists.

7.4.4 Korea's reliance on prior WTO disputes

7.623. A peculiar feature of this dispute is the way in which Korea seeks to rely on dispute settlement reports in three prior WTO disputes, namely *US – Carbon Steel (India)*, *US – Anti-Dumping Methodologies (China)*, and *US – Supercalendered Paper.* Korea asserts that "prior WTO panel and Appellate Body findings have confirmed the existence of the United States' AFA Norm or similar AFA Ongoing Conduct".[1834] Korea further submits that "[a] number of relevant factual findings were made by the panels and the Appellate Body in these disputes relating to the use of AFA by the United States, which confirm the claims made by Korea about the use of AFA as a Norm or as a form of Ongoing Conduct".[1835] The United States, for its part, asserts that any findings concerning "the existence of a measure with th[e] precise content" in these prior disputes "offer[] no support for the existence of the markedly different alleged measure in Korea's panel request".[1836]

7.624. Korea submits that in *US – Carbon Steel (India)*, the Appellate Body "implicitly acknowledged that there exists a practice of always using AFA in cases of non-cooperation".[1837] Korea asserts that the Appellate Body in that dispute made certain factual findings that "acknowledged that using AFA was a consistent 'practice' of the USDOC".[1838] Specifically, Korea refers to the

[1826] See paras. 7.682-7.683, 7.686, and 7.697-7.698 below.
[1827] Korea's panel request, sections I.C and II.C.
[1828] Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.124. See also Appellate Body Reports, *US – Continued Zeroing*, para. 179; and *Argentina – Import Measures*, para. 5.102.
[1829] Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.124.
[1830] Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.127.
[1831] Korea's first written submission, paras. 878 and 895-940.
[1832] Korea's first written submission, paras. 941-960.
[1833] Appellate Body Report, *Argentina – Import Measures*, para. 5.104. (emphasis added)
[1834] Korea's first written submission, para. 879.
[1835] Korea's first written submission, para. 962.
[1836] United States' second written submission, para. 143. See also United States' first written submission, paras. 456 and 465.
[1837] Korea's first written submission, para. 971 (quoting Appellate Body Report, *US – Carbon Steel (India)*, fn 1181).
[1838] Korea's first written submission, para. 969.

Appellate Body's discussion of certain US domestic court decisions and the USDOC determinations that India invoked.[1839]

7.625. In *US – Carbon Steel (India)*, India presented an "as such" challenge against certain statutory provisions of US domestic law, including Section 776(b) of the Tariff Act prior to the changes introduced by the Section 502 of the Trade Preferences Extension Act of 2015 (the 2015 TPEA Amendment).[1840] The Appellate Body found that the written measure at issue, "on its face", does not require the investigating authority to act inconsistently with Article 12.7.[1841] Noting that the "practice" of the USDOC was "distinct and separate" from the written measure at issue, the Appellate Body observed that "India expressly clarified that it did not challenge the 'practice' of the USDOC in the application of the measure 'as such'".[1842] As to the USDOC's determinations that India presented in support of its case, the Appellate Body did not understand "why a number of instances of the application of the measure should, in this case, conclusively establish the meaning of the measure at issue in general, which … is confined to" the written measure at issue.[1843] Following a very brief analysis of the USDOC's determinations, the Appellate Body also noted that "the United States placed a number of cases on the Panel record where the 'worst possible inference' was not applied in instances of non-cooperation".[1844] The Appellate Body's analysis, including its discussion of US court rulings, was thus not aimed at ascertaining the USDOC's alleged "practice" – a measure that was not challenged by India – but instead sought to determine whether the written "measure at issue is mandatory in requiring the use of the worst possible information in all cases of non-cooperation".[1845]

7.626. Korea acknowledges that its "as such" claim in the present dispute is "different from that of India" and "is not that under AFA, the USDOC will always use the worst information possible".[1846] Moreover, Korea's claim is not directed at the written legislation.[1847] The Appellate Body's findings in *US – Carbon Steel (India)* were made in the context of the claim and evidence presented by India – both of which are not exactly the same as what Korea presents before us. Neither the Appellate Body nor the panel in that dispute sought to ascertain the existence and precise content of the USDOC's alleged "practice", as it was not the measure challenged by India. For these reasons, we disagree with Korea that the Appellate Body in *US – Carbon Steel (India)* somehow "implicitly acknowledged that there exists a practice of *always* using AFA in cases of non-cooperation".[1848]

7.627. Korea submits that the panel and the Appellate Body's findings in *US – Anti-Dumping Methodologies (China)* "confirm the position of Korea that the United States' use of adverse facts available is a rule or norm of general and prospective application".[1849] Korea notes the "overlap in terms of the U.S. statutory basis for the AFA Norm in this dispute (Section 776 of the Tariff Act of 1930)" and the content of the AFA Norm in that prior dispute, which it variously describes as "identical", "almost identical", "very similar", and "similar".[1850] Observing that the measure at issue in *US – Anti-Dumping Methodologies (China)* "related to [non-market economy] NME-wide entities, which are not even arguably relevant to this proceeding", the United States responds that Korea's discussion of this report offers no support for establishing the precise content or general and prospective nature of the specific unwritten measure at issue in the present proceedings.[1851]

[1839] Korea's first written submission, paras. 969-970.
[1840] Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.464-4.466. See also Korea's first written submission, para. 967.
[1841] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.470.
[1842] Appellate Body Report, *US – Carbon Steel (India)*, fn 1180.
[1843] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.480.
[1844] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.480.
[1845] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.477. Furthermore, we note that, in respect of one of the judicial decisions relied upon by India, the Appellate Body observed that it "points to accuracy as the goal for applying the inference in the measure". (Ibid. para. 4.475).
[1846] Korea's first written submission, para. 974.
[1847] Korea's second written submission, para. 374; response to Panel question No. 40(c); comments on draft descriptive part, para. 1.
[1848] Korea's first written submission, para. 971. (emphasis added)
[1849] Korea's first written submission, para. 979.
[1850] Korea's first written submission, paras. 995 and 977-978.
[1851] United States' second written submission, paras. 441 and 457.

7.628. We disagree with Korea that the manner in which Korea's panel request identifies the measure is also how the measure was identified in *US – Anti-Dumping Methodologies (China)*.[1852] In that case, China's panel request identified the unwritten measure as follows:

> When the USDOC considers that a producer or exporter has failed to cooperate by not acting to the best of its ability, it uses inferences that are "adverse to the interests of that party in selecting from among the facts otherwise available". China refers to the USDOC's approach as the "Use of Adverse Facts Available".[1853]

China further provided the following description of the precise content of the unwritten measure at issue:

> [W]henever [the] USDOC considers that an NME-wide entity has failed to cooperate to the best of its ability, it systematically makes an adverse inference and selects, to determine the rate for the NME-wide entity, facts that are *adverse* to the interests of that fictional entity and each of the producers/exporters included within it.[1854]

7.629. Thus, the scope of the measure in *US – Anti-Dumping Methodologies (China)* was expressly limited not only to those instances in anti-dumping investigations where the USDOC found that "an NME wide entity has failed to cooperate", but also to the determination of "the rate for the NME-wide entity". In such cases, China alleged that the USDOC selected "facts that are *adverse* to the interests of that fictional entity and each of the producers/exporters included within it". However, as the United States' correctly points out, the precise content of the alleged unwritten measure identified by Korea is not limited in this manner.[1855] Korea submits that the findings in *US – Anti-Dumping Methodologies (China)* nonetheless remain "relevant for the present dispute as the same mechanism applies to non-NME situations".[1856] However, Korea offers no further explanation as to why "the same mechanism applies to non-NME situations" at issue in the present dispute.

7.630. Finally, we note that the panel's findings in that dispute were based on "73 determinations [placed] on the record [by China] where the NME-wide entity was found to be non-cooperating" prior to the 2015 TPEA Amendment.[1857] By contrast, as discussed below, Korea submits a tabular summary and a "representative sample" of determinations in which the USDOC used "adverse facts available" since the 2015 TPEA Amendment.[1858] In these circumstances, we consider the panel's finding in *US – Anti-Dumping Methodologies (China)* concerning the precise content of the measure challenged in that dispute to be of limited relevance for purposes of establishing the existence of the alleged unwritten measure with the precise content alleged by Korea in these proceedings.

7.631. Korea submits that the panel and Appellate Body findings in *US – Supercalendered Paper* also confirm the use of "adverse facts available" as "ongoing conduct".[1859] In that dispute, Canada successfully challenged, as "ongoing conduct", the "Other Forms of Assistance-AFA measure", which consisted of "the USDOC asking the 'other forms of assistance' question and, where the USDOC 'discovers' information that it deems should have been provided in response to the above question, applying AFA with respect to the respondent to determine that the 'discovered' information amounts to countervailable subsidies".[1860]

7.632. We note that the measure at issue in *US – Supercalendered Paper* was notably different from – and narrower than – the alleged unwritten measure challenged by Korea in these proceedings. The "ongoing conduct" measure in that dispute was limited to a fact pattern that could be triggered by a response to a specific question posed to a respondent during the course of countervailing duty investigations.[1861] By contrast, the alleged unwritten measure at issue in the

[1852] Korea's response to Panel question No. 104, para. 129.
[1853] *US – Anti-Dumping Methodologies (China)*, request for the establishment of a panel by China, p. 4.
[1854] Panel Report, *US – Anti-Dumping Methodologies (China)*, para. 7.422. (emphasis original)
[1855] Korea' second written submission, para. 183.
[1856] Korea' second written submission, para. 377.
[1857] Panel Report, *US – Anti-Dumping Methodologies (China)*, para. 7.452.
[1858] Korea's first written submission, para. 919.
[1859] Korea's first written submission, section V.5.3; opening statement at the second meeting of the Panel, para. 111.
[1860] Panel Report, *US – Supercalendered Paper*, para. 7.308.
[1861] Panel Report, *US – Supercalendered Paper*, para. 7.295.

present dispute is limited neither to the USDOC posing a specific question, nor to the conduct of countervailing duty investigations. Contrary to Korea's arguments, we find nothing in the panel and Appellate Body reports in *US – Supercalendered Paper* to suggest that the "same reasoning applies to this dispute and Korea's challenge of the USDOC's use of AFA in cases of non-cooperation more generally".[1862]

7.633. We recall that panels must "*not lightly assume* the existence"[1863] of an unwritten measure and must exercise "*[p]articular rigour* … to support a conclusion as to the existence of a 'rule or norm' that is *not* expressed in the form of a written document".[1864] In keeping with these duties, our findings on the existence of an unwritten measure cannot be based on certain general observations made by panels and the Appellate Body in prior WTO disputes. The precise content and scope of the alleged unwritten measure identified by Korea in this dispute are different from that of the measures challenged in prior WTO disputes. The evidence that Korea adduces is also not exactly the same as the evidence that was examined in these past cases. In *US – Carbon Steel (India)*, the Appellate Body examined a claim against *written* US legislation and emphasized that India did not challenge an unwritten practice. Given the Appellate Body's limited engagement with the factual question of the existence of such a practice, its observations in that dispute cannot, in our view, demonstrate the existence of the alleged *unwritten* measure identified by Korea in this dispute. The measures at issue in *US – Anti-Dumping Methodologies (China)* and *US – Supercalendered Paper* were also limited to a significantly narrower set of circumstances and situations in contrast to the broad scope of the alleged unwritten measure challenged by Korea in these proceedings, which is triggered upon a finding of non-cooperation by the USDOC in *any* circumstance and on *any* question or issue.

7.634. Even if the measures at issue were the same – which they are not – we note that "factual findings made in prior disputes do not determine facts in another dispute".[1865] Although "[e]vidence adduced in one proceeding, and admissions made in respect of the same factual question about the operation of an aspect of municipal law, may be submitted as evidence in another proceeding", panels, as the "finders of fact[,] are of course obliged to make their own determination afresh and on the basis of all the evidence before them".[1866] Only if the "critical evidence is the same and the factual question about the operation of domestic law is the same", is it "likely that the finder of facts would reach similar findings in the two proceedings".[1867] In these circumstances, we cannot agree with Korea that these prior WTO disputes "confirmed the existence of the United States' AFA Norm or similar AFA Ongoing Conduct" nor that they "confirm the claims made by Korea about the use of AFA as a Norm or as a form of Ongoing Conduct".[1868] We now turn to examine the specific arguments and evidence presented by Korea in these proceedings to establish the existence of the alleged unwritten measure at issue.

7.4.5 Whether Korea has established the existence of the AFA rule or a norm with the precise content alleged by it

7.635. When an unwritten rule or a norm is challenged "as such", a complainant is required to adduce arguments and supporting evidence to demonstrate the precise content, attribution, and general and prospective nature of the rule or norm.[1869] We therefore begin by examining whether Korea has established the existence of the unwritten measure with the precise content alleged by it. To this end, Korea presents arguments and evidence concerning (i) statutory provisions of US law, namely Section 776 of the Tariff Act of 1930 (9 U.S.C 1677 (e)), as amended by the 2015 TPEA Amendment[1870]; (ii) the USDOC Anti-Dumping Manual[1871]; (iii) certain rulings by US courts[1872]; and (iv) certain anti-dumping and countervailing duty determinations by the USDOC.[1873] We address

[1862] Korea's first written submission, para. 1000.
[1863] Appellate Body Report, *US – Zeroing (EC)*, para. 196. (emphasis added)
[1864] Appellate Body Report, *US – Zeroing (EC)*, para. 198 (first italics added; second italics original). See also para. 7.609 above.
[1865] Appellate Body Report, *US – Continued Zeroing*, para. 190.
[1866] Appellate Body Report, *US – Continued Zeroing*, para. 190.
[1867] Appellate Body Report, *US – Continued Zeroing*, para. 190.
[1868] Korea's first written submission, para. 962.
[1869] Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.127.
[1870] Korea's first written submission, paras. 897-909.
[1871] Korea's first written submission, para. 912.
[1872] Korea's first written submission, paras. 920-921.
[1873] Korea's first written submission, paras. 913-919.

these different bases in turn, beginning with the written instruments and rulings that Korea invokes before examining the USDOC's alleged practice.

7.4.5.1 Written instruments and rulings

7.4.5.1.1 Statutory provisions of US law

7.636. Korea relies upon Section 776 of the Tariff Act (19 U.S.C 1677 (e)) as modified by the 2015 TPEA Amendment, which reads as follows:

> **(a) In general**
>
> If –
>
> (1) necessary information is not available on the record, or
>
> (2) an interested party or any other person –
>
> (A) withholds information that has been requested by the administering authority or the Commission under this subtitle,
>
> (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 1677m of this title,
>
> (C) significantly impedes a proceeding under this subtitle, or
>
> (D) provides such information but the information cannot be verified as provided in section 1677m(i) of this title,
>
> the administering authority and the Commission shall, subject to section 1677m(d) of this title, use the facts otherwise available in reaching the applicable determination under this subtitle.
>
> **(b) Adverse inferences**
>
> **(1) In general**
>
> If the administering authority or the Commission (as the case may be) finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority or the Commission, the administering authority or the Commission (as the case may be), in reaching the applicable determination under this subtitle –
>
> (A) may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available; and
>
> (B) is not required to determine, or make any adjustments to, a countervailable subsidy rate or weighted average dumping margin based on any assumptions about information the interested party would have provided if the interested party had complied with the request for information.
>
> **(2) Potential sources of information for adverse inferences**
>
> An adverse inference under paragraph (1)(A) may include reliance on information derived from –
>
> (A) the petition,
>
> (B) a final determination in the investigation under this subtitle,

(C) any previous review under section 1675 of this title or determination under section 1675b of this title, or

(D) any other information placed on the record.

(c) Corroboration of secondary information

(1) In general

Except as provided in paragraph (2), when the administering authority or the Commission relies on secondary information rather than on information obtained in the course of an investigation or review, the administering authority or the Commission, as the case may be, shall, to the extent practicable, corroborate that information from independent sources that are reasonably at their disposal.

(2) Exception

The administrative authority and the Commission shall not be required to corroborate any dumping margin or countervailing duty applied in a separate segment of the same proceeding.

(d) Subsidy rates and dumping margins in adverse inference determinations

(1) In general

If the administering authority uses an inference that is adverse to the interests of a party under subsection (b)(1)(A) in selecting among the facts otherwise available, the administering authority may –

(A) in the case of a countervailing duty proceeding –

(i) use a countervailable subsidy rate applied for the same or similar program in a countervailing duty proceeding involving the same country; or

(ii) if there is no same or similar program, use a countervailable subsidy rate for a subsidy program from a proceeding that the administering authority considers reasonable to use; and

(B) in the case of an antidumping duty proceeding, use any dumping margin from any segment of the proceeding under the applicable antidumping order.

(2) Discretion to apply highest rate

In carrying out paragraph (1), the administering authority may apply any of the countervailable subsidy rates or dumping margins specified under that paragraph, including the highest such rate or margin, based on the evaluation by the administering authority of the situation that resulted in the administering authority using an adverse inference in selecting among the facts otherwise available.

(3) No obligation to make certain estimates or address certain claims

If the administering authority uses an adverse inference under subsection (b)(1)(A) in selecting among the facts otherwise available, the administering authority is not required, for purposes of subsection (c) or for any other purpose –

(A) to estimate what the countervailable subsidy rate or dumping margin would have been if the interested party found to have failed to cooperate under subsection (b)(1) had cooperated; or

> (B) to demonstrate that the countervailable subsidy rate or dumping margin used by the administering authority reflects an alleged commercial reality of the interested party.[1874]

7.637. Korea makes clear that it does not challenge the written law "as such", but instead relies upon the text of the statute to make the limited point that it:

> [P]rovides the express *permission* for the USDOC to act the way it does. Although the statute may not *require* the WTO-inconsistent behavior, it does describe the practice of the USDOC and *gives discretion* to the USDOC to act in this incompliant manner by, for example, expressly relieving the USDOC of certain tasks of corroboration and special circumspection. It is not because Korea ultimately decided to focus its claim on the unwritten measure that the written permission for the measure becomes irrelevant for purposes of describing the specific contents of the measure.[1875]

7.638. The United States considers it "nonsensical" that Korea seeks to prove the existence of an unwritten measure, by reference to a written law.[1876] According to the United States, "Korea has not pursued a claim against any provision of the U.S. statute, which of course is a written measure. Therefore, the contents of this statute do not support the alleged existence of an *unwritten* measure with the precise content reflecting Korea's description in its panel request".[1877]

7.639. We agree with previous findings to the effect that the specific measure challenged and how it is described and characterized by a complainant will determine the kind of evidence the complainant is required to submit and the elements that it must prove in order to establish the existence of the measure.[1878] We note that, as part of identifying the unwritten measure in its panel request, Korea provides the following explanation:

> The use of adverse facts available has been consistently applied by the USDOC and is undertaken pursuant to: (i) Section 502 of the Trade Preferences Extension Act of 2015, Pub. L. No. 114-27; (ii) Section 776 of the Tariff Act of 1930, codified at 19 U.S.C. § 1677e; and (iii) the implementing regulations of the USDOC in 19 C.F.R. § 351, including in particular section 308.[1879]

7.640. Korea clearly indicates that, although it is not challenging the written legislation individually and "as such", the alleged unwritten measure is undertaken pursuant to the "discretion" or "permission" granted under the written legislation. Contrary to the United States, we see nothing "nonsensical" insofar as Korea seeks to rely upon the text of a written measure for the limited purpose clearly stated by it. We see no compelling reason as to why, in challenging unwritten measures, complainants should *a priori* be precluded from relying on the text of a written measure as evidence. Rather, what is important is the manner in which a complainant relies on the written measure as evidence in support of its arguments concerning the existence of the unwritten measure.

7.641. Turning to the legislation, Korea explains that "[p]rior to the enactment of the TPEA, the USDOC and the USITC … possessed the authority under 19 U.S.C. 1677e(i) to make determinations on the basis of facts available, in line with Article 6.8 of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement". According to Korea, the "TPEA Amendment[] made a number of key changes to U.S. law that significantly altered the manner in which the authorities make such determinations".[1880] Specifically, Korea avers that the "checks and balances that may have existed in the past, have been removed by the TPEA amendment[], leading to the use of AFA as a rule or norm with general and prospective application, or as ongoing conduct", that violates the relevant provisions of the covered agreements.[1881] On this basis, Korea asserts that the

[1874] Section 776 of the Tariff Act, (Exhibit KOR-245), pp. 1-2.
[1875] Korea's second written submission, para. 374. (italics original; underlining added)
[1876] United States' first written submission, para. 440.
[1877] United States' second written submission, para. 141. (emphasis original)
[1878] Appellate Body Reports, *Argentina – Import Measures*, para. 5.110.
[1879] Korea's panel request, fn 1.
[1880] Korea's first written submission, paras. 898-899.
[1881] Korea's response to Panel question No. 40(a).

2015 TPEA Amendment "essentially *codified* and *supported* the existing practice of the USDOC and are a *good reflection* of the precise content of the AFA Norm or Ongoing Conduct".[1882]

7.642. The United States, for its part, "strongly maintains" that "no provision in the TPEA, whether in isolation or in combination with another provision, breaches the covered Agreements".[1883] According to the United States, because the various statutory provisions raised by Korea are "inherently limited to particular contexts that do not exist in all or even most cases, they most certainly cannot be relied upon to demonstrate the as such WTO-inconsistency of an unwritten measure".[1884]

7.643. Although the written legislation identified by Korea contains many provisions, for purposes of establishing the precise content of the alleged unwritten measure, Korea relies on certain changes made by the 2015 TPEA Amendment with a view to identifying the "most important points" for its case.[1885]

7.644. First, according to Korea, subsection (d) allows competent authorities to "use as the 'facts otherwise available' a countervailable subsidy rate or dumping margin meeting, including the highest rate or margin, when making an inference adverse to a party's interests". Relatedly, according to Korea, competent authorities are now "permitted to use a subsidy rate for a subsidy program from any proceeding that the authority considers reasonable, irrespective of the fact that such rates are obviously company specific and may thus not be pertinent to the producer or exporter under examination".[1886]

7.645. Second, Korea points out that, under subsection (c)(2), competent authorities are no longer "required to corroborate any dumping margin or subsidy rate as soon as it has already been applied in a separate segment of the same proceeding, and this irrespective of whether the facts and other available information is different from what prevailed at the time of that prior determination".[1887] Third, and finally, Korea considers that, under the amended law, competent authorities are no longer "required to determine, or make any adjustments to, a countervailable subsidy rate or dumping margin based on any assumptions about information the interested party would have provided or that otherwise represents the 'commercial reality' of the interested party if it had complied with a request for information".[1888]

7.646. It is clear that our task is not to examine whether these provisions or aspects thereof are "as such" inconsistent with the applicable provisions of the covered agreements. We recall in this regard that although Korea included an "as such" claim of WTO-inconsistency against the 2015 TPEA Amendment, it subsequently decided not to pursue this "as such" claim against the written legislation, focusing instead on its claim against the alleged unwritten measure.[1889] Therefore, we limit our analysis to examining the factual conclusions that Korea seeks to draw based on the written legislation for purposes of establishing the precise content of the alleged unwritten measure.

7.647. As to Korea's first point, we note that subsection (d) – entitled "Subsidy rates and dumping margins in adverse inference determinations" – *permits* competent authorities, when using adverse inferences in "selecting from the facts otherwise available", to engage in certain conduct. Specifically, for countervailing duty proceedings, competent authorities using adverse inferences "may" "(i) use a countervailable subsidy rate applied for the same or similar program in a countervailing duty proceeding involving the same country; or (ii) if there is no same or similar program, use a countervailable subsidy rate for a subsidy program from a proceeding that the administering authority considers reasonable to use". In the case of anti-dumping proceedings, competent

[1882] Korea's first written submission, para. 909. (emphasis added)
[1883] United States' second written submission, para. 149.
[1884] United States' second written submission, para. 149.
[1885] Korea's first written submission, para. 907.
[1886] Korea's first written submission, paras. 904 and 907.
[1887] Korea's first written submission, paras. 902 and 907.
[1888] Korea's first written submission, paras. 906-907.
[1889] Korea's second written submission, para. 374; response to Panel question No. 40(c); comments on draft descriptive part, para. 1.

authorities "may" "use any dumping margin from any segment of the proceeding under the applicable antidumping order".

7.648. Korea alleges that "[t]his change permits the USDOC to apply an adverse dumping margin or subsidy rate *without having to exercise reason and judgment* or to demonstrate otherwise the *reasonableness* of the adverse rate selected for purposes of arriving at an accurate determination".[1890] We note, however, that, in the case of countervailing duty proceedings, subsection (d)(1)(A)(ii) permits competent authorities to "use a countervailable subsidy rate for a subsidy program from a proceeding that the *administering authority considers reasonable to use*" in cases where there "is no same or similar program".[1891] In our view, contrary to Korea's position, this provision does not wholly preclude the exercise of reason and judgment by a competent authority in such cases.

7.649. In a similar fashion, subsection (d)(2) – entitled "Discretion to apply highest rate" – provides that competent authorities "may" apply any of the countervailable subsidy rates or dumping margins specified above, "including the highest such rate or margin, *based on the evaluation by the administering authority of the situation that resulted in the administering authority using an adverse inference in selecting among the facts otherwise available*".[1892] Thus, in *permitting* investigating authorities to select various rates or margins, including the highest, the provision requires that this be "based on the evaluation" by the investigating authority of the procedural circumstances surrounding non-cooperation in selecting "among the facts otherwise available". This is important not only because it implies reasoning and evaluation on the part of the competent authority, but also because one of the key features of the unwritten measure identified by Korea is that the USDOC draws "adverse inferences" *without taking* into account the procedural circumstances of non-cooperation.

7.650. Korea's second point concerns subsection (c)(2), which sets out the "exception" to the "corroboration of secondary information". The provision states that competent authorities "shall not be required to corroborate any dumping margin or countervailing duty applied in a separate segment of the same proceeding". According to Korea, competent authorities can thus rely upon a margin or a duty from a separate segment of the same proceeding without "corroboration", "even if it is based on secondary source information".[1893] We agree with Korea that the provision makes clear that competent authorities "shall *not be required* to corroborate any dumping margin or countervailing duty applied in a separate segment of the same proceeding".[1894]

7.651. Korea's third and final point concerns subsection (d)(3) – entitled "No obligation to make certain estimates or address certain claims". When using an "adverse inference … in selecting among the facts otherwise available", this provision makes clear that competent authorities are not required "to estimate what the countervailable subsidy rate or dumping margin would have been" if the interested party had cooperated; or, "to demonstrate that the countervailable subsidy rate or dumping margin used by the administering authority reflects an *alleged commercial reality* of the interested party".[1895]

7.652. While we note these aspects of the provision, we find it difficult to draw any meaningful conclusions from them in the abstract. Although the term "alleged commercial reality" may be used under US law, we note that it is not found in the covered agreements and Korea does not engage with its meaning and implications in greater detail as part of its discussion of the written legislation. This, together with the fact that Korea does not challenge this specific provision on an "as such" basis, prevents us from drawing any comparisons between the concept of "commercial reality" under the written legislation and the "reasonableness" of the replacement facts under the covered agreements.

7.653. Having addressed the specific points raised by Korea for purposes of establishing the precise content of the unwritten measure, we now turn to the general conclusions that Korea draws based upon the text of the provision. First, Korea concludes that the provision "gives *full discretion* to the

[1890] Korea's first written submission, para. 907. (emphasis added)
[1891] Emphasis added.
[1892] Emphasis added.
[1893] Korea's first written submission, para. 902.
[1894] Emphasis added.
[1895] Emphasis added.

authorities to apply the highest rate or margin available from among the available dumping margins or countervailable subsidy rates, without the need to corroborate such margins".[1896] As discussed above, however, this is not entirely accurate inasmuch as the provision allows the selection of the highest rate or margin "based on the evaluation by the administering authority of the situation that resulted in the administering authority using an adverse inference in selecting among the facts otherwise available". Contrary to Korea's conclusion, the discretion available to the competent authorities in such cases is not "full" or entirely unbounded, as the provision clearly requires an evaluation of the particular situation of non-cooperation leading to the use of the facts available in a given investigation.

7.654. Second, Korea asserts that the provision "essentially codified and supported the existing practice of the USDOC" and is therefore "a good reflection of the precise content of the AFA Norm or Ongoing Conduct".[1897] We find nothing in the statutory text to suggest that the provision somehow "codifies" the "existing practice" of the USDOC. Korea does not offer any further explanation or evidence in support of its assertion. The written legislation does not show how frequently the discretion available thereunder to the USDOC is actually exercised in a WTO-inconsistent manner. This is an essential aspect of Korea's alleged unwritten measure. That said, we note the various permissive aspects of the written legislation that Korea highlights insofar as they bear upon the USDOC's selection of replacement facts and are relevant to understanding what Korea describes as the "written permission" for the alleged unwritten norm.

7.4.5.1.2 USDOC Anti-Dumping Manual

7.655. The next piece of evidence that Korea relies upon to establish the existence of the unwritten measure with the precise content alleged by it is the USDOC Anti-Dumping Manual, which is "used for the 'internal training and guidance of Enforcement and Compliance (E&C) personnel'".[1898] Specifically, Korea quotes the following excerpt from the USDOC Anti-Dumping Manual:

> [I]f the respondent has not cooperated to the best of its ability in supplying information, E&C can make an adverse inference in choosing which facts to use. The potential use of adverse facts available gives respondents incentive to cooperate fully in providing the information requested by E&C.[1899]

The United States points out that the USDOC Anti-Dumping Manual expressly disclaims that it "cannot be cited to establish DOC practice".[1900]

7.656. Besides the issue of the normative value of the Anti-Dumping Manual – which is also relevant for analysing the general and prospective nature of the alleged unwritten norm – for present purposes, we note that the excerpt quoted by Korea envisages that the USDOC "*can make* an adverse inference in choosing which *facts* to use".[1901] Thus, not only is it cast in permissive terms when envisaging the use of "adverse inferences", but it also suggests that such inferences are aimed at "choosing which *facts* to use". In keeping with the permissive nature of the text, the second sentence refers to the "*potential* use" of "adverse facts available" as providing an "incentive" to respondents "to cooperate fully in providing the information requested". We find nothing in the excerpt *requiring* the selection of facts by the USDOC that are adverse to the interests of the non-cooperating party based solely on a finding of non-cooperation, which, as discussed above, is an important feature of the alleged unwritten measure identified by Korea. As discussed below, we also note that the alleged unwritten measure identified by Korea is not described in terms of the USDOC's "policy" of using "adverse facts available" as an "incentive to cooperate".[1902] In these circumstances, we consider the single excerpt from the USDOC Anti-Dumping Manual that Korea cites to be of limited utility for demonstrating the "precise content" of the alleged unwritten measure.

[1896] Korea's first written submission, para. 909. (emphasis added)
[1897] Korea's first written submission, para. 909.
[1898] Korea's first written submission, para. 912 (quoting USDOC Anti-Dumping Manual, (Exhibit KOR-226), pp. 1 and 4).
[1899] Korea's first written submission, para. 912 (quoting USDOC Anti-Dumping Manual, (Exhibit KOR-226), pp. 1 and 4).
[1900] United States' second written submission, fn 233 (quoting USDOC Anti-Dumping Manual, (Exhibit KOR-226), p. 1).
[1901] Emphasis added.
[1902] See paras. 7.658-7.659 below.

7.4.5.1.3 Rulings by US courts

7.657. Korea asserts that "[s]everal rulings of the [USCIT] and the U.S. Court of Appeals for the Federal Circuit ('USCAFC') are consistent with the description of the contents of" the alleged unwritten measure.[1903] Referring to court rulings between 2000 and 2017, Korea asserts that US courts have confirmed that when resorting to the use of facts available, the USDOC relies on various "secondary" sources of information (the petition, the final determination from the investigation, prior administrative reviews, or any other information placed on the record) to select a proxy that should be a "reasonably accurate estimate of the respondent's actual rate, *albeit with some built-in increase intended as a deterrent to noncompliance*".[1904] Based solely on this excerpt, Korea argues that "[e]ven according to the U.S. courts, therefore, the drawing of adverse inferences seeks to induce cooperation by respondents".[1905] The United States, for its part, responds that US courts "have stated unambiguously that, under U.S. law, application of adverse inferences in resorting to facts available cannot be punitive".[1906]

7.658. We note, first, that, somewhat contrary to Korea's arguments that the USDOC "consistently does not seek to replace the missing information with the facts otherwise available in order to arrive at an accurate determination"[1907], the excerpt from the US court rulings that Korea relies upon expressly recognizes that selected replacement facts should be a "*reasonably accurate estimate* of the respondent's actual rate".[1908] Korea does not explain how this language supports the existence of its alleged unwritten measure. Korea also does not address the United States' assertion that its courts have stated that the application of "adverse inferences" cannot be "punitive". Second, insofar as Korea argues that "the drawing of adverse inferences seeks to induce cooperation by respondents"[1909], we note that the question before us is not whether and to what extent the mechanism of "facts available" can generally be used to "induce cooperation". As discussed above, the alleged unwritten measure identified by Korea has several interlinked aspects that must each be demonstrated for the alleged unwritten measure to exist. The measure is not described in terms of a "policy" or "tool" of using "adverse facts available" or a "built-in increase" to incentivize cooperation. Korea can, of course, seek to rely upon the "policy" underlying the measure to establish certain aspects, such as its allegedly general and prospective nature, but this is not enough to discharge its burden of establishing the existence of the unwritten measure with the precise content alleged by it.

7.659. We also note that Korea acknowledges that the "degree of cooperation is something that can be taken into consideration in the weighing and balancing of different pieces of information and evidence on the record".[1910] Amongst the third parties, the European Union "agrees … that the use of adverse inferences is not necessarily inconsistent, in all circumstances, with Article 6.8 of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement" and "that the use of adverse inferences … would be justified in cases of fraud or total lack of cooperation by the producer or exporter in question".[1911] Pointing out that "Annex II of the Anti-Dumping Agreement contemplates the possibility that the use of facts available may result in a less favourable outcome for an interested party", Canada – another third party – submits that this "d[oes] not preclude the use of adverse inferences in all situations".[1912] In these circumstances, and given the alleged unwritten measure

[1903] Korea's first written submission, para. 920.
[1904] Korea's first written submission, para. 921 (quoting Essar Steel Ltd. v. United States, (Exhibit KOR-175), p. 1373, in turn quoting De Cecco Di Filippo Fara. S. Martino v. United States, (Exhibit KOR-176), p. 1032; Özdemir Boru San. ve Tic. Ltd. Sti. v. United States, (Exhibit KOR-177), p. 1245, in turn quoting De Cecco Di Filippo Fara. S. Martino v. United States, (Exhibit KOR-176), p. 1032; and Lifestyle Enterprise, Inc. v United States, (Exhibit KOR-178), p. 1298, in turn quoting De Cecco Di Filippo Fara. S. Martino v. United States, (Exhibit KOR-176), p. 1032 (emphasis original)).
[1905] Korea's first written submission, para. 921.
[1906] United States' second written submission, para. 195; first written submission, para. 485 (referring to Viet I-Mei Frozen Foods Co. v. United States, (Exhibit USA-61), pp. 11-12).
[1907] Korea's first written submission, para. 880.
[1908] Emphasis added.
[1909] Korea's first written submission, para. 921.
[1910] Korea's response to Panel question No. 50, para. 10. See also Korea's response to Panel question No. 44 (noting that "a reasonable degree of inference is warranted in order to prevent the party from benefiting from its non-cooperation" and that "drawing an adverse inference in the ordinary sense is still aimed at achieving a reasonably accurate result and is part of a process of reasoning and evaluation of all of the evidence and facts on the record").
[1911] European Union's third-party submission, para. 81.
[1912] Canada's third-party submission, para. 18.

specifically identified by Korea, we do not consider that a single quote from court rulings recognizing that the replacement facts must be a "reasonably accurate estimate", albeit with a "built-in increase" to promote compliance, suffices to demonstrate the precise content of the alleged unwritten measure or the "policy" underlying such a measure.

7.4.5.2 The USDOC's alleged "practice"

7.660. Korea submits that the existence of the unwritten measure with the precise content alleged by it is "established" and "confirmed" by the way the USDOC has "repeatedly and consistently exercised its discretion" in the use of "adverse facts available" since the enactment of the 2015 TPEA Amendment.[1913] In support of its assertion, Korea submits a "list of all [319] proceedings in which AFA was used since the amendment[] of Section 502 of the TPEA".[1914] Furthermore, as a "representative sample", Korea presents an "overview table of 12 cases involving different products related to determinations made at different times, which all confirm the precise content" of the alleged unwritten measure and "reflect the automatic link between a finding of a failure to cooperate … and the drawing of adverse inferences".[1915]

7.661. The United States points out that "Korea's approach, as a logical matter, is fundamentally incapable of demonstrating the conclusion it draws".[1916] According to the United States, Korea's list starts with all 319 cases in which adverse inferences allegedly were applied, and its assertion that all but 13 cases included some language regarding failure to cooperate "simply shows the frequency of non-cooperation findings in those 319 cases".[1917] However, it is "incapable of establishing the frequency with which [the] USDOC applies adverse inferences when it finds non-cooperation", because, "[a]t minimum, one would need to start with the universe of instances in which [the] USDOC found non-cooperation, and then measure how often within the context of those instances [the] USDOC applied adverse inferences".[1918] The United States identifies several other methodological issues with Korea's approach and takes issue with its "conclusory" and "unsupported" statements and assertions.[1919]

7.662. As to the "representative sample" of 12 cases offered by Korea, the United States highlights that "Korea does not indicate how it chose these 12 determinations or on what basis the Panel could conclude that they are representative of other determinations". According to the United States, "[i]dentifying 12 determinations, out of hundreds that Korea itself cites, simply cannot support the existence of some sort of unwritten measure of general and prospective application".[1920] Moreover, the United States presents examples of the USDOC's practice which, in its view, establish that whenever it finds non-cooperation the USDOC does not (a) always make adverse inferences[1921]; and (b) cease to engage in any reasoning and evaluation and uses the finding of non-cooperation as the sole basis of selecting the replacement facts.[1922]

7.663. We recall that the only alleged unwritten measure at issue in this dispute is the one identified in Korea's panel request.[1923] Our task is therefore to examine whether the USDOC's practice that Korea relies upon establishes the existence of the unwritten measure with the precise content alleged by Korea.

7.664. Turning to the database of 319 cases, Korea submits that this is a list of "all *proceedings* in which AFA was used" by the USDOC since the 2015 TPEA Amendment.[1924] The United States points

[1913] Korea's first written submission, paras. 910 and 913.
[1914] Korea's first written submission, para. 916.
[1915] Korea's first written submission, para. 919.
[1916] United States' first written submission, para. 473.
[1917] United States' first written submission, para. 472.
[1918] United States' first written submission, para. 472. See also United States' second written submission, para. 187 (noting that "[a]n analogy would be if Korea maintained that whenever an animal has legs (trigger), it is a spider (consequence). Obviously, the correct way to test that would be start to with a set of animals that have legs (*i.e.*, the trigger). If every animal is indeed a spider, then one may conclude that whenever an animal has legs, it is a spider.")
[1919] United States' first written submission, paras. 474-476.
[1920] United States' first written submission, para. 483.
[1921] United States' second written submission, paras. 152-165.
[1922] United States' second written submission, paras. 166-179.
[1923] See para. 7.597 above.
[1924] Korea's first written submission, para. 916. (emphasis added)

out that, "[o]f the 319 cases listed … Korea double counts 59 cases. Specifically, Korea repeatedly counts the same case once as a preliminary determination, and a second time as a final determination".[1925] Our assessment of the list provided by Korea reveals that, as pointed out by the United States, Korea treats the preliminary and final determinations in the same investigation as two different "cases" or items for purposes of its database.[1926] It is therefore more accurate to describe Korea's database as comprising of 319 determinations – both preliminary and final – and not 319 investigations or proceedings.

7.665. As to the United States' argument that Korea's "statistical analysis" is logically flawed[1927], we note that Korea's begins with a "list of *all* [319] proceedings *in which AFA was used* since the amendment[] of Section 502 of the TPEA"[1928], and asserts that "all of these cases clearly show a failure to cooperate in substance".[1929] We see merit in the United States' argument that beginning with a list of all instances when "adverse facts available" were used by the USDOC is insufficient to fully and definitively establish the *automatic* causal link between a finding of non-cooperation and the use of "adverse facts available" that Korea needs to establish.[1930] As discussed above, the finding of non-cooperation is an important aspect of the alleged unwritten measure because it serves as the "trigger" and defines the universe of situations in which the alleged unwritten measure applies. Therefore, in order to successfully establish the "automatic link" between a finding of non-cooperation and the use of "adverse facts available", a more sound approach would have been to begin with a list of all cases in which a finding of non-cooperation was made and then ascertain whether "adverse facts available" were used in all such cases.

7.666. As to the contents of the database, Korea explains that the initial list of 319 determinations submitted to the Panel as Exhibit KOR-216 is "broken down by: Product; Country; Whether it concerns and anti-dumping or countervailing duty proceeding (AD/CVD); Whether it concerns an Investigation or a Review; Date; Federal Register citation; and Whether it involves a Non Market Economy ('NME') situation or a market situation".[1931] In response to questioning by the Panel, Korea submits a revised "list of cases involving AFA, this time with two new columns indicating where a reference to AFA as a 'practice' is being made and a brief summary of the 'practice' related language for each of these".[1932]

7.667. In its first written submission, Korea explains that, "[i]n all but 13 cases, the USDOC included standard language regarding a party's 'failure to cooperate' by failing to act to the best of its abilities in terms of responding to certain request for information from the USDOC".[1933] Moreover, in "virtually all of the 306 cases in which the language was included, the use of this language was boilerplate, and the USDOC was citing to the statutory provisions and requirements for an application of AFA in line with Section 776 of the Tariff Act of 1930, as amended".[1934] According to Korea, the "consequence in all of these cases was the drawing of adverse inferences in the sense that the allegedly missing information was replaced with facts otherwise available that would ensure a result that was adverse to the interests of the foreign producer or exporter in question".[1935]

7.668. In response to questioning by Panel with respect to the 13 instances in the initial list where the USDOC did not include standard language regarding "failure to cooperate", Korea explains that it subsequently "discovered that in four of them, the USDOC did actually use the standard boilerplate language about the failure to cooperate".[1936] According to Korea, "[t]his discovery is due to the fact that [it] had originally conducted [its] research based on LexisNexis which [it] understood to have included both the Federal Register and the Issues & Decision Memorandum for each case".[1937]

[1925] United States' second written submission, para. 193 (referring to List of duplicative cases in KOR-216, (Exhibit USA-96 (revised)) (fn omitted)).
[1926] List of AFA proceedings, (Exhibit KOR-216 (revised)); List of duplicative cases in KOR-216, (Exhibit USA-96).
[1927] See, e.g. United States' second written submission, paras. 185-189.
[1928] Korea's first written submission, para. 916. (emphasis added)
[1929] Korea's response to Panel question No. 45.
[1930] United States' second written submission, paras. 185-186.
[1931] Korea's first written submission, para. 917.
[1932] Korea's response to Panel question No. 45, fn 128; List of AFA proceedings, (Exhibit KOR-216 (revised)).
[1933] Korea's first written submission, para. 918.
[1934] Korea's first written submission, para. 918.
[1935] Korea's first written submission, para. 918.
[1936] Korea's response to Panel question No. 45. (fn omitted)
[1937] Korea's response to Panel question No. 45. (fn omitted)

However, it "found out that this was not always the case" and "upon examination of the final Issues & Decision Memorandum for these cases, [it] found that in four of them, the USDOC did actually make an express finding of a failure to cooperate".[1938] Korea asserts that, in any event, "all of these cases clearly show a failure to cooperate in substance" and the "few cases in which the boilerplate language is not used in extenso are thus equally based on the automatic link between non-cooperation and the use of AFA".[1939] For Korea, statistics thus support the "conclusion that non-cooperation *equals the use* of AFA, which in turn means the use of information that is sufficiently adverse to the interests of the producer or exporter in question".[1940]

7.669. The database of 319 determinations provided by Korea contains a variety of information. For each of the 319 listed items, it indicates the "product" concerned (column A); the "country" at issue (column B); whether it is in the context of an anti-dumping or countervailing duty investigation (column C); whether it concerns an original investigation or a review proceeding (column D); whether it represents a preliminary or a final determination (column E); the date of the determination (column F); the US "Federal Register" citation for the determination (column G); whether it involves a non-market economy (NME) or "market" situation (column H); whether the interested party "didn't respond" (column I – coded as "yes", "no", "yes (in part)", or "both"); and whether the determination includes language concerning the "failure to cooperate" (column J – coded as a "yes" or "no").[1941] The revised list subsequently submitted by Korea adds two columns indicating whether the determinations contain a reference to the "practice" of using "adverse facts available" by the USDOC (column K – coded as a "yes" or "no); and, finally, a "brief summary of the 'practice' related language" used in each determination.[1942]

7.670. As to the information that is contained in Korea's database, we note that for 119 out of the 319 determinations listed, the data in column K indicates that the USDOC made "no" reference to the "practice" of using "adverse facts available".[1943] For the remaining 200 determinations, Korea provides limited excerpts of the "practice-related language" used by the USDOC. Useful as these pieces of information are, we note that Korea's database provides very limited information about the USDOC's actual use of "adverse inferences" or "adverse facts available" in each of the 319 determinations. The limited information contained in the database does not provide full details of crucial aspects of the investigations at issue, including, the "necessary" information that was "missing" from the record; the "facts" that were otherwise available to the USDOC; the procedural circumstances surrounding non-cooperation; how the "facts" selected by the USDOC were "adverse" to the interests of the non-cooperating party; and the USDOC's analysis, if any, in selecting the replacement information. As the United States points out, Korea does not "place the vast majority of these cases on the record of this dispute".[1944] In fact, Korea places on the panel record the full text of the USDOC's analysis in only 28 out of the 319 determinations that are included in its database.[1945]

7.671. The absence of such information in Korea's database and its choice to not place on the record and engage with each of the 319 determinations is particularly problematic because, as we have found[1946], the meaning that Korea ascribes to the terms "adverse inferences" and "adverse facts available" constitute important features of the precise content of the alleged unwritten measure. As discussed, Korea alleges that the USDOC selects facts adverse to the interests of the non-cooperating party based solely on a finding of non-cooperation. Although, based on its database

[1938] Korea's response to Panel question No. 45. (fn omitted)
[1939] Korea's response to Panel question No. 45.
[1940] Korea's first written submission, para. 1011. (emphasis original)
[1941] List of AFA proceedings, (Exhibit KOR-216 (revised)).
[1942] List of AFA proceedings, (Exhibit KOR-216 (revised)). Korea's response to Panel question No. 45, fn 128.
[1943] List of AFA proceedings, (Exhibit KOR-216 (revised)). Korea explains in this regard that "it is of course not at all necessary for the USDOC to use this term in order for Korea to demonstrate the existence of a repeated, frequent, consistent, and extended use of an AFA rule or norm, or ongoing conduct. In the first written submission, Korea already included a number of references to the USDOC itself referring to the AFA 'rule', and to its adverse selection of facts available as its practice in a number of the specific proceedings Korea challenged 'as applied'". (Korea's response to Panel question No. 45 (fn omitted)).
[1944] United States' second written submission, para. 193.
[1945] As discussed in paragraph 7.630 above, we note that, in contrast to Korea's approach in the present dispute, in *US – Anti-Dumping Methodologies (China)*, China placed on the record the full text of the 73 determinations where the "NME-wide entity was found to be non-cooperating". (Panel Report, *US – Anti-Dumping Methodologies (China)*, para. 7.452).
[1946] See paras. 7.617-7.619 above.

of 319 determinations, Korea draws the conclusion "that non-cooperation *equals* the use of AFA"[1947], given the limited information contained in Korea's database, and without access to all of the determinations cited by Korea, we are unable to examine whether the USDOC's use of AFA or "adverse inferences" in these proceedings, in fact, corresponds with the meaning that Korea ascribes to these terms as part of its identification of the precise content of the alleged unwritten measure at issue.

7.672. While the examples of "practice-related" language used by the USDOC in 200 of the 319 determinations cited by Korea may, to some extent, indicate that the USDOC considered the non-cooperation of an interested party as being relevant for its selection of the "facts available", we are unable to find, based on these excerpts alone, that this was the *sole basis* for the USDOC's ultimate selection of the facts available in these determinations. Korea's decision not to place on the Panel record each of the 319 determinations identified by it – let alone engage with them in greater detail – further limits our ability to examine whether the USDOC selected "adverse" facts based *solely* on its finding of non-cooperation, without undertaking further analysis as to the reasonableness of the replacement facts – features that are crucial to the alleged unwritten measure identified by Korea.

7.673. In the absence of the additional information identified above for each of the 319 determinations relied upon by Korea – whether in a tabular form or by providing and discussing the full determinations – the Panel simply cannot examine the manner in and the extent to which the USDOC relied upon its finding of non-cooperation, whether it considered any other facts besides the finding of non-cooperation, whether and how the replacement facts selected were "adverse", and, whether, as alleged by Korea, it did not engage in further reasoning required to select "reasonable replacements" for the missing "necessary" information in the particular circumstances of each case.[1948] In our view, Korea's identification of the specific unwritten measure at issue necessitates these lines of inquiry. For these reasons, we find that the database of 319 determinations provided by Korea is, in and of itself, insufficient to establish the existence of the unwritten measure with the precise content alleged by it.

7.674. In light of these limitations in Korea's discussion of the 319 determinations, we also remain cautious in relying upon Korea's analysis of a limited subset of these cases. We note, for example, that Korea narrows its list of 319 determinations to focus on a subset of 90 determinations in which it alleges there was "at least a partial response by the interested parties to the information requests (i.e. not a complete failure to cooperate)".[1949] In doing so, Korea explains that "it seeks to focus on the *most egregious situation* where the use of AFA as a Norm or as part of Ongoing Conduct is in any case not consistent with the relevant WTO obligations of the United States".[1950] Then, without any further discussion or analysis of these 90 determinations, Korea concludes that, "[i]n all of these 90 cases, the USDOC applied AFA in a mechanistic manner solely based on the finding that party failed to cooperate to the best of its ability and without engaging in the required comparative process of reasoning and evaluation and an assessment of the available facts on the record to identify the facts that lead to an accurate determination".[1951]

7.675. First, without a fuller analysis of the 319 determinations – which is rendered impossible in light of the cursory way in which Korea discusses them – it is difficult for the Panel to assess whether and how the 90 determinations that are short-listed by Korea reflect the "most egregious situation" as well as the utility of such a distinction when challenging "as such" an unwritten measure that is described as having a general and prospective nature.[1952] Moreover, focusing on a subset of determinations in this manner still does not speak to the precise circumstances of each of the 90 determinations beyond what is contained in Korea's original database. In particular, the Panel remains unable to determine whether, in each of the 90 determinations, the USDOC used "adverse inferences" or "adverse facts available" in the sense that Korea describes the precise content of these terms.

[1947] Emphasis added.
[1948] See also Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.178.
[1949] Korea's opening statement at the first meeting of the Panel, para. 144.
[1950] Korea's first written submission, para. 1016. (emphasis added)
[1951] Korea's first written submission, para. 1017.
[1952] See also United States' second written submission, para. 191.

7.676. As part of demonstrating the precise content of the alleged unwritten measure, Korea also presents a table "reflect[ing]" the "specific statements contained in the 12 proceedings" that it focuses on.[1953] Korea's discussion of these 12 cases in the context of the first step of *establishing the existence* of the measure is therefore somewhat limited in this manner. By contrast, Korea addresses these 12 proceedings in considerably greater detail as part of the second step of the analysis which seeks to demonstrate that the unwritten measure *breaches* Article 6.8 and Annex II of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement.[1954]

7.677. Even if we were to agree with Korea and find that the 12 cases discussed in greater detail reflect the precise content of the alleged unwritten measure that is identified by Korea, it remains unclear as to how this conclusion in respect of a limited number of investigations can be used to arrive at a similar finding for the many other determinations in which the USDOC allegedly used "adverse facts available" but for which Korea provides very limited information. Given the overall approach adopted by Korea, we therefore see merit in the United States' argument that "[i]dentifying 12 determinations, out of hundreds that Korea itself cites, simply cannot support the existence of some sort of unwritten measure of general and prospective application".[1955]

7.678. In any event, we do not consider that all of the 12 cases discussed by Korea unequivocally demonstrate the precise content of alleged unwritten measure. For example, in *Heavy walled rectangular welded carbon steel pipes and tubes from Turkey*, the USDOC found numerous discrepancies in the respondent MMZ's reporting of certain information, including, production quantities, general and administrative expenses, financial expenses, indirect selling expenses, CONNUMs, and per-unit product weight for home market sales.[1956] In applying "partial AFA", the USDOC selected the highest transaction-specific margin of the cooperating respondent (Özdemir) and applied it to the non-cooperating respondent (MMZ).[1957] In doing so, the USDOC explained that:

> *While petition rates are permissible as adverse rates in some instances, it is not appropriate to use any of the petition rates here because the [USDOC] is unable to corroborate them.* Therefore, based on record evidence, the [USDOC] has assigned to MMZ as AFA the highest transaction-specific margin, 35.66 percent, of the cooperating company, Ozdemir. It is unnecessary to corroborate this rate because it was obtained in the course of this investigation and, therefore, is not secondary information. *The transaction underlying this dumping margin is neither unusual in terms of transaction quantities nor otherwise atypical*.[1958]

7.679. In our view, the above analysis by the USDOC suggests that, in selecting the replacement facts, it engaged in some reasoning and evaluation. Specifically, the USDOC did not consider it "appropriate" to select the dumping margins in the petition, which were "facts" that were otherwise available to it, precisely because it was "unable to corroborate them". Moreover, in selecting the highest transaction-specific margin from the cooperating respondent, the USDOC explained that the "transaction underlying this dumping margin is neither unusual in terms of transaction quantities nor otherwise atypical".

7.680. In response to questioning by the Panel on this issue, Korea explained that the "mere fact that the USDOC did not opt for the 'worst' information such as in this case the highest margin from the petition is not determinative. *The mechanistic application of a particular practice of selecting margins that ensure an adverse result and the failure to engage in a process of reasoning and evaluation are key*".[1959] Noting that the USDOC "expressly rejected the need to corroborate the information it selected because it was obtained in the course of the investigation and thus allegedly did not constitute 'secondary' information", Korea also points out that "the information from another producer [i.e. Özdemir] is clearly 'secondary' source information for the exporter to which AFA is applied".[1960] Finally, Korea submits that "the lack of 'corroboration' to support the use of the highest

[1953] Korea's first written submission, paras. 922 and 919.
[1954] Korea's first written submission, paras. 1022-1032; Analysis of USDOC cases, (Exhibit KOR-217).
[1955] United States' first written submission, para. 483.
[1956] Heavy welded steel final determination, (Exhibit KOR-163), pp. 9-11.
[1957] Heavy welded steel final determination, (Exhibit KOR-163), p. 6.
[1958] Heavy welded steel final determination, (Exhibit KOR-163), pp. 6-7. (fns omitted; emphasis added)
[1959] Korea's response to Panel question No. 107, para. 163. (emphasis added)
[1960] Korea's response to Panel question No. 107, para. 164.

petition margin … was in fact only a reference to the kind of *meaningless 'corroboration' of checking for anomalies*".[1961]

7.681. Far from establishing that the USDOC's conduct in this investigation reflects the precise content of the alleged unwritten measure, we consider that Korea's responses to the Panel's questions highlight the problem with losing sight of the alleged unwritten measure identified by Korea and the "as such" basis of its challenge. According to the measure identified by Korea, the USDOC selects facts adverse to the interests of the non-cooperating party based solely on a finding of non-cooperation. Yet, the USDOC's analysis in this case shows that its selection of the replacement information was not based solely on its finding of non-cooperation, but was also influenced by its inability to corroborate the margin in the petition. The USDOC also observed that the "transaction underlying this dumping margin is neither unusual in terms of transaction quantities nor otherwise atypical".

7.682. Insofar as Korea considers the USDOC's "mechanistic application of a particular practice of selecting margins" to be the "key", we note that this is not the specific unwritten measure identified by Korea, which hinges, in Korea's own words, upon the "automatic link" between the finding of non-cooperation and the selection of "adverse facts available". Furthermore, Korea also appears to take issue with the USDOC's finding that the information from another producer is not "secondary" and therefore does not need to be "corroborated"; for Korea, this "clearly" constitutes secondary source information. This raises the important question of what constitutes "information from a secondary source" within the meaning of paragraph 7 of Annex II to the Anti-Dumping Agreement. However, elsewhere in its responses, Korea also expressly "agrees with the United States that the Panel does not need to come up with a general definition of the term 'secondary source' information" in interpreting paragraph 7 of Annex II.[1962]

7.683. To be clear, this is not to say that the points raised by Korea in its responses are unimportant or that the USDOC's conduct in this particular instance was WTO-consistent. To the contrary, it is precisely because these issues – relating to the nature of the USDOC's reasoning, the definition of a "secondary source", and the proper scope of "corroboration" – are extremely important, that they should be the subject of an "as applied" claim, or, an "as such" claim against a different unwritten measure, if such a measure were to exist. For purposes of Korea's present "as such" claim, we simply cannot find, as a matter of fact, that the USDOC in *Heavy walled rectangular welded carbon steel pipes and tubes from Turkey* selected the replacement facts based solely on its finding of non-cooperation. To the extent that Korea takes issue with the "kind of evaluation" provided by the USDOC as falling short of what is required under Article 6.8 and Annex II, we address this in section 7.4.5.3 below.

7.684. Another case that Korea discusses as part of its "representative sample" of 12 cases is *Certain carbon and alloy steel cut-to-length plate from France*. In that case, the USDOC found that the respondent Industeel had:

> (1) [M]isreported the product characteristics for chromium and nickel content for a significant percentage of its home market and U.S. sales, as well as in the costs for these products; (2) made numerous errors in the data reported in numerous expense fields for the home market and U.S. sales examined at verification; and (3) failed to include certain production orders, including certain orders for abrasion products, when weight averaging its costs by CONNUM.[1963]

7.685. Having found that the respondent did not act to the best of its ability, the USDOC applied "total AFA" and "assigned Industeel the highest margin contained in the petition of 148.02 percent".[1964] In doing so, the USDOC "corroborated the petition rate using transaction specific margins from the mandatory respondent Dillinger France, which were not calculated using total AFA".[1965] Furthermore, the USDOC found that that the "petition margin falls within the range

[1961] Korea's response to Panel question No. 107, para. 165. (emphasis added)
[1962] Korea's comments on United States' response to Panel question No. 52, p. 13.
[1963] Alloy steel final determination, (Exhibit KOR-160), p. 33.
[1964] Alloy steel final determination, (Exhibit KOR-160), p. 6.
[1965] Alloy steel final determination, (Exhibit KOR-160), p. 6.

of the highest transaction-specific margins calculated for Dillinger France, which appear to be sales whose terms were normal, when compared with other sales in Dillinger France's database".[1966]

7.686. In response to questioning by the Panel, Korea asserts that the USDOC's reasoning is "not the kind of evaluation of the available facts on the record with a view to making an accurate determination that is required by Article 6.8 and Annex II of the Anti-Dumping Agreement".[1967] Furthermore, Korea contends that the kind of "corroboration" undertaken by the USDOC falls short of what is required under the covered agreements.[1968] Again, while we consider the issues raised by Korea to be important, our task is limited to determining whether the USDOC selected facts "adverse" to the interests of the non-cooperating respondent based solely on its finding of non-cooperation. For this purpose, as a factual matter, it is clear that, in selecting the petition margin, the USDOC engaged in an exercise of corroboration and also noted that the margins from another mandatory respondent were from "sales whose terms were normal, when compared with other sales in Dillinger France's database". Therefore, we simply cannot find, as a matter of fact, that the USDOC in this instance selected the replacement facts based solely on its finding of non-cooperation and nothing else. In our view, this case does not reflect the precise content of the unwritten measure identified by Korea. To the extent that Korea takes issue with the "kind of evaluation" provided by the USDOC as falling short of what is required under Article 6.8 and Annex II, we address this in section 7.4.5.3 below.

7.687. The United States also offers several counterexamples to demonstrate that, contrary to Korea's arguments, whenever it makes a finding of non-cooperation, the USDOC does not always adopt "adverse inferences" and fail to engage in any further evaluation.[1969] The United States submits that, in *Stainless steel bar from Italy*, the USDOC found that the respondent failed to cooperate to the best of its ability, however, it did not draw adverse inferences and instead "relied on other information on the record that allowed it to accurately calculate the subsidy rate".[1970]

7.688. Korea stresses, first, that "[t]his case concerns a CVD proceeding from 2002, thus well before the adoption of the TPEA amendment[] to Section 776 in 2015".[1971] We note in this regard Korea's argument that the "unwritten measure … has existed for much longer" than the 2015 TPEA Amendment.[1972] We also note that Korea cites several US court rulings that pre-date the 2015 TPEA Amendment for purposes of demonstrating the existence of the alleged unwritten measure.[1973] In these circumstances, it is not entirely clear to us as to why Korea considers any less relevant the evidence from the same period that United States' relies upon.

7.689. Second, Korea submits that the USDOC in that case actually applied "adverse facts available" and "[t]he only issue was … was which information to use as AFA".[1974] As discussed, however, the exact meaning that Korea ascribes to the term "adverse facts available" relates precisely to "which information to use as AFA" and is therefore an important feature of the precise content of the alleged unwritten measure. In *Stainless steel bar from Italy*, the USDOC found that the respondent, CAS, "did not act to the best of its ability".[1975] The petitioners argued that "the rate calculated in a previous proceeding represents a proper starting point for the [USDOC]'s construction of a facts available rate".[1976] Disagreeing with the petitioners, the USDOC instead used information provided by the Government of Italy and the European Commission because it allowed the USDOC "to calculate a

[1966] Alloy steel final determination, (Exhibit KOR-160), p. 6.
[1967] Korea's response to Panel question No. 109, para. 175.
[1968] Korea's response to Panel question No. 109, para. 176.
[1969] United States' second written submission, paras. 155-164 and 169-70; opening statement at the first meeting of the Panel, paras. 70-73; and opening statement at the second meeting of the Panel, paras. 98-101.
[1970] United States' second written submission, para. 157 (referring to Stainless steel bar from Italy, issues and decision memorandum, (Exhibit USA-62)).
[1971] Korea's second written submission, para. 389.
[1972] Korea's response to Panel question No. 40(a).
[1973] Korea's first written submission, para. 921 (referring to, *inter alia*, Essar Steel Ltd. v. United States, (Exhibit KOR-175), p. 1373; De Cecco Di Filippo Fara. S. Martino v. United States, (Exhibit KOR-176), p. 1032; and Lifestyle Enterprise, Inc. v United States, (Exhibit KOR-178), p. 1298).
[1974] Korea's second written submission, para. 389.
[1975] Stainless steel bar from Italy, issues and decision memorandum, (Exhibit USA-62), p. 16.
[1976] Stainless steel bar from Italy, issues and decision memorandum, (Exhibit USA-62), p. 15.

more precise subsidy rate for the POI".[1977] Thus, this example offered by the United States does not support the existence of the unwritten measure with the precise content alleged by Korea.

7.690. Korea offers a similar response to the United States' reliance upon *Non-oriented electrical steel from Chinese Taipei*. Korea submits that it "pre-dates the TPEA amendment[]" and "the USDOC applied AFA to an exporter in relation to several programs for its failure to cooperate and the only issue related to the selection of AFA".[1978] For reasons discussed above, we remain unconvinced that cases pre-dating the 2015 TPEA Amendment cannot be offered as evidence challenging the existence of the alleged unwritten measure, particularly when Korea itself cites court rulings from that period. Moreover, we note that the USDOC's determination contains standard "boilerplate" language relating to the use of "adverse inferences" that Korea places great significance upon as part of its own database of the USDOC's alleged practice.[1979] The USDOC clearly made a finding of non-cooperation and found that the non-cooperating party "did not respond to the … countervailing duty questionnaires, even after asking, and receiving an extension for time to respond".[1980] For the "alleged income tax programs pertaining to either the reduction or exemption of the income tax rates or payment of no income tax", the USDOC thus applied an "adverse inference that the non-cooperating mandatory respondent paid no income tax during the POI". The USDOC explained that, "under this approach, the highest possible benefit for income tax programs is equal to the standard income tax rate in the country at issue. In the instant case, the standard income tax rate for corporations in [Chinese Taipei] is 17 percent". However, the USDOC did not select this rate "because the [foreign authority] placed [the non-cooperating party's] tax returns on the record of this investigation" and it therefore used these returns for purposes of its AFA analysis. Thus, using the other information properly available to it, the USDOC determined that the respondent "did not use any tax exemptions or reductions at issue in this CVD investigation" and thus the USDOC did not assign a subsidy rate for these programmes.[1981] In our view, therefore, the USDOC *clearly* did not select the more "adverse" replacement fact based solely upon its finding of non-cooperation.

7.691. The United States also refers to *Welded line pipe from Korea*, asserting that the USDOC in that case "discovered at verification several unreported subsidies, including exemptions from the local education tax", but it used facts available without an adverse inference.[1982] Korea responds that "the USDOC did not make a finding of non-cooperation and the case is thus not applicable to the claim of Korea that each time a finding of non-cooperation is made, AFA is applied".[1983] We note, however, that the USDOC stated that because the respondent "failed to provide information on this exemption [of local education tax] by the deadline" it "relied on the facts available".[1984] The petitioner in that case urged the USDOC to use the rate calculated in another proceeding, "which is the highest rate calculated in any Korean case for such a program".[1985] The USDOC disagreed and instead used information provided by the Government of Korea in its initial questionnaire response as the replacement for the missing information.[1986] Therefore, we agree with the United States that this case undermines the "automatic link" between a finding of non-cooperation and the selection of facts that are adverse to the interests of the non-cooperating party that is an important feature of the precise content of the alleged unwritten measure.

7.4.5.3 The nature of an "as such" claim

7.692. We recall that "as such" claims are "serious challenges" and their implications "are obviously more far-reaching than 'as applied' claims" as they seek to prevent Members *ex ante* from engaging in certain conduct.[1987] We agree in this regard that, "[b]y definition, an 'as such' claim challenges

[1977] Stainless steel bar from Italy, issues and decision memorandum, (Exhibit USA-62), p. 17.
[1978] Korea's opening statement at second meeting of the Panel, para. 104.
[1979] Non-oriented electrical steel from Chinese Taipei, issues and decision memorandum, (Exhibit USA-91), pp. 10-11.
[1980] Non-oriented electrical steel from Chinese Taipei, issues and decision memorandum, (Exhibit USA-91), p. 9.
[1981] Non-oriented electrical steel from Chinese Taipei, issues and decision memorandum, (Exhibit USA-91), p. 11.
[1982] United States' second written submission, para. 161.
[1983] Korea's opening statement at second meeting of the Panel, para. 104.
[1984] Welded line pipe from Korea, issues and decision memorandum, (Exhibit USA-90), p. 35.
[1985] Welded line pipe from Korea, issues and decision memorandum, (Exhibit USA-90), p. 33.
[1986] Welded line pipe from Korea, issues and decision memorandum, (Exhibit USA-90), pp. 34-35.
[1987] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 172. See also para. 7.608 above.

[measures] that have general and prospective application, asserting that a Member's conduct – not only in a particular instance that has occurred, but in future situations as well – will necessarily be inconsistent with that Member's WTO obligations".[1988]

7.693. With respect to the alleged unwritten measure at issue, we note that Korea does not challenge the written legislation setting out the discretion available to the USDOC in its selection of the replacement facts. Rather, the alleged unwritten measure concerns the *exercise* of that discretion in a WTO-inconsistent manner by the USDOC. Korea thus needs to demonstrate that the alleged unwritten measure cannot lead to a WTO-consistent selection of replacement facts and that it *necessarily* entails a WTO-inconsistent selection of the replacement facts in future situations, *irrespective* of the particular circumstances of individual investigations. As Korea asserts, "[t]he AFA Rule or Norm, or the AFA Ongoing Conduct, does not take 'differences in the factual circumstances of the situation into account'".[1989] Any other approach risks rendering the alleged unwritten measure's WTO-consistency dependent upon the circumstances, which requires a case-by-case assessment of the kind that is required for "as applied" claims of WTO-inconsistency.

7.694. To establish that the alleged unwritten measure *necessarily* results in the WTO-inconsistent conduct, Korea stresses the "automatic link" between the USDOC's finding of non-cooperation and its use of "adverse inferences". As discussed above, under the alleged unwritten measure, the USDOC selects replacement facts that are adverse to the interests of the non-cooperating party based solely upon its finding of non-cooperation. Specifically, Korea submits that the USDOC, in using "adverse facts available" in this manner, does not take into account the procedural circumstances of non-cooperation and does not engage in a "comparative evaluation" with a view to selecting the "best information available" in the particular circumstances.

7.695. We recall that Article 6.8 requires investigating authorities to select *reasonable replacements* for the missing "necessary" information in a given case.[1990] Together with Annex II, the provision prescribes in considerable detail an investigating authority's conduct in selecting reasonable replacements in the particular circumstances of a given investigation. While the search for reasonable replacements requires an investigating authority to exercise its judgment and consider all the facts that are properly available to it as well as the procedural circumstances of non-cooperation, the nature and extent of the evaluation and analysis that are required on the part of the investigating authority depend inevitably upon the particular facts and circumstances, including the "necessary" information that was found to be missing, the circumstances surrounding non-cooperation, as well as the facts that are otherwise available to it. As discussed in our interpretative analysis, we disagree with Korea insofar as it suggests that the Anti-Dumping Agreement and the SCM Agreement always require a certain kind of "comparative evaluation" in all circumstances.

7.696. Korea alleges that the 319 determinations show that the USDOC does not engage in a "comparative analysis". However, in light of Korea's limited discussion of each of these 319 determinations and the fact that it does not place on the panel record a vast majority of these determinations, we are unable to ascertain whether a "comparative evaluation" of the kind that Korea envisages was, in fact, required in the specific circumstances of each of the 319 investigations. Put differently, asserting that the USDOC did not engage in a certain kind of evaluation in the abstract is not enough; Korea must also demonstrate that the kind of evaluation it envisages was, in fact, required in light of the specific facts of each of the 319 determinations.

7.697. Furthermore, our analysis of the representative sample of the USDOC's determinations that Korea places on the record indicates that the USDOC use of "adverse inferences" and "adverse facts available" is not always as "automatic" as Korea claims. We disagree with Korea that the USDOC selects "adverse facts available" based *solely* upon its finding of non-cooperation. As discussed above, contrary to Korea's position, in many of the determinations placed on the record by the parties the USDOC does, in fact, engage in some analysis and reasoning for purposes of selecting the replacement facts and, therefore, the link between a finding of non-cooperation and the adoption of adverse inferences and the selection of "adverse facts available" is not as "automatic" as Korea suggests. Insofar as Korea argues that the USDOC's analysis in these determinations is nonetheless WTO-inconsistent, we consider that such a conclusion cannot be arrived at without a case-by-case

[1988] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 172.
[1989] Korea's second written submission, para. 419.
[1990] See para. 7.36 above.

assessment of each instance of the USDOC's use of "adverse facts available", thereby questioning the utility of Korea's "as such" challenge and the existence of a rule or a norm of general and prospective application.

7.698. To the extent that Korea takes the position that the alleged unwritten measure comprises of the USDOC selecting "adverse facts available" without engaging in the *kind* of analysis and evaluation that is *required* under the covered agreements, it appears to describe the impugned measure by reference to a treaty obligation. As discussed, at times – including in its responses to the Panel's questions concerning the individual determinations that it discusses – Korea asserts that the AFA rule or norm entails the USDOC's failure to select the "best information available" in the "particular circumstances" or its failure to undertake the "required comparative assessment" to arrive at an "accurate determination". These terms are not used by the USDOC, but are instead found in the covered agreements and in WTO jurisprudence. The fact that Korea describes the alleged unwritten measure as comprising of the USDOC's failure to act WTO-consistently by not undertaking the "required" evaluation has the important effect of blurring the line between the factual question of the existence of the measure and the issue of its WTO-consistency. This is because Korea's unwritten measure is defined by reference to the USDOC engaging in WTO-inconsistent conduct, i.e. its failure to select the "best information available" or to undertake a "comparative evaluation".[1991] At the same time, Korea alleges that it is for this very "reason" that the unwritten measure is WTO-inconsistent.[1992] We agree with the Appellate Body in this regard that such an approach is "flawed" and "introduce[s] uncertainty because the identification of the measure would vary depending on the substance of the legal provision invoked by a complainant and the interpretation that a panel might give to that provision".[1993]

7.4.5.4 Conclusion regarding the "AFA rule or norm"

7.699. Based on our examination of the arguments and evidence, we find that Korea has not established the existence of the unwritten "AFA rule or norm" with the precise content alleged by it. Given Korea's failure to demonstrate to the precise content of the alleged unwritten measure, it is not necessary for us to consider whether the alleged rule or norm is attributable to the United States and is of general and prospective application.

7.4.6 Whether Korea has established the existence of the AFA ongoing conduct with the precise content alleged by it

7.700. Having found that Korea has failed to establish the existence of the unwritten "AFA rule or norm", we now address Korea's alternative characterization of the alleged unwritten measure as a form of "ongoing conduct" that can be challenged in WTO dispute settlement proceedings.

7.701. The description of the unwritten measure in its panel request, as well as its submissions to the Panel, suggest that Korea characterizes the *same* substantive measure as a "rule or norm of general and prospective application", or, in the alternative, as "ongoing conduct". In its first written submission, for establishing the existence of the alleged "ongoing conduct" measure, Korea explains that it "already demonstrated … the precise content" of the measure as part of its arguments on the existence of the "rule or norm of general and prospective application".[1994]

7.702. In response to further questioning by the Panel, Korea acknowledges that, "[i]n terms of determining the precise content and the repeated application of AFA, the evidence is the same".[1995] Thus, not only does Korea offer the same description for the precise contents of the alleged "rule or norm" and "ongoing conduct", but it also relies on the very same evidence to demonstrate the existence of both kinds of measures. The only reason offered by Korea to present such distinct

[1991] See Korea's request for interim review, para. 73 (identifying the alleged unwritten measure as follows: "whenever there is a finding of non-cooperation, the USDOC will use adverse facts to fill the alleged gap, which, in turn, means that it will not engage in the *required search* for reasonable replacements for the missing information" (emphasis added)).

[1992] Korea's request for interim review, para. 74 (explaining that "[t]he reason why the use of AFA (i.e. the challenged measure) *violates* the Anti-Dumping and the SCM Agreement[s] is because it involves a wholly *inadequate evaluation*" (emphasis added)).

[1993] Appellate Body Report, *EC – Selected Customs Matters*, para. 132.

[1994] Korea's first written submission, para. 944.

[1995] Korea's response to Panel question No. 47.

characterizations is that "both types of measures have their own conditions that must be demonstrated to exist".[1996]

7.703. While many different kinds of measures have been challenged by complainants in previous disputes – including, *inter alia*, a "rule or norm"[1997] and "ongoing conduct"[1998] – nothing in the treaty text distinguishes different measures in this manner. Generally speaking, we agree with the Appellate Body that "[t]hese distinctions are not always useful or appropriate to define the elements that must be substantiated for purposes of proving the existence and nature of a measure at issue".[1999] Instead, as discussed, the additional elements that must be demonstrated to establish the existence of an unwritten measure are to be ascertained in light of the specific measure challenged and how it is described by a complainant in a given case. Rather than focusing on the elements necessary to establish the existence of different kinds of measures in the abstract, our task is better served by examining the precise description of the specific measure offered by Korea with a view to ascertaining the elements that it must demonstrate.

7.704. According to the description in Korea's panel request, the unwritten measure exists "*whenever* the USDOC makes a finding that a producer or exporter has failed to cooperate by not acting to the best of its ability".[2000] This suggests that Korea, in fact, seeks to prevent the United States from engaging in the alleged conduct *in general* and *in the future*. This is also consistent with the fact that Korea's challenge is made on an "as such" basis, because, "[b]y definition, an 'as such' claim challenges [measures] that have general and prospective application".[2001] Nothing in Korea's description suggests that the measure does not cover *all* imports into the United States from *all* countries.[2002] Nor does the description offered by Korea limit the scope of the measure to certain finite number of investigations or a determinate group of cases or proceedings. Rather, Korea recognizes that "the AFA Rule or Norm, or *AFA Ongoing Conduct*, applies to an *unidentified number of economic operators and in a broad range of situations* or cases".[2003]

7.705. The measure described by Korea is also markedly different from the measures previously challenged as "ongoing conduct" in *US – Continued Zeroing* and *US – Orange Juice (Brazil)*. In *US – Continued Zeroing*, the European Communities challenged two sets of measures (a) the continued application of duties resulting from 18 anti-dumping duty orders, as calculated or maintained in the most recent proceeding, at the time of the challenge; and (b) the use of the zeroing methodology in anti-dumping proceedings pertaining to the duties resulting from these 18 anti-dumping duty orders (including original investigations, periodic reviews, and sunset reviews).[2004] The Appellate Body noted that the European Communities' claims against the measures at issue could neither be characterized as a challenge to the measures "as such", nor as a challenge to these measures "as applied", and explained as follows:

> The European Communities' claim regarding these measures is not an "as such" claim, in that its scope is narrower than a challenge to the zeroing methodology as a rule or norm of general and prospective application with regard to all imports into the United States from all countries. At the same time, the measures at issue are broader than specific instances in which the zeroing methodology was applied, such as a periodic review or sunset review determination. In other words, the measures at issue consist of the use of the zeroing methodology in a string of connected and sequential determinations, in each of the 18 cases, by which the duties are maintained. As the European Communities explains, its complaint is directed at "the zeroing methodology as used in the final order and programmed to continue to be used until such time as the

[1996] Korea's response to Panel question No. 47.
[1997] Appellate Body Report, *US – Zeroing (EC)*, paras. 192-194.
[1998] Appellate Body Report, *US – Continued Zeroing*, para. 181.
[1999] Appellate Body Report, *Argentina – Import Measures*, para. 5.109. See also Appellate Body Report, *US – Continued Zeroing*, para. 179.
[2000] Emphasis added.
[2001] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 172.
[2002] This is further confirmed by annex I of Korea's panel request, which sets out a "preliminary and non-exhaustive list" of USDOC investigations that, in Korea's view, establish the existence of the unwritten measure and illustrates the USDOC's practice. (Korea's panel request, fn 1 and annex I). The proceedings listed in annex I concern a wide-range of products that are imported from many different countries.
[2003] Korea's second written submission, para. 379. (emphasis added)
[2004] Appellate Body Report, *US – Continued Zeroing*, para. 164.

> United States eliminates zeroing from the particular anti-dumping duty under consideration.[2005]

7.706. The Appellate Body explained that the "successive determinations by which duties are maintained are connected stages in each of the 18 cases involving imposition, assessment, and collection of duties under the same anti-dumping duty order".[2006] For the Appellate Body, the "use of the zeroing methodology in a string of these stages [was] the allegedly unchanged component of each of the 18 measures at issue"[2007] and it was "with respect to this ongoing conduct that the European Communities brought its challenge, seeking its cessation".[2008] Notably, the Appellate Body considered that the European Communities' claim against "ongoing conduct" "is not an 'as such' claim".[2009]

7.707. In *US – Orange Juice (Brazil)*, Brazil challenged the "continued use by the United States of zeroing procedures in successive anti-dumping proceedings under the Orange Juice Order, including the original investigation and any subsequent administrative reviews by which duties are applied and maintained over a period of time".[2010] The United States claimed that the "ongoing conduct" challenged by Brazil was not susceptible to a WTO challenge because it was based on "an indefinite number of future individual measures that do not and may never exist".[2011] In response to the United States' argument, the panel observed that "ongoing conduct may be simply described as conduct that is currently taking place and is *likely to continue* in the future".[2012] The panel explained that:

> [I]mplicit in the United States' argument is the view that there is a prospective element to the alleged "ongoing conduct" "measure" Brazil challenges which cannot be established with any degree of certainty because it is inherently speculative. We note, however, that although describing the "ongoing conduct" measure in *US – Continued Zeroing* in terms that contemplate its prospective operation, the Appellate Body did not require absolute certainty as to the future conduct it envisaged.
>
> …
>
> Thus, ongoing conduct may be simply described as conduct that is currently taking place and is *likely to continue* in the future.[2013]

7.708. In this regard, we also note the Appellate Body's explanation that, "in addition to attribution to a WTO Member and precise content … [a] complainant that is challenging a measure characterized as 'ongoing conduct' would need to provide evidence of its repeated application, and of the likelihood that such conduct will continue".[2014] In both *US – Continued Zeroing* and *US – Orange Juice (Brazil)*, the measures challenged as "ongoing conduct" thus exuded a certain prospective character, but were not of general application and were, instead, limited to certain finite or determinate number of (connected) proceedings or instances.

7.709. In contrast to the measures challenged in these prior disputes, Korea's description of the measure at hand is broadly-worded and is not limited to certain finite number of proceedings or narrow set of circumstances. Korea does not characterize the alleged unwritten measure as "ongoing conduct" to challenge the use of "adverse facts available" by the USDOC in connected segments of a determinate number of investigations, such as, for example, the investigations challenged in this dispute on an "as applied" basis. Rather, the unwritten measure allegedly prevents the USDOC from engaging in WTO-consistent conduct *in general* and *in the future*. Consistent with the "as such"

[2005] Appellate Body Report, *US – Continued Zeroing*, para. 180. (fns omitted)
[2006] Appellate Body Report, *US – Continued Zeroing*, para. 181.
[2007] Appellate Body Report, *US – Continued Zeroing*, para. 181.
[2008] Appellate Body Report, *US – Continued Zeroing*, para. 181.
[2009] Appellate Body Report, *US – Continued Zeroing*, para. 180. (fns omitted)
[2010] Panel Report, *US – Orange Juice (Brazil)*, para. 7.163 (quoting Brazil's first written submission, para. 48).
[2011] Panel Report, *US – Orange Juice (Brazil)*, para. 7.174 (quoting United States' first written submission, paras. 51 and 131).
[2012] Panel Report, *US – Orange Juice (Brazil)*, para. 7.176. (emphasis original)
[2013] Panel report, *US – Orange Juice (Brazil)*, paras. 7.175-7.176. (emphasis original)
[2014] Appellate Body Reports, *Argentina – Import Measures*, para. 5.108 (referring to Appellate Body Report, *US – Continued Zeroing*, para. 191 (fns omitted)).

nature of Korea's challenge, as well the manner in which it describes and demonstrates the precise content of the alleged unwritten measure, we consider that the alleged unwritten measure described by Korea is properly characterized as a "rule or a norm" and not as "ongoing conduct".[2015]

7.710. In any event, Korea acknowledges that the arguments and evidence for establishing the "precise content" of the "ongoing conduct" measure are the same as those presented in the context of the "rule or a norm".[2016] We have found above that Korea has failed to establish the existence of the "rule or a norm" with the precise content alleged by it. Therefore, Korea's attempt at establishing the existence of the "ongoing conduct" measure also fails for the same reasons.

7.711. The panel and the Appellate Body in *US – Supercalendered Paper* appear to have shared an understanding of "ongoing conduct" that is substantially closer to the notion of a "rule or norm of general and prospective application".[2017] However, as one Appellate Body Member observed in their separate opinion on this issue, "[i]n this case, the Panel and the majority [went] beyond *US – Continued Zeroing* to enhance and broaden the concept of 'ongoing conduct' into something akin to a 'rule or norm of general and prospective application', only vaguer and less disciplined in its requirements".[2018] We agree with this observation and consider that Korea's description and characterization of the alleged unwritten measure in this case serves to caution against a mechanistic and rigid application of these notions.

7.712. We note Korea's argument that, "[i]n the context of its AFA Ongoing Conduct, the USDOC applies several specific methodologies for selecting AFA from among facts available in its anti-dumping and countervailing duty proceedings in case a particular factual situation arises".[2019] Specifically, Korea identifies three "methodologies". First, under the "Total AFA – Highest Dumping Margin" methodology, Korea alleges that the "USDOC has a practice of selecting, as an AFA rate, the higher of (1) the highest dumping margin alleged in the petition, or (2) the highest calculated dumping margin of any respondent in the investigation".[2020] In support, Korea references six USDOC determinations. Second, under the "Expenses AFA – Highest / Lowest Expenses" methodology, Korea alleges that "in a situation where the allegedly missing information concerns expenses, the USDOC maintains a specific ongoing conduct of applying an adverse inference, as it has a standard 'practice' of selecting as AFA the lowest expenses for home-market sales and the highest expenses for export sales, so that the normal value is increased as high as possible and the export price is reduced as low as possible".[2021] Korea refers to five investigations as reflecting this specific "methodology". Finally, under the "Subsidy Program – Highest Rates AFA" methodology, Korea contends that, "if the allegedly missing information requires resort to AFA for a particular subsidy program, the USDOC has a practice of computing the AFA by using the highest calculated program-specific rates determined for a cooperating respondent in the same investigation, or, if not available, rates calculated in prior CVD cases involving the same country".[2022] Korea identifies nine investigations as embodying this methodology.

7.713. Korea acknowledges that the three "methodologies" that it identifies "are triggered in *particular circumstances*" and are "clear *examples* of the United States' AFA Ongoing Conduct".[2023] However, the alleged unwritten measure identified by Korea is not limited to "particular circumstances" or to a limited number of investigations. Instead, the alleged unwritten measure is very broad in scope and exists "whenever the USDOC makes a finding non-cooperation".[2024] Moreover, the alleged unwritten measure identified by Korea is not described in terms of these specific "methodologies". In these circumstances, it is not clear to us – and, importantly, Korea does

[2015] We note, in this regard, Korea's argument that the manner in which Korea's panel request identifies the unwritten measure at issue "is also how the measure was identified in" *US – Anti-Dumping Methodologies (China)*. (Korea's response to Panel question No. 104, para. 129 (quoting *US – Anti-Dumping Methodologies (China)*, China's panel request, p. 4)). While we see some important differences between the unwritten measures at issue in these two disputes, we nonetheless note that the Appellate Body in *US – Anti-Dumping Methodologies (China)* ultimately found that the measure identified was a "rule or norm of general and prospective application". (Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.183).
[2016] Korea's first written submission, para. 944.
[2017] See, e.g. Appellate Body Report, *US – Supercalendered Paper*, para. 5.29.
[2018] Appellate Body Report, *US – Supercalendered Paper*, para. 5.86.
[2019] Korea's first written submission, para. 947.
[2020] Korea's first written submission, para. 950.
[2021] Korea's first written submission, para. 952.
[2022] Korea's first written submission, para. 954.
[2023] Korea's first written submission, para. 948. (emphasis added)
[2024] Korea's panel request, para. 9.

not explain – how these "examples" of the USDOC's conduct in "particular circumstances" demonstrate the existence of the unwritten measure with the precise content alleged by Korea. Given this important limitation, we do not consider it necessary to examine whether Korea has demonstrated the existence of the three alleged "methodologies".

7.714. For the above reasons, we find that the alleged unwritten measure challenged on an "as such" basis by Korea is properly characterized as a "rule or a norm of general and prospective application" and not as "ongoing conduct". In any event, given that Korea's arguments and evidence for establishing the "precise content" of the "ongoing conduct" measure are the same as those presented in the context of the "rule or a norm", Korea's attempt at establishing the existence of the "ongoing conduct" measure also fails in light of our finding that Korea has failed to establish the existence of the "rule or a norm" with the precise content alleged by it.

7.4.7 Overall conclusion

7.715. As the complainant challenging an unwritten measure on an "as such" basis, Korea bears the burden of establishing the existence as well as the WTO-inconsistency of the measure with the precise content alleged by it. As indicated in our preliminary ruling, the only alleged unwritten measure that is within the Panel's terms of reference is the one identified in Section I.C of Korea's panel request. Korea characterizes the alleged unwritten measure as a "rule or a norm" of general and prospective application or, in the alternative, as a form of "ongoing conduct". Mindful of avoiding an overly rigid application of labels that do not find a basis in the treaty text, we consider that, ultimately, the specific elements that must be substantiated with arguments and evidence in order to prove the existence of the impugned measure are informed by how a complainant describes and characterizes the unwritten measure alleged to exist in a given case. In the case at hand, the measure described by Korea is of general and prospective application and is therefore more akin to a "rule or a norm" than to a form of "ongoing conduct". In any event, we note that Korea offers the same description and substantially similar arguments and evidence for establishing the existence of the "ongoing conduct" measure as it does for demonstrating the existence of a "rule or a norm".

7.716. As to its precise content, Korea identifies several interlinked aspects that, working together, constitute the alleged unwritten measure. The first aspect serves as the trigger for the WTO-inconsistent action and consists of a finding of non-cooperation being made by the USDOC. The subsequent aspects concern the consequences that follow the trigger and comprise of the USDOC adopting "adverse inferences" and selecting "adverse facts available". As to the precise meaning of these terms, Korea explains that the USDOC adopts "adverse inferences" and selects replacement facts that are "adverse" to the interests of the non-cooperating party, without establishing (i) that such inferences can reasonably be drawn in light of the "degree of cooperation" received, and (ii) that such facts are the "best information available" in the particular circumstances. Korea therefore defines the precise content of the alleged unwritten measure by reference to both what the USDOC does (a finding of non-cooperation and the adoption of "adverse inferences" and selection of "adverse facts available"), as well as what the USDOC does not do (i.e., the precise meaning that Korea ascribes to "adverse inferences" and "adverse facts available"). We consider these positive and negative aspects of the USDOC's conduct to be an important feature of the precise content of the alleged unwritten measure because, according to Korea, the existence of the measure is predicated upon the "automatic" link between a finding of non-cooperation and the adoption of "adverse inferences" and the selection of "adverse facts available".

7.717. We disagree with Korea that several prior WTO disputes confirm the existence of the alleged unwritten measure at issue in this case because the precise content of the alleged unwritten measure identified by Korea in these proceedings is different from that of the measures challenged in prior WTO disputes. Moreover, the evidence that Korea adduces is also not exactly the same as what was examined in the past disputes that Korea cites. Turning to the different kinds of evidence that Korea presents to establish the existence of the alleged unwritten measure, we note the various permissive aspects of the written legislation that Korea highlights (Section 776 of the Tariff Act (19 U.S.C 1677 (e)) as modified by the 2015 TPEA Amendment) as embodying the "written permission" for the alleged unwritten norm. However, we find nothing in the statutory text to suggest that the provision somehow "codifies" the "existing practice" of the USDOC or shows how frequently the discretion available thereunder to the USDOC is actually exercised in a WTO-inconsistent manner.

7.718. Turning to the USDOC's Anti-Dumping Manual and the US court rulings that Korea refers to, we do not consider that the excerpts from these documents that Korea relies upon demonstrate the precise content of the alleged unwritten measure. For example, the USDOC's Anti-Dumping Manual is cast in permissive language and the excerpt from the US court rulings cited by Korea suggests that the USDOC is required to select "reasonably accurate" replacements for the missing information. As to Korea's reliance upon the USDOC's alleged "practice", we find that the database of 319 determinations provided by Korea is insufficient to establish the existence of the unwritten measure with the precise content alleged by it and note that Korea does not discuss or place on the record the full text of the 319 determinations. Given the "as such" nature of Korea's challenge and the general and prospective nature of the alleged unwritten norm, and in light of the limitations in Korea's discussion of the 319 determinations that it identifies, we also remain cautious in relying upon Korea's analysis of a limited subset of these cases. Even if we were to agree with Korea and find that the few cases that it discusses in greater detail reflect the precise content of the alleged unwritten measure that is identified by Korea, it remains unclear as to how this conclusion in respect of a limited number of determinations can be used to arrive at a similar finding for the many other determinations wherein the USDOC used "adverse facts available", but for which Korea provides very limited information.

7.719. In any event, we do not consider that the USDOC's conduct in the few cases that Korea discusses in greater detail always reflects the precise content of the alleged unwritten measure. Contrary to Korea's position, in many of the determinations placed on the record by the parties, the USDOC does, in fact, engage in *some* analysis and reasoning for purposes of selecting the replacement facts and, therefore, the link between a finding of non-cooperation and the adoption of adverse inferences and the selection of "adverse facts available" is not as "automatic" as Korea suggests. Insofar as Korea argues that the USDOC's analysis in these determinations is nonetheless WTO-inconsistent, given our interpretation of Article 6.8 and Annex II of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement, we consider that such a conclusion cannot be arrived at without a case-by-case assessment of each instance of the USDOC's use of "adverse facts available", thereby questioning the utility of Korea's "as such" challenge and the existence of a "rule or a norm" of general and prospective application.

7.720. For these reasons, we find that Korea has failed to establish the existence of the alleged unwritten measure with the precise content identified by it. In these circumstances, it is not necessary for us to examine whether the alleged unwritten measure is inconsistent with the United States' obligations under Article 6.8 and Annex II of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement.

8 CONCLUSIONS AND RECOMMENDATION

8.1. On Korea's claims concerning the USDOC's CORE AD investigation, for the reasons contained in this Report, the Panel concludes as follows:

a. the United States acted inconsistently with paragraph 1 of Annex II to the Anti-Dumping Agreement because the USDOC did not "specify in detail" the information requested and "the manner in which that information should be structured" with respect to Hyundai Steel's reporting of information concerning further manufactured sales. Given that paragraph 1 of Annex II serves as a precondition for an investigating authority's proper resort to facts available under Article 6.8 of the Anti-Dumping Agreement, we find that the United States also acted inconsistently with that provision;

b. in light of our findings of WTO-inconsistency, we do not consider it necessary to rule upon Korea's claims under paragraphs 3, 5, and 6 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us;

c. having found that the USDOC erred in resorting to facts available with respect to Hyundai Steel's reporting of information concerning further manufactured sales, we do not consider that making further findings on Korea's claims concerning the USDOC's selection of the replacement facts on the basis of the record used for the USDOC's WTO-inconsistent findings would assist in providing a positive solution to the dispute before us; and

d. having found that the United States acted inconsistently with Article 6.8 and paragraph 1 of Annex II, we do not consider it necessary to rule upon Korea's claims under Articles 1, 9.3, and 18.1 of the Anti-Dumping Agreement in order to resolve the dispute before us.

8.2. On Korea's claims concerning the USDOC's CRS AD investigation, for the reasons contained in this Report, the Panel concludes as follows:

a. in respect of the affiliated party transactions issue:

   i. the United States acted inconsistently with the first sentence of paragraph 3 of Annex II to the Anti-Dumping Agreement because the USDOC did not "take[] into account" the information concerning affiliated party transactions that was submitted by Hyundai Steel in accordance with that provision. Given that paragraph 3 of Annex II serves as a precondition for an investigating authority's proper resort to facts available under Article 6.8 of the Anti-Dumping Agreement, we find that the United States also acted inconsistently with that provision;

   ii. in light of our findings of WTO-inconsistency, we do not consider it necessary to rule upon Korea's claims under paragraphs 1, 5, and 6 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us; and

   iii. having found that the USDOC erred in resorting to facts available with respect to information concerning affiliated party transactions that was submitted by Hyundai Steel, we do not consider that making further findings on Korea's claims concerning the USDOC's selection of the replacement facts on the basis of the record used for the USDOC's WTO-inconsistent findings would assist in providing a positive solution to the dispute before us.

b. in respect of the CONNUMs issue:

   i. the United States acted inconsistently with Article 6.8 of the Anti-Dumping Agreement because the USDOC resorted to facts available in respect of the cost of manufacturing for all the affected CONNUMs for Specs D, E, and H home market sales;

   ii. in light of our findings of WTO-inconsistency with respect to Specs D, E, and H home market sales, we do not consider it necessary to rule upon Korea's claims under paragraphs 3, 5, and 6 of Annex II to the Anti-Dumping Agreement concerning these sales in order to provide a positive solution to the dispute before us;

   iii. having found that the USDOC erred in resorting to facts available with respect to Specs D, E, and H home market sales, we do not consider that making further findings on Korea's claims concerning the USDOC's selection of the replacement facts for these sales on the basis of the record used for the USDOC's WTO-inconsistent findings would assist in providing a positive solution to the dispute before us;

   iv. with respect of the USDOC's resort to facts available for Spec C sales, Korea has not established that the United States acted inconsistently with Article 6.8 and paragraphs 3, 5, and 6 of Annex II of the Anti-Dumping Agreement; and

   v. the United States acted inconsistently with Article 6.8 of the Anti-Dumping Agreement because, in selecting the replacement facts for the Spec C sales at issue, the USDOC failed to take into account all the information that was properly before it. In light of our finding of WTO-inconsistency, we do not consider it necessary to rule upon Korea's claim under paragraph 7 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us.

c. having found that the United States acted inconsistently with Article 6.8 and paragraph 3 of Annex II, we do not consider it necessary to rule upon Korea's claims under Articles 1, 9.3, and 18.1 of the Anti-Dumping Agreement in order to resolve the dispute before us.

8.3. On Korea's claims concerning the USDOC's HRS AD investigation, for the reasons contained in this Report, the Panel concludes as follows:

a. the United States acted inconsistently with paragraph 1 of Annex II to the Anti-Dumping Agreement because the USDOC did not "specify in detail" the information concerning the affiliates' contracts with unaffiliated customers "[a]s soon as possible after the initiation". Given that paragraph 1 of Annex II serves as a precondition for an investigating authority's proper resort to facts available under Article 6.8 of the Anti-Dumping Agreement, we find that the United States also acted inconsistently with that provision;

b. in light of our findings of WTO-inconsistency, we do not consider it necessary to rule upon Korea's claims under paragraphs 3, 5, and 6 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us;

c. having found that the USDOC erred in resorting to facts available, we do not consider that making further findings on Korea's claims concerning the USDOC's selection of the replacement facts on the basis of the record used for the USDOC's WTO-inconsistent findings would assist in providing a positive solution to the dispute before us; and

d. having found that the United States acted inconsistently with Article 6.8 and paragraph 1 of Annex II, we do not consider it necessary to rule upon Korea's claims under Articles 1, 9.3, and 18.1 of the Anti-Dumping Agreement in order to resolve the dispute before us.

8.4. On Korea's claims concerning the USDOC's CRS CVD investigation, for the reasons set forth in this Report, the Panel concludes as follows:

a. in respect of the issue of cross-owned affiliate input suppliers:

   i. Korea has not established that the United States acted inconsistently with Article 12.7 of the SCM Agreement with respect to the USDOC's resort to facts available; and

   ii. the United States acted inconsistently with Article 12.7 of the SCM Agreement because the USDOC, in selecting the replacement facts, did not take into account all the information that was properly before it and made an assumption unsupported by positive evidence that the inputs supplied by the cross-owned affiliates discovered at verification were "primarily dedicated" to the production of the downstream product, thereby also erring in finding that the relevant subsidies received by these affiliates were countervailable and attributable to POSCO.

b. in respect of the issue of a POSCO facility in an FEZ:

   i. the United States acted inconsistently with Article 12.7 of the SCM Agreement because the USDOC, in resorting to facts available, erroneously disregarded the GOK's response; and

   ii. having found that the USDOC erred in resorting to facts available, we do not consider that making further findings on Korea's claims concerning the USDOC's selection of the replacement facts on the basis of the record used for the USDOC's WTO-inconsistent findings would assist in providing a positive solution to the dispute before us.

c. in respect of the issue of the DWI loan data:

   i. the United States acted inconsistently with Article 12.7 of the SCM Agreement because the USDOC, in resorting to facts available, did not take into account information that was submitted as part of POSCO's and DWI's direct responses before concluding that DWI had failed to provide "necessary" information; and

   ii. having found that the USDOC erred in resorting to facts available, we do not consider that making further findings on Korea's claims concerning the USDOC's selection of

the replacement facts on the basis of the record used for the USDOC's WTO-inconsistent findings would assist in providing a positive solution to the dispute before us.

d. having found that the United States acted inconsistently with Article 12.7 of the SCM Agreement, we do not consider it necessary to rule upon Korea's claims under Articles 10, 19.4, and 32.1 of the SCM Agreement in order to resolve the dispute before us.

8.5. On Korea's claims concerning the USDOC's HRS CVD investigation, for the reasons contained in this Report, the Panel concludes as follows:

a. in respect of the issue of cross-owned affiliate input suppliers, the United States acted inconsistently with Article 12.7 of the SCM Agreement because the USDOC rejected the information concerning the cross-owned affiliate input suppliers solely on the basis that it was provided after the time-limit imposed by the USDOC, without considering whether, in light of the specific facts and circumstances, the information submitted by POSCO was nonetheless submitted within a "reasonable period";

b. in respect of the issue of a POSCO facility in an FEZ, the United States acted inconsistently with Article 12.7 of the SCM Agreement because the USDOC rejected the information concerning POSCO's facility in an FEZ solely on the basis that it was provided after the time-limit imposed by the USDOC, without considering whether, in light of the specific facts and circumstances, the information submitted by POSCO was nonetheless submitted within a "reasonable period";

c. in respect of the issue of the DWI loan data, the United States acted inconsistently with Article 12.7 of the SCM Agreement because the USDOC rejected the information concerning DWI loan data solely on the basis that it was provided after the time-limit imposed by the USDOC, without considering whether, in light of the specific facts and circumstances, the information submitted by POSCO was nonetheless submitted within a "reasonable period";

d. having found that the USDOC erred in resorting to facts available for each of the three issues set out above, we do not consider that making further findings concerning the USDOC's selection of the replacement facts on the basis of the record used for the USDOC's WTO-inconsistent findings would assist in providing a positive solution the dispute before us; and

e. having found that the United States acted inconsistently with Article 12.7 of the SCM Agreement, we do not consider it necessary to rule upon Korea's claims under Articles 10, 19.4, and 32.1 of the SCM Agreement in order to resolve the dispute before us.

8.6. On Korea's claims concerning the USDOC's LPT POR2 proceedings, for the reasons contained in this Report, the Panel concludes as follows:

a. the United States acted inconsistently with paragraph 6 of Annex II to the Anti-Dumping Agreement because – having "not accepted" the information provided by HHI – the USDOC failed to inform HHI "forthwith" of the reasons for its non-acceptance and failed to provide an opportunity to HHI for furnishing "further explanations within a reasonable period, due account being taken of the time limits of the investigation". Given that paragraph 6 of Annex II serves as a precondition for an investigating authority's proper resort to facts available under Article 6.8 of the Anti-Dumping Agreement, we find that the United States also acted inconsistently with that provision;

b. in light of our findings of WTO-inconsistency, we do not consider it necessary to rule upon Korea's claims under paragraphs 3 and 5 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us; and

c. having found that the USDOC erred in resorting to facts available with respect to HHI's reporting of information concerning service-related revenues, we do not consider that making further findings on Korea's claims concerning the USDOC's selection of the replacement facts on the basis of the record used for the USDOC's WTO-inconsistent findings would assist in providing a positive solution to the dispute before us.

8.7. On Korea's claims concerning the USDOC's LPT POR3 proceedings, for the reasons contained in this Report, the Panel concludes as follows:

a. in respect of the issue of service-related revenues, the United States acted inconsistently with the first sentence of paragraph 3 of Annex II to the Anti-Dumping Agreement because the USDOC, in resorting to facts available, did not "take[] into account" the information concerning service-related revenues that was submitted by HHI in accordance with that provision. Given that paragraph 3 of Annex II serves as a precondition for an investigating authority's proper resort to facts available under Article 6.8 of the Anti-Dumping Agreement, we find that the United States also acted inconsistently with that provision. In light of our findings of WTO-inconsistency, we do not consider it necessary to rule upon Korea's claims under paragraph 5 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us;

b. in respect of the issue of understatement of home-market prices, the United States acted inconsistently with Article 6.8 of the Anti-Dumping Agreement because the USDOC resorted to facts available for HHI's reporting of an LPT part as non-subject merchandise. In light of our finding of WTO-inconsistency, we do not consider it necessary to address Korea's claims under paragraphs 3 and 5 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us;

c. in respect of the issue of accessories, the United States acted inconsistently with paragraph 1 of Annex II to the Anti-Dumping Agreement because the USDOC, by not providing further guidance as to the meaning of the term "accessories", failed to "specify in detail" the information required before resorting to facts available. Given that paragraph 1 of Annex II serves as a precondition for an investigating authority's proper resort to facts available under Article 6.8 of the Anti-Dumping Agreement, we find that the United States also acted inconsistently with that provision. In light of our findings of WTO-inconsistency, we do not consider it necessary to rule upon Korea's claims under paragraphs 3 and 5 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us;

d. in respect of the issue of certain sales documentation, the United States acted inconsistently with paragraph 6 of Annex II because the USDOC – having "not accepted" the information provided by HHI – subsequently failed to give an opportunity to HHI to "provide further explanations within a reasonable period". Given that paragraph 6 of Annex II serves as a precondition for an investigating authority's proper resort to facts available under Article 6.8 of the Anti-Dumping Agreement, we find that the United States also acted inconsistently with that provision. In light of our findings of WTO-inconsistency, we do not consider it necessary to rule upon Korea's claims under paragraphs 3 and 5 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us; and

e. having found that the USDOC erred in resorting to facts available for each of the four issues identified above, we do not consider that making further findings on Korea's claims concerning the USDOC's selection of the replacement facts on the basis of the record used for the USDOC's WTO-inconsistent findings would assist in providing a positive solution to the dispute before us.

8.8. On Korea's claims concerning the USDOC's LPT POR4 proceeding, for the reasons contained in this Report, the Panel concludes as follows:

a. in respect of the issue of accessories for HHI, the United States acted inconsistently with paragraph 1 of Annex II to the Anti-Dumping Agreement because the USDOC, by not providing further guidance as to the meaning of the term "accessories", failed to "specify

in detail" the information required before resorting to facts available. Given that paragraph 1 of Annex II serves as a precondition for an investigating authority's proper resort to facts available under Article 6.8 of the Anti-Dumping Agreement, we find that the United States also acted inconsistently with that provision. In light of our findings of WTO-inconsistency, we do not consider it necessary to rule upon Korea's claims under paragraphs 3 and 5 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us;

b. in respect of the issue of home market gross-unit prices for HHI, the United States acted inconsistently with paragraph 6 of Annex II to the Anti-Dumping Agreement because the USDOC – having "not accepted" the information provided by HHI as it was "unclear" – did not subsequently give an opportunity to HHI to provide "further explanations within a reasonable period". Given that paragraph 6 of Annex II serves as a precondition for an investigating authority's proper resort to facts available under Article 6.8 of the Anti-Dumping Agreement, we find that the United States also acted inconsistently with that provision. In light of our findings of WTO-inconsistency, we do not consider it necessary to rule upon Korea's claims under paragraphs 3 and 5 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us;

c. in respect of the issue of the US sales agent for HHI, the United States acted inconsistently with paragraph 6 of Annex II to the Anti-Dumping Agreement because the USDOC – having not accepted HHI's submission that it was not affiliated with any of its sales agents – did not subsequently give an opportunity to HHI to provide "further explanations within a reasonable period". Given that paragraph 6 of Annex II serves as a precondition for an investigating authority's proper resort to facts available under Article 6.8 of the Anti-Dumping Agreement, we find that the United States also acted inconsistently with that provision. In light of our findings of WTO-inconsistency, we do not consider it necessary to address Korea's claims under paragraphs 3 and 5 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us;

d. in respect of the issue of service-related revenues for Hyosung, the United States acted inconsistently with paragraph 6 of Annex II to the Anti-Dumping Agreement because the USDOC did not inform Hyosung "forthwith" of the reasons for not accepting the information that had been submitted and did not give Hyosung an opportunity to provide "further explanations within a reasonable period". Given that paragraph 6 of Annex II serves as a precondition for an investigating authority's proper resort to facts available under Article 6.8 of the Anti-Dumping Agreement, we find that the United States also acted inconsistently with that provision. In light of our findings of WTO-inconsistency, we do not consider it necessary to address Korea's claims under paragraphs 3 and 5 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us;

e. in respect of the issue of the invoice covering multiple US sales for Hyosung, the United States acted inconsistently with paragraph 6 of Annex II to the Anti-Dumping Agreement because the USDOC did not inform Hyosung "forthwith" about the alleged deficiency in the invoice at issue that was "not accepted" and because it did not give Hyosung an opportunity to provide "further explanations within a reasonable period". Given that paragraph 6 of Annex II serves as a precondition for an investigating authority's proper resort to facts available under Article 6.8 of the Anti-Dumping Agreement, we find that the United States also acted inconsistently with that provision. In light of our findings of WTO-inconsistency, we do not consider it necessary to address Korea's claims under paragraphs 3 and 5 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us;

f. in respect of the issue of discounts and price adjustments for Hyosung, the United States acted inconsistently with paragraph 6 of Annex II to the Anti-Dumping Agreement because the USDOC did not inform Hyosung of any alleged deficiencies in the explanations that were provided in Hyosung's case brief and because it did not give Hyosung an opportunity to provide "further explanations within a reasonable period". Given that paragraph 6 of Annex II serves as a precondition for an investigating authority's proper resort to facts available under Article 6.8 of the Anti-Dumping Agreement, we find that the United States

also acted inconsistently with that provision. In light of our findings of WTO-inconsistency, we do not consider it necessary to address Korea's claims under paragraphs 3 and 5 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us;

g. having found that the USDOC erred in resorting to facts available with respect to both HHI and Hyosung for all of the issues set out above, we do not consider that making further findings on Korea's claims concerning the USDOC's selection of the replacement facts on the basis of the record used for the USDOC's WTO-inconsistent findings would assist in providing a positive solution to the dispute before us; and

h. in respect of the USDOC's selection of an "all others" rate, the United States acted inconsistently with Article 9.4 of the Anti-Dumping Agreement because the USDOC determined the ceiling for the "all others" rate in respect of Iljin, Iljin Electric, and LSIS based on "margins established under the circumstances referred to in paragraph 8 of Article 6" of the Anti-Dumping Agreement.

8.9. On the claims under Articles 1, 9.3, and 18.1 of the Anti-Dumping Agreement concerning the USDOC's LPT POR2, POR3, and POR4 proceedings, for the reasons contained in this Report, having already found that the United States acted inconsistently with Article 6.8 and certain provisions of Annex II, we do not consider it necessary to rule upon Korea's claims under Articles 1, 9.3, and 18.1 in order to resolve the dispute before us.

8.10. On Korea's "as such" claim against the alleged unwritten measure, for the reasons contained in this Report, the Panel concludes as follows:

a. Having considered the United States' request for a preliminary ruling regarding the Panel's terms of reference and the responses thereto, for purposes of Article 6.2 of the DSU, the alleged unwritten measure that is the object of Korea's "as such" challenge is properly identified in Section I.C of its panel request; and

b. Korea has failed to establish the existence of the alleged unwritten measure with the precise content identified by it.

8.11. Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that Agreement. Accordingly, to the extent the United States has acted inconsistently with certain provisions of the SCM and Anti-Dumping Agreements, we conclude that it has nullified or impaired benefits accruing to Korea under those Agreements.

8.12. Pursuant to Article 19.1 of the DSU, having found that the United States has acted inconsistently with the Anti-Dumping and the SCM Agreements, we recommend that the United States bring the measures at issue into conformity with these Agreements.