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

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS539/R.

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WORKING PROCEDURES OF THE PANEL

Adopted on 13 February 2019

General

1. (1) In this proceeding, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). In addition, the following Working Procedures apply.

(2) The Panel reserves the right to modify these procedures, as well as any additional working procedures, as necessary, after consultation with the parties.

Confidentiality

2. (1) The deliberations of the Panel and the documents submitted to it shall be kept confidential. Members shall treat as confidential information that is submitted to the Panel which the submitting Member has designated as confidential.

(2) Nothing in the DSU or in these Working Procedures shall preclude a party or third party from disclosing statements of its own positions to the public.

(3) If a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

(4) In the event that business confidential information ("BCI") is submitted, the parties and third parties shall treat such information in accordance with the procedures set out in the Additional Working Procedures of the Panel Concerning Business Confidential Information.

Submissions

3. (1) Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel.

(2) Each party shall also submit to the Panel, before the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

(3) Each third party that chooses to make a written submission before the first substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel.

(4) The Panel may invite the parties or third parties to make additional submissions during the proceeding, including with respect to requests for preliminary rulings in accordance with paragraph 4 below.

Preliminary rulings

4. (1) If the United States considers that the Panel should make a ruling before the issuance of the Report that certain measures or claims in the panel request or in the Republic of Korea's first written submission are not properly before the Panel, the following procedure applies. Exceptions to this procedure shall be granted upon a showing of good cause.

a. The United States shall submit any such request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the

Panel. The Republic of Korea shall submit its response to the request before the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request.

b. The Panel may issue a preliminary ruling on the issues raised in such a preliminary ruling request before, during or after the first substantive meeting, or the Panel may defer a ruling on the issues raised by a preliminary ruling request until it issues its Report to the parties.

c. In the event that the Panel finds it appropriate to issue a preliminary ruling before the issuance of its Report, the Panel may provide reasons for the ruling at the time that the ruling is made, or subsequently in its Report.

d. Any request for such a preliminary ruling by the United States before the first meeting, and any subsequent submissions of the parties in relation thereto before the first meeting, shall be served on all third parties. The Panel may provide all third parties with an opportunity to provide comments on any such request, either in their submissions as provided for in the timetable or separately. Any preliminary ruling issued by the Panel before the first substantive meeting on whether certain measures or claims are properly before the Panel shall be communicated to all third parties.

(2) This procedure is without prejudice to the parties' right to request other types of preliminary or procedural rulings during the proceeding, and to the procedures that the Panel may follow with respect to such requests.

Evidence

5. (1) Each party shall submit all evidence to the Panel no later than during the first substantive meeting, except evidence necessary for purposes of rebuttal, or evidence necessary for answers to questions or comments on answers provided by the other party. Additional exceptions may be granted upon a showing of good cause.

(2) If any new evidence has been admitted upon a showing of good cause, the Panel shall accord the other party an appropriate period of time to comment on the new evidence submitted.

6. (1) Where the original language of an exhibit or portion thereof is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of the exhibit or relevant portion into the WTO working language of the submission. The Panel may grant reasonable extensions of time for the translation of exhibits upon a showing of good cause.

(2) Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next submission or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds for the objection and an alternative translation.

7. (1) To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. Exhibits submitted by the Republic of Korea should be numbered KOR-1, KOR-2, etc. Exhibits submitted by the United States should be numbered USA-1, USA-2, etc. If, for example, the last exhibit in connection with the first submission was numbered KOR-5, the first exhibit in connection with the next submission would be numbered KOR-6.

(2) Each party shall provide an updated list of exhibits (in Word or Excel format) together with each of its submissions, oral statements, and responses to questions.

(3) If a party submits a document that has already been submitted as an exhibit by the other party, it should explain why it is submitting that document again.

(4) If a party includes a hyperlink to the content of a website in a submission, and intends that the cited content form part of the official record, the cited content of the website shall be provided in the form of an exhibit.

Editorial Guide

8. In order to facilitate the work of the Panel, each party and third party is encouraged to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions (electronic copy provided).

Questions

9. The Panel may pose questions to the parties and third parties at any time, including:

a. Before any meeting, the Panel may send written questions, or a list of topics it intends to pursue in questioning orally during a meeting. The Panel may ask different or additional questions at the meeting.

b. The Panel may put questions to the parties and third parties orally during a meeting, and in writing following the meeting, as provided for in paragraphs 15 and 21 below.

Substantive meetings

10. The Panel shall meet in closed session.

11. The parties shall be present at the meetings only when invited by the Panel to appear before it.

12. (1) Each party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

13. Each party shall provide to the Panel the list of members of its delegation no later than 5.00 p.m. (Geneva time) three working days preceding the first day of each meeting with the Panel.

14. A request for interpretation by any party should be made to the Panel as early as possible, preferably at the organizational stage, to allow sufficient time to ensure availability of interpreters.

15. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite the Republic of Korea to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. If interpretation is needed, each party shall provide additional copies for the interpreters.

b. Each party should avoid lengthy repetition of the arguments in its submissions. Each party is invited to limit the duration of its opening statement to not more than 75 minutes. If either party considers that it requires more time for its opening statement, it should inform the Panel and the other party at least 10 days prior to the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to the other party.

c. After the conclusion of the opening statements, the Panel shall give each party the opportunity to make comments or ask the other party questions.

d. The Panel may subsequently pose questions to the parties.

e. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the Republic of Korea presenting its statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its closing statement, if available.

f. Following the meeting:

i. Each party shall submit a final written version of its opening statement no later than 5.00 p.m. (Geneva time) on the first working day following the meeting. At the same time, each party should also submit a final written version of any prepared closing statement that it delivered at the meeting.

ii. Each party shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the other party to which it wishes to receive a response in writing.

iii. The Panel shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the parties to which it wishes to receive a response in writing.

iv. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the time-frame established by the Panel before the end of the meeting.

16. The second substantive meeting of the Panel with the parties shall be conducted in the same manner as the first substantive meeting with the Panel, except that the United States shall be given the opportunity to present its oral statement first. If the United States chooses not to avail itself of that right, it shall inform the Panel and the other party no later than 5.00pm (Geneva time) three working days day before the meeting. In that case, the Republic of Korea shall present its opening statement first, followed by the United States. The party that presented its opening statement first shall present its closing statement first.

Third party session

17. The third parties shall be present at the meetings only when invited by the Panel to appear before it.

18. (1) Each third party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each third party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

19. A request for interpretation by any third party should be made to the Panel as early as possible, preferably upon receiving the working procedures and timetable for the proceeding, to allow sufficient time to ensure availability of interpreters.

20. (1) Each third party may present its views orally during a session of the first substantive meeting with the parties set aside for that purpose.

(2) Each third party shall indicate to the Panel whether it intends to make an oral statement during the third-party session, along with the list of members of its delegation, in advance of this session and no later than 5.00 p.m. (Geneva time) three working days preceding the third-party session of the meeting with the Panel.

21. The third-party session shall be conducted as follows:

a. All parties and third parties may be present during the entirety of this session.

b. The Panel shall first hear the oral statements of the third parties, who shall speak in alphabetical order. Each third party making an oral statement at the third-party session shall provide the Panel and other participants with a provisional written version of its statement before it takes the floor. If interpretation of a third party's oral statement is needed, that third party shall provide additional copies for the interpreters.

c. Each third party should limit the duration of its statement to 15 minutes, and avoid repetition of the arguments already in its submission. If a third party considers that it requires more time for its opening statement, it should inform the Panel and the parties at least 10 days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to all third parties for their statements.

d. After the third parties have made their statements, the parties shall be given the opportunity to pose questions to any third party for clarification on any matter raised in that third party's submission or statement.

e. The Panel may subsequently pose questions to any third party.

f. Following the third-party session:

   i. Each third party shall submit the final written version of its oral statement, no later than 5.00 p.m. (Geneva time) on the first working day following the meeting.

   ii. Each party may send in writing, within the timeframe to be established by the Panel before the end of the meeting, any questions to a third party or parties to which it wishes to receive a response in writing.

   iii. The Panel may send in writing, within the timeframe to be established by the Panel before the end of the meeting, any questions to a third party or parties to which it wishes to receive a response in writing.

   iv. Each third party choosing to do so shall respond in writing to written questions from the Panel or a party, within a timeframe established by the Panel before the end of the meeting.

Descriptive part and executive summaries

22. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

23. Each party shall submit an integrated executive summary. The integrated executive summary shall summarize the facts and arguments as presented to the Panel in the party's first and second written submissions, its first and second oral statements, and if possible, its responses to questions following the first and second substantive meetings. The timing of the submission of the parties' integrated executive summaries shall be indicated in the timetable adopted by the Panel.

24. Each integrated executive summary shall be limited to no more than 20 pages.

25. The Panel may request the parties and third parties to provide executive summaries of facts and arguments presented in any other submissions to the Panel for which a deadline may not be specified in the timetable.

26. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions, if relevant. The executive summary to be provided by each third party shall not exceed six pages. If a third-party submission and/or oral statement does not exceed six pages in total, this may serve as the executive summary of that third party's arguments.

Interim review

27. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

28. If no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

Interim and Final Report

29. The interim report, as well as the final report before its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

30. The following procedures regarding service of documents shall apply to all documents submitted by parties and third parties during the course of the proceeding, except to the extent they conflict with the Additional Working Procedures of the Panel Concerning Business Confidential Information:

a. Each party and third party shall submit all documents to the Panel by submitting them with the DS Registry (office No. 2047; DSRegistry@wto.org). Each party and third party shall submit a copy of its submissions and a copy of its Exhibits to the Panel by 5.00 p.m. (Geneva time) on the due dates established by the Panel in Microsoft Word format or in PDF format, either on a CD-ROM, a DVD or as an e-mail attachment.

b. The electronic version of documents shall constitute the official version for the purposes of the record of the dispute. Should there be any discrepancy between the Microsoft Word format and PDF format of the documents, the Word format shall constitute the final version of the party's submission.

c. All emails to the Panel shall be addressed to DSRegistry@wto.org, and copied to other WTO Secretariat staff whose email addresses have been provided to the parties during the course of the proceeding. If a CD-ROM/DVD is provided, it shall be filed with the DS Registry (office No. 2047).

d. As soon as possible, and in any case no later than two working days following the submission of documents in accordance with the above procedures, each party and third party shall provide the DS Registry (office No. 2047) with a paper copy of all such documents submitted to the Panel.

e. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve any submissions in advance of the first substantive meeting with the Panel directly on the third parties. Each third party shall serve any document submitted to the Panel directly on the parties and on all other third parties. A party or third party may serve its documents on another party or third party in electronic format only, either as an e-mail attachment, or on a CD-ROM or DVD. Each party and third party shall confirm that copies have been served on the parties and third parties, as appropriate, at the time it provides each document to the Panel.

f. Each party and third party shall submit its documents with the DS Registry and serve copies on the other party (and third parties if appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel.

g. In addition, each party and third party is encouraged to submit all documents through the Digital Dispute Settlement Registry (DDSR) within 24 hours following the deadline for the submission of the electronic copy pursuant to paragraph a. If the parties or third parties

have any questions or technical difficulties relating to the DDSR, they are invited to consult the DDSR User Guide (electronic copy provided) or contact the DS Registry at DSRegistry@wto.org.

h. As a general rule, all communications from the Panel to the parties and third parties will be via email. In addition to transmitting them to the parties by email, the Panel shall provide the parties with a paper copy of the Interim Report and the Final Report.

Correction of clerical errors in submissions

31. The Panel may grant leave to a party or third party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request should identify the nature of the errors to be corrected, and should be made promptly following the filing of the submission in question.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING BUSINESS CONFIDENTIAL INFORMATION

Adopted on 13 February 2019

1. The following procedures apply to business confidential information (BCI) submitted during the course of the present Panel proceedings.

2. For the purposes of these Panel proceedings, BCI is any information that was previously treated by the U.S. Department of Commerce as confidential or proprietary information protected by Administrative Protective Order in the course of the specific antidumping and countervailing proceedings at issue in this dispute, entitled Certain Corrosion-Resistant Steel Products From the Republic of Korea (A-580-878), Certain Cold-Rolled Steel Flat Products From the Republic of Korea (A-580-881), Certain Hot-Rolled Steel Flat Products From the Republic of Korea (A-580-883), Large Power Transformers From the Republic of Korea (A-580-867), Large Power Transformers From the Republic of Korea (A-580-867) (Second Review), Large Power Transformers From the Republic of Korea (A-580-867) (Third Review), Large Power Transformers From the Republic of Korea (A-580-867) (Fourth Review), Large Power Transformers From the Republic of Korea (A-580-867) (Sunset Review), Certain Cold-Rolled Steel Flat Products From the Republic of Korea (C-580-882), and Certain Hot-Rolled Steel Flat Products From the Republic of Korea (C-580-884). However, these procedures do not apply to any information that is available in the public domain. In addition, these procedures do not apply to any BCI if the entity which provided the information in the course of the aforementioned investigations or administrative reviews agrees in writing to make the information publicly available.

3. If a party considers it necessary to submit to the Panel BCI as defined above from an entity that submitted that information in the investigation or administrative review at issue, the party shall, at the earliest possible date, obtain an authorizing letter from the entity and provide such authorizing letter to the Panel, with a copy to the other party. The authorizing letter from the entity shall authorize both Korea and the United States to submit in this dispute, in accordance with these procedures, any confidential information submitted by that entity in the course of the investigation or administrative review. Each party shall, at the request of the other party, facilitate the communication to an entity in its territory of any request to provide an authorizing letter referred to above. Each party shall encourage any entity in its territory that is requested to grant the authorization referred to in this paragraph to grant such authorization.

4. No person may have access to BCI except a member of the Secretariat or the Panel, an employee of a party or third party, or an outside advisor to a party or third party for the purposes of this dispute. However, an outside advisor to a party or third party is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the products that were the subject of the investigation or administrative review at issue in this dispute, or an officer or employee of an association of such enterprises.

5. A person having access to BCI shall treat it as confidential, i.e. shall not disclose that information other than to persons authorized to have access to it pursuant to these procedures. Each party and third party is responsible for ensuring that its employees and outside advisors comply with these procedures. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose. All documents and electronic storage media containing BCI shall be stored in such a manner as to prevent unauthorized access to such information. Third parties' access to BCI shall be subject to the terms of these procedures.

6. A party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains Business Confidential Information on pages xxxxxx", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page. Documents previously submitted to or created by

the U.S. Department of Commerce containing information designated as BCI for the purposes of these proceedings pursuant to paragraph 2, and marked as business proprietary information, or words to that effect (including headers and bracketing), shall be deemed to comply with this requirement. A party submitting BCI in the form of, or as part of, an Exhibit shall, in addition to the above, so indicate by putting "BCI" next to the exhibit number (e.g., Exhibit KOR-001 (BCI), Exhibit USA-001 (BCI)).

7. Where BCI is submitted in electronic format, the file name shall include the terms "Business Confidential Information" or "BCI". In addition, where applicable, the label of the storage medium shall be clearly marked with the statement "Business Confidential Information" or "BCI".

8. Where a party submits a document containing BCI to the Panel, the other party or third party referring to that BCI in its documents, including written submissions and oral statements, shall clearly identify all such information in those documents. All such documents shall be marked and treated as described in paragraph 6. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are present or observing the session at that time. The written versions of such oral statements submitted to the Panel shall be marked as provided for in paragraph 6.

9. If a party or third party considers that information submitted by the other party or a third party should have been designated as BCI and objects to its submission without such designation, it shall forthwith bring this objection to the attention of the Panel and the other party, and, where relevant, the third parties, together with the reasons for the objection. Similarly, if a party or third party considers that the other party or a third party designated as BCI information which should not be so designated, it shall forthwith bring this objection to the attention of the Panel and the other party, and, where relevant, the third parties, together with the reasons for the objection. The Panel shall decide whether information subject to an objection will be treated as BCI for the purposes of these proceedings on the basis of the criteria set out in paragraph 2.

10. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not contain any BCI.

11. Submissions, exhibits, and other documents or recordings containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Report of the Panel.

12. The Panel reserves the right, after consulting with the parties, to amend and/or supplement these Additional Working Procedures concerning BCI.

ANNEX A-3

PRELIMINARY RULING OF THE PANEL

2 July 2019

1 INTRODUCTION

1.1. On 23 April 2019, pursuant to paragraph 4 of the Panel's Working Procedures, the United States requested a preliminary ruling, alleging that, contrary to the requirements of Article 6.2 of the DSU, Korea's Panel Request fails to clearly identify the specific unwritten measure that is the object of an "as such" claim. On this basis, the United States requests the Panel to rule that Korea's "as such" claim against an "alleged unwritten measure" is outside the Panel's terms of reference.[1] Korea responded to the United States' preliminary ruling request on 21 May 2019, asserting that its Panel Request properly identifies the specific measure at issue in accordance with Article 6.2 of the DSU and that, therefore, its "as such" claim against the unwritten measure is within the Panel's jurisdiction.[2] With respect to timing, both parties requested the Panel to issue its preliminary ruling at the earliest moment practicable.[3]

1.2. For the efficient conduct of these proceedings, and in keeping with the Parties' desire for a ruling at the earliest moment practicable, the Panel considers it appropriate to issue its preliminary ruling before the first substantive meeting in this dispute. At the same time, the Panel notes that paragraph 4.1.(c) of the Working Procedures allows the Panel, in instances where it decides to issue a preliminary ruling before the issuance of its Report, to provide the reasons for such a ruling subsequently in its Report. In exercise of the latitude available to it under paragraph 4.1.(c) of the Working Procedures, the Panel shall provide the reasoning underlying this preliminary ruling as part of its Interim Report to the Parties.

2 PRELIMINARY RULING

2.1. 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]] [4]

[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;

[1] United States' request for a preliminary ruling, paras. 1, 4 and 24.
[2] Korea's response to United States' preliminary ruling request, para. 53.
[3] United States' request for a preliminary ruling, para. 24; Korea's response to United States' preliminary ruling request, para. 54.
[4] Panel Request, para. 9 and footnote 1 thereto.

(ii) Section 776 of the Tariff Act of 1930, codified at 19 U.S.C. § 1677e; and (iii) the implementing regulations of the USDOC in 19 C.F.R. § 351, including in particular section 308.

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

2.2. 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.

2.3. A copy of this preliminary ruling will be transmitted to the Third Parties.

ANNEX A-4

INTERIM REVIEW

1 INTRODUCTION

1.1. On 24 September 2020, the Panel transmitted its Interim Report to the parties. 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.

1.2. In accordance with Article 15.3 of the DSU, this section of the Panel Report sets out our response to the parties' requests made at the interim review stage. Where appropriate, we have modified aspects of the Report, in light of the parties' requests and comments. Due to changes as a result of our review, the numbering of paragraphs and footnotes in the Final Report has changed from the Interim Report. The text below refers to the numbers in the Interim Report, with the numbers in the Final Report in parentheses for ease of reference, if different.

1.3. The Panel has also rectified certain typographical and other non-substantive errors and made adjustments concerning the designation of BCI, in light of the parties' comments and on its own initiative.

2 SPECIFIC REQUESTS FOR REVIEW

2.1 Korea's specific requests for review

2.1.1 The Panel's use of judicial economy

2.1. Korea takes issue with the Panel's exercise of judicial economy with respect to its claims regarding selection of the replacement facts by the USDOC, in cases where the Panel has found that the USDOC resorted to facts available in a WTO-inconsistent manner. Acknowledging that "the exercise of judicial economy is a judgment call for WTO panels to make in light of the specific claims in each dispute", Korea nonetheless asserts that "this competence is not boundless".[1]

2.2. Specifically, Korea takes issue with ten instances of the Panel's exercise of judicial economy with respect to Korea's claims on the selection of replacement facts by the USDOC in four anti-dumping and two countervailing duty investigations.[2] Korea submits that, in these instances, the findings made by the Panel "may not suffice to resolve the dispute in case of an appeal by the United States".[3] Korea considers it "desirable and prudent" for the Panel to make findings on its claims concerning the selection of replacement facts by the USDOC, "even if only on an 'arguendo' basis", in instances where the Panel had already found the USDOC's resort to facts available to be WTO-inconsistent.[4] Korea notes that, although closely linked, the issues of resort and selection "focus on different factual questions and raise different legal issues".[5] Therefore, "[i]n case of a successful appeal by the United States … Korea will not have secured a positive solution to the second aspect of its claims on the selection of facts available" because "the Appellate Body may not be able to complete the legal analysis in the absence of sufficient factual findings or undisputed facts on the record".[6]

2.3. The United States objects to Korea's request that the Panel reconsider its exercise of judicial economy. According to the United States, a panel's discretion to exercise judicial economy flows

[1] Korea's request for interim review, paras. 5 and 11 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, paras. 403-405, in turn referring to Appellate Body Report, *Australia – Salmon*, para. 223).
[2] Korea's request for interim review, para. 8 (referring to Interim Report paras. 7.84, 7.141, 7.182, 7.227, 7.314, 7.315, 7.369, 7.408, 7.476, and 7.568).
[3] Korea's request for interim review, para. 7.
[4] Korea's request for interim review, para. 8.
[5] Korea's request for interim review, para. 9.
[6] Korea's request for interim review, paras. 10-11.

from Articles 3.7 and 11 of the DSU, and nothing in the text of these provisions "indicates that a panel is required to examine or make findings on each and every claim made by a complaining party".[7] Referring to the ten instances of the Panel's exercise of judicial economy identified by Korea, the United States submits that the Panel's findings do not lead to a partial resolution of the matter, and that Korea has not argued such.[8] For the United States, Korea's argument that its claims with respect to "resort" and "selection" rely on different factual questions and raise different legal issues only supports the conclusion that the Panel acted appropriately in exercising judicial economy.[9] The United States argues that, "[w]here additional claims with respect to the same measure involve different factual and legal issues, a substantial economy is achieved by not addressing those additional matters".[10] For the United States, Korea's argument that it will not be able to secure a positive solution to some aspects of its claims in the event of a successful appeal "relies entirely on speculation regarding future, unknowable events" and, by this logic, "apparently no panel should exercise judicial economy on any issue, with each issue to be considered by a panel in the event of an appeal".[11]

2.4. We recall that, in addressing Korea's "as applied" claims, where we have found that the USDOC's resort to facts available was WTO-inconsistent, we have not ruled upon Korea's claims and arguments aimed at the USDOC's subsequent selection of the replacement facts. As we have explained in our Report, we do not believe that making further findings on such claims "on the basis of the record used for the USDOC's WTO-inconsistent findings would assist in providing a positive solution to the dispute".[12] Panels would be unable to ever exercise judicial economy if they were required to rule upon every claim and complete the analysis for each issue in view of the mere possibility that some of their other findings of WTO-inconsistency could be reversed on appeal. In the specific circumstances of this case, we consider that the Panel's discretion to exercise judicial economy cannot be guided by this possibility alone. We therefore reject Korea's request. That said, in order to further support our reasoning, we have added to the relevant paragraphs a reference to a prior instance where another panel exercised judicial economy for similar reasons.[13]

2.1.2 Paragraph 7.20

2.5. Korea considers, first, that it would be "more accurate" if the Panel does not refer to "all claims" in this paragraph, but rather limits its reference to the claims under Article 6.8 of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement.[14] Second, Korea also submits that it "did not argue that a comparative analysis was always required when selecting the replacement facts", but rather that "a process of reasoning and evaluation" is required by the investigating authority.[15] According to Korea, "the Panel's view is not really different from Korea's position in this regard", noting that the legal obligation for investigating authorities "is to engage in a process of reasoning and evaluating 'all facts that are properly available' before the authority" when selecting replacement facts for the missing "necessary" information.[16] Korea argues that "a comparative evaluation would rather be a likely result of the requisite process of reasoning and evaluation", but not a "legal obligation".[17] Korea asserts that "the extent to which a comparative evaluation is required" depends on the circumstances of the investigation in question, including factors such as the quantity and quality of the available facts on the record, and the types of determinations to be made.[18] Based on the above, Korea requests that paragraph 7.20 and footnote 51 be amended to more accurately reflect Korea's arguments.[19]

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[7] United States' comments on Korea's request for interim review, para. 7.
[8] United States' comments on Korea's request for interim review, para. 8.
[9] United States' comments on Korea's request for interim review, para. 8.
[10] United States' comments on Korea's request for interim review, para. 8.
[11] United States' comments on Korea's request for interim review, para. 9.
[12] Report of the Panel, paras. 7.84, 7.141, 7.182, 7.227, 7.314, 7.315, 7.369 (7.370), 7.408 (7.409), 7.476 (7.477), and 7.568 (7.569).
[13] Report of the Panel, paras. 7.84, 7.141, 7.182, 7.227, 7.314, 7.315, 7.369 (7.370), 7.408 (7.409), 7.476 (7.477) and 7.568 (7.569), and footnotes 247 (252), 448 (453), 562 (567), 723 (729), 972 (982), 973 (983), 1133 (1145), 1254 (1266), 1457 (1470), and 1689 (1702).
[14] Korea's request for interim review, para. 14.
[15] Korea's request for interim review, para. 14.
[16] Korea's request for interim review, para. 21.
[17] Korea's request for interim review, para. 21.
[18] Korea's request for interim review, para. 19 (referring to Appellate Body Report, *US – Carbon Steel (India)*, para. 4.434).
[19] Korea's request for interim review, paras. 22-23.

2.6. The United States does not respond to Korea's first comment, but objects to its second request concerning this paragraph. Pointing out that Korea made several references in its submissions to the need for an investigating authority to undertake the "requisite comparative analysis" when selecting the "best information available", the United States submits that the Panel correctly reflects Korea's position.[20]

2.7. We have modified this paragraph in order to accommodate the first request made by Korea. We are, however, unable to accede to Korea's second request. The text of this paragraph accurately presents the arguments made by Korea at multiple instances in its written submissions. Despite Korea's broader references to the investigating authority's obligation "to engage in a process of reasoning and evaluation", Korea has also more specifically stated that "when selecting the facts available to be used, the investigating authority should make a comparative evaluation of all available information before deciding which information constitutes the best information available".[21] In its submissions, Korea has referred multiple times to "the required comparative evaluation"[22] and the "requisite comparative analysis".[23] Korea also has noted, already when presenting the "guiding principles" for the use of facts available, that "an investigating authority *must undertake* a comparative evaluation to ensure that it is using the 'best information' available".[24] We therefore disagree with Korea that it "did not argue that a comparative analysis was always required when selecting the replacement facts".[25] We have, however, modified footnote 51 in order to include additional references to Korea's submissions asserting that a "comparative evaluation" is always required when an investigating authority is selecting the replacement facts.

2.1.3 Footnote 56 of paragraph 7.22

2.8. Korea considers the references in footnote 56 on the "fundamental disagreement between the parties" to be out of place as they concern the description and precise content of the alleged unwritten measure that is challenged "as such".[26] The United States does not respond to Korea's request.

2.9. Having examined Korea's concern, we have deleted footnote 56 and modified the accompanying text.

2.1.4 Paragraphs 7.45-7.48

2.10. Korea requests the Panel "to reconsider the discussion" in paragraphs 7.45-7.48 of the Interim Report for the same reasons underlying its request for modification of paragraph 7.20.[27] Korea asserts that the Panel erroneously understood "that Korea developed an argument that an authority must always engage in a comparative evaluation".[28] Korea requests the Panel to delete

[20] United States' comments on Korea's request for interim review, para. 11 (referring to Korea's first written submission, para. 88).

[21] Korea's first written submission, para. 62.

[22] In the context of the HRS Anti-Dumping Investigation, Korea argued that the USDOC acted inconsistently with Article 6.8 and paragraph 7 of Annex II when selecting facts available, as "there was zero explanation, let alone the required comparative evaluation, as to how and why the highest and lowest values were the best information available to fill the alleged missing information". (Korea's first written submission, para. 509). Under the CRS Countervailing Duty Investigation, Korea asserted that the USDOC "failed to engage in the required comparative evaluation to determine whether the information used was the best information available that would lead to an accurate determination". (Korea's first written submission, para. 337). See also Korea's first written submission, paras. 323, 443, 450, 461, 853, 859, and 880; second written submission, paras. 264 and 367.

[23] Korea argued in the context of the CORE Anti-Dumping Investigation that "the choice of facts available used by the USDOC to replace the allegedly missing information was not based on the requisite comparative analysis of available information on the record with a view to reaching an accurate determination". (Korea's first written submission, para. 126). In the context of the LPT Anti-Dumping Investigation (POR3), Korea argued that "the USDOC was obliged to sufficiently reflect in its investigative reports the process of requisite comparative evaluation and assessment, involving consideration and comparison of 'all substantiated facts on the record'". (Korea's first written submission, para. 859). See also Korea's first written submission, paras. 88, 201, and 776.

[24] Korea's first written submission, para. 71. (emphasis added)

[25] Korea's request for interim review, para. 14.

[26] Korea's request for interim review, para. 24.

[27] Korea's request for interim review, para. 25.

[28] Korea's request for interim review, para. 25.

paragraphs 7.45-7.48 of the Interim Report, and to replace them with a paragraph expressing its view that 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'".[29] The United States disagrees with Korea's requests and notes, by reference to Korea's substantive submissions, that the Panel has correctly presented Korea's arguments.[30]

2.11. We are unable to accede to Korea's request for the same reasons that are set out in our examination of Korea's request for modification of paragraph 7.20.[31]

2.1.5 Paragraph 7.52

2.12. Korea requests the Panel to modify this paragraph and add to the description of the facts relating to Hyundai Steel's communication with the USDOC regarding its difficulties in reporting further manufactured sales the events reflected in Exhibits KOR-13, KOR-14, and KOR-16.[32] The United States does not object to Korea's request, but proposes a different manner of presenting these additions.[33]

2.13. We have modified the text of paragraph 7.52 in light of the comments by the parties.

2.1.6 Paragraph 7.55

2.14. Korea requests the Panel to modify this paragraph by adding text indicating that Hyundai Steel commented in its case brief on the USDOC's decision to cancel verification.[34] The United States does not object to Korea's request, but proposes a different manner of presenting this addition.[35]

2.15. We have modified the text of paragraph 7.55 in light of the comments by the parties.

2.1.7 Paragraph 7.60

2.16. Korea requests the Panel to insert an explanation in order to clarify Korea's claim under paragraph 5 of Annex II.[36] The United States does not comment on this request.

2.17. We have modified the text of paragraph 7.60 in light of Korea's request.

2.1.8 Paragraphs 7.67 and 7.71

2.18. Korea requests the Panel to delete the following sentence from paragraph 7.67: "[c]ontrary 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'". Korea also requests the deletion of the following sentence from paragraph 7.71: "[w]e disagree with Korea's argument that the USDOC 'originally determined' that Hyundai Steel did not have to file a Section E response". Korea further requests the Panel to modify the second sentence of paragraph 7.71. Specifically, Korea requests that it be "reflected that Korea did not argue that the USDOC made a 'determination' that a Section E response did not have to be filed. Rather, Korea noted that the USDOC 'instructed' Hyundai Steel not to file".[37] The United States disagrees with Korea's requests, and notes that these paragraphs correctly reflect Korea's arguments and the USDOC's instructions.[38] In particular, the United States cites Korea's first written submission, wherein Korea stated that the USDOC "originally determined that

[29] Korea's request for interim review, para. 27.
[30] United States' comments on Korea's request for interim review, para. 12.
[31] See para. 2.7. above.
[32] Korea's request for interim review, paras. 28-29.
[33] United States' comments on Korea's request for interim review, para. 13.
[34] Korea's request for interim review, paras. 30-31.
[35] United States' comments on Korea's request for interim review, para. 14.
[36] Korea's request for interim review, paras. 32-33.
[37] Korea's request for interim review, para. 35.
[38] United States' comments on Korea's request for interim review, paras. 15-17.

Hyundai Steel did not have to file a Section E response", and the USDOC's questionnaire, which stated that Hyundai Steel was "not currently required to respond to section E".[39]

2.19. We consider that these paragraphs accurately reflect the argument presented by Korea as part of its submissions. While we are, for this reason, unable to accede to Korea's requests, we have inserted a footnote to the second sentence of paragraph 7.71 including the USDOC's statement on this issue, for further clarity.

2.1.9 Paragraph 7.173

2.20. Korea requests the Panel to modify a sentence in this paragraph which states that "[b]esides 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", and insert certain additional arguments made by Korea.[40] The United States considers that the Panel's statement in paragraph 4.1 of the Interim Report that arguments of the parties are reflected in their provided executive summaries appropriately addresses Korea's request.[41]

2.21. We consider that this paragraph accurately reflects the arguments presented by Korea as part of its submissions and we are, therefore, unable to accede to Korea's request.

2.1.10 Footnote 565 (570) of paragraph 7.183

2.22. Korea requests the Panel to delete the text in footnote 565 of the Interim Report on the basis that it concerns "home-market sales" and is not "entirely relevant" to the issue discussed in the main text of this paragraph (concerning "US export sales").[42] The United States objects to this request, noting that the Panel intended to address home-market sales in the footnote and US sales in the main text of the paragraph.[43]

2.23. We have deleted the text of footnote 565 (570) in light of Korea's request.

2.1.11 Paragraph 7.186

2.24. Korea requests the Panel to modify its finding of violation in this paragraph in order to cover both Article 6.8 and paragraph 7 of Annex II of the Anti-Dumping Agreement. Korea argues that these provisions "jointly speak to the relevant obligation on investigating authorities in selecting the replacement facts", therefore given the Panel's finding of violation of Article 6.8, the Panel should not exercise judicial economy with respect to Korea's claim under paragraph 7.[44] The United States objects to this request, noting that "the Panel's finding was limited the USDOC's decision to resort to facts available and not to the USDOC's selection of facts available".[45]

2.25. We note first that, contrary to the United States' position, our finding in this paragraph concerns the USDOC's selection of the replacement facts and it is not limited to the USDOC's decision to resort to facts available. In that respect, we have explained, as part of our interpretative analysis, that paragraph 7 of Annex II serves as relevant context for the interpretation of Article 6.8 of the Anti-Dumping Agreement. It is also clear, however, that the texts of these provisions are different. Korea has not provided any compelling reason, based on the text of paragraph 7 of Annex II, as to why, having already concluded that the USDOC acted inconsistently with Article 6.8 in selecting the replacement facts, the Panel was also under an obligation to make findings under paragraph 7 of Annex II. We are, therefore, unable to accede to Korea's request.

[39] United States' comments on Korea's request for interim review, paras. 15-17 (referring to Korea's first written submission, para. 151; CORE anti-dumping questionnaire to Hyundai Steel, (Exhibit KOR-6), p. 2).
[40] Korea's request for interim review, paras. 39-40.
[41] United States' comments on Korea's request for interim review, para. 18.
[42] Korea's request for interim review, para. 41.
[43] United States' comments on Korea's request for interim review, paras. 19-20.
[44] Korea's request for interim review, paras. 42-43.
[45] United States' comments on Korea's request for interim review, para. 21.

2.1.12 Paragraph 7.237

2.26. Korea requests the Panel to modify this paragraph by including certain additional factual information "to describe the full extent of the USDOC's application of adverse facts available on this issue".[46] The United States objects to this request, noting that "this section of the Report concerns the USDOC's decision to resort to facts available and not the USDOC's application of facts available".[47]

2.27. We are unable to accede to Korea's request as we do not consider the proposed additions to be necessary for our analysis and findings.

2.1.13 Paragraphs 7.240 and 7.244

2.28. Korea requests the Panel to modify these paragraphs by including certain additional factual information "to describe the full extent of the USDOC's application of adverse facts available".[48] The United States objects to these requests, noting that these paragraphs "are in a section of the Report concerning the USDOC's decision to resort to facts available, and not the application of facts available".[49]

2.29. We are unable to accede to Korea's request as we do not consider the proposed additions to be necessary for our analysis and findings.

2.1.14 Paragraph 7.248

2.30. Korea requests the Panel to modify this paragraph in order to "reflect more fully the legal claims by Korea".[50] The United States does not comment on this request.

2.31. We are unable to accede to Korea's request because we consider that this paragraph accurately reflects Korea's claims, and because the addition requested by Korea is already included in the summary of Korea's arguments.

2.1.15 Paragraph 7.250

2.32. Korea requests the Panel to include in this paragraph its claim that "the USDOC failed to use timely, appropriately submitted, and verifiable information from POSCO about the cross-owned affiliates".[51] The United States objects to this request, noting that this paragraph is "in a section of the Report concerning the USDOC's decision to resort to facts available, and not the application of facts available", and that therefore the requested addition is not relevant to this section of the Report.[52]

2.33. We consider it appropriate to accommodate Korea's request by modifying paragraph 7.249, instead of paragraph 7.250, to include Korea's claim.

2.1.16 Paragraph 7.284

2.34. Korea requests the Panel to modify this paragraph by, at a minimum, specifying the facts as "alleged" by the USDOC and the United States, because the parties disagree over the accuracy of the facts described in this paragraph.[53] Korea further requests the Panel to modify this paragraph in order to reflect Korea's position on the issue of the visit of the USDOC officials to the FEZ facility.[54]

[46] Korea's request for interim review, paras. 45-46.
[47] United States' comments on Korea's request for interim review, para. 22.
[48] Korea's request for interim review, paras. 47 and 49.
[49] United States' comments on Korea's request for interim review, para. 23.
[50] Korea's request for interim review, paras. 51-52.
[51] Korea's request for interim review, para. 53.
[52] United States' comments on Korea's request for interim review, para. 23.
[53] Korea's request for interim review, para. 54.
[54] Korea's request for interim review, para. 55.

The United States objects to Korea's requests, as Korea does not propose specific language and the arguments of the parties are reflected in their executive summaries.[55]

2.35. Having carefully examined the parties' comments, we have modified this paragraph in order to accurately reflect the relevant factual background.

2.1.17 Paragraph 7.313

2.36. Korea requests the Panel to modify this paragraph by finding that the USDOC erred not only in its intermediate finding that the cross-owned affiliate inputs were "primarily dedicated" to the cold-rolled steel production of POSCO, but also in its ultimate finding that the affiliates received countervailable subsidies that were attributable to POSCO.[56] The United States objects to this request noting that Korea has not offered any valid basis for the Panel to make additional findings that it had declined to make.[57]

2.37. We have modified this paragraph in order to accommodate Korea's request. In line with this change, we have also modified paragraph 7.249.

2.1.18 Paragraph 7.319

2.38. Korea requests the Panel to add references to Korea's arguments regarding the USDOC's selection of the replacement facts.[58] The United States does not comment on this request.

2.39. We have inserted additional text in a new paragraph (7.320) in light of Korea's request.

2.1.19 Paragraph 7.335 (7.336)

2.40. Korea requests the Panel to modify this paragraph by including certain additional factual information "to describe the full extent of the USDOC's application of adverse facts available".[59] The United States objects to this request, as this paragraph is in a section of the Panel Report regarding the USDOC's decision to resort to facts available, and not the USDOC's selection of facts available.[60]

2.41. We are unable to accede to Korea's request as we do not consider the proposed changes to be necessary for our analysis and findings.

2.1.20 Paragraph 7.462 (7.463)

2.42. Korea requests the Panel to modify the last sentence of this paragraph to more accurately reflect the facts. Korea requests the Panel to clarify that the USDOC accepted the petitioner's submission, but stated that it would not accept new information "thereafter".[61] The United States objects to this request, noting that this modification would incorrectly imply that the USDOC allowed the petitioner to make certain factual additions when raising certain inconsistencies.[62]

2.43. We have modified this paragraph in order to address Korea's request, while also taking into account the United States' concern. Accordingly, we have also modified paragraph 7.467 (7.468) of the Interim Report.

2.1.21 Paragraph 7.613 (7.614)

2.44. Korea requests the Panel to modify the third sentence of this paragraph by adding further details about its argument concerning the meaning of the term "adverse inferences".[63] The

[55] United States' comments on Korea's request for interim review, paras. 24-25.
[56] Korea's request for interim review, para. 57.
[57] United States' comments on Korea's request for interim review, para. 27.
[58] Korea's request for interim review, paras. 58-59.
[59] Korea's request for interim review, para. 63.
[60] United States' comments on Korea's request for interim review, para. 28.
[61] Korea's request for interim review, paras. 65-66.
[62] United States' comments on Korea's request for interim review, para. 29.
[63] Korea's request for interim review, para. 68.

United States objects to this modification on the basis that it would confuse the Panel's deliberate discussion of one aspect of the alleged measure and would "take[] away from the clarity of the report".[64]

2.45. We have modified the text of this paragraph for further clarity in light of Korea's request.

2.1.22 Paragraphs 7.616 (7.617), 7.618 (7.619), and 7.619 (7.620)

2.46. As part of its comments on all of these paragraphs, Korea notes that the "unwritten measure challenged by Korea in this dispute is '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'".[65] With respect to paragraph 7.616 (7.617) of the Interim Report, Korea requests the Panel to "reconsider" its understanding of paragraph 9 of the panel request and make the "necessary" changes.[66] Specifically, Korea submits that paragraph 9 of its panel request merely goes on to "explain what i[s] meant by applying 'AFA' by pointing to certain aspects of this practice of AFA", "[b]ut, these explanations do not change the nature of the challenge made which related to the use of AFA".[67]

2.47. With respect to paragraphs 7.618 (7.619) and 7.619 (7.620), Korea similarly requests the Panel to "reconsider its understanding of the unwritten measure" challenged by Korea and make the "necessary edits".[68] Korea asserts that it "did not argue that the selection of replacement facts did not involve some form of evaluation; just not the appropriate one".[69] Korea submits that the "'crux of Korea's concern' is better stated as that, 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".[70] According to Korea, there are no "two sets of arguments" as it never argued that "the use of AFA means that the USDOC will not engage in *any* evaluation when selecting the facts to replace the missing information", rather that this "evaluation" is simply and consistently an inadequate evaluation.[71] Moreover, Korea notes that, although the Panel says that it will examine both possible readings of Korea's argument, it does not actually do so and focuses entirely on the argument that there is no evaluation of any kind that follows a finding of non-cooperation.[72]

2.48. The United States objects to Korea's requests, noting that it cannot offer any meaningful response as Korea does not request and identify any specific change.[73] Referring to Korea's submissions to the Panel, the United States takes issue with Korea's comment that it "did not argue that the selection of replacement facts did not involve some form of evaluation; just not the appropriate one".[74] Moreover, the United States points out that, contrary to Korea's comments, the Panel's Interim Report fully addresses both possible understandings of the alleged unwritten measure identified by Korea, including one where the USDOC undertakes an inadequate analysis.[75]

2.49. We note that Korea does not propose any specific changes to these paragraphs, but, instead, requests the Panel to "reconsider" its understanding of the precise content of the alleged unwritten measure described by Korea. Most of Korea's comments on this point repeat its earlier arguments that we have already considered and addressed as part of our Interim Report. For example, Korea continues to assert that the "*sole* procedural circumstance of non-cooperation is the basis for the selection of the facts available".[76] If, as Korea alleges, the finding of non-cooperation is the "*sole*" basis for the selection of the replacement facts by the USDOC, it follows that there can be *no other*

[64] United States' comments on Korea's request for interim review, para. 37.
[65] Korea's request for interim review, paras. 69 and 72-73 (quoting Korea's response to Panel question No. 104, para. 128).
[66] Korea's request for interim review, paras. 69-70.
[67] Korea's request for interim review, para. 69.
[68] Korea's request for interim review, paras. 72 and 76.
[69] Korea's request for interim review, para. 72.
[70] Korea's request for interim review, para. 73.
[71] Korea's request for interim review, para. 75. (emphasis original)
[72] Korea's request for interim review, para. 74.
[73] United States' comments on Korea's request for interim review, paras. 38 and 40-41.
[74] United States' comments on Korea's request for interim review, para. 32.
[75] United States' comments on Korea's request for interim review, paras. 34-36 (referring to Interim Report, paras. 7.691-7.692 and 7.696).
[76] Korea's request for interim review, para. 69. (emphasis added)

basis – or "evaluation" – for the USDOC's selection. At the same time, Korea also maintains that the USDOC's "AFA replacement 'evaluation' is simply and consistently an *inadequate* evaluation".[77] Furthermore, as the United States points out, our Interim Report already considers and addresses both possible understandings of the alleged unwritten measure identified by Korea.[78] While we do not consider it necessary or useful to repeat our analysis in the Interim Report, we have made some additional modifications to the text of these paragraphs in order to provide further clarity to our reasoning.

2.1.23 Paragraph 7.617 (7.618)

2.50. Korea requests the Panel to modify this paragraph by completing the quote of Korea's argument from paragraph 1034 of its first written submission.[79] The United States objects to this addition and considers that it would only distract from the narrow focus of this paragraph.[80]

2.51. We have modified the text of this paragraph for further clarity in light of Korea's request.

2.1.24 Paragraph 7.627 (7.628)

2.52. Korea requests the Panel to reconsider its understanding of the differences between the alleged unwritten measure identified by Korea and the measure at issue in *US – Anti-Dumping Methodologies (China)*. Korea asserts that the alleged unwritten measure challenged by Korea is "essentially the same" as the measure that was challenged by China in that dispute, as the precise content of the AFA Norm was explained in very similar terms in the two instances.[81] Additionally, Korea also requests the Panel to modify this paragraph in order to accurately reflect Korea's position, which was not that a "comparative evaluation is always required".[82]

2.53. The United States objects to the first request, noting that the measure identified in *US – Anti-Dumping Methodologies (China)* is distinct from the alleged measure challenged by Korea, as also explained by the Panel.[83] The United States also objects to Korea's second request, referring to parts of Korea's submissions relevant to the "comparative evaluation" argument.[84]

2.54. We have modified the text of this paragraph in light of Korea's first request. Relatedly, we have also modified the text of paragraphs 7.629 and 7.633 to provide further clarity to our reasoning, in light of Korea's concerns. In light of our modifications, we do not need to address Korea's second request concerning this paragraph.

2.1.25 Paragraph 7.657 (7.658)

2.55. Korea requests the Panel to "reconsider its reflection of Korea's argument by deleting the first part of this sentence that refers to Korea's arguments and to reconsider its findings accordingly".[85] Korea maintains that it did not argue that there is no evaluation to select replacement facts, but rather that this evaluation is "totally inadequate as it is focused on ensuring an adverse result rather than an accurate determination".[86] The United States objects to this request and considers it to be based on the erroneous allegation that the Panel misunderstood the challenged measure.[87]

2.56. We have modified the text of this paragraph to provide further clarity in light of Korea's request. For reasons provided in paragraph 2.49. above, we see no need to further "reconsider" our findings, as urged by Korea.

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[77] Korea's request for interim review, para. 75. (emphasis added)
[78] Interim Report, paras. 7.696 and 7.717 (Final Report, paras. 7.697 and 7.719).
[79] Korea's request for interim review, para. 71.
[80] United States' comments on Korea's request for interim review, para. 39.
[81] Korea's request for interim review, para. 78.
[82] Korea's request for interim review, paras. 77-81.
[83] United States' comments on Korea's request for interim review, para. 42.
[84] United States' comments on Korea's request for interim review, paras. 43-44.
[85] Korea's request for interim review, para. 83.
[86] Korea's request for interim review, para. 82.
[87] United States' comments on Korea's request for interim review, para. 45.

2.1.26 Paragraph 7.670 (7.671)

2.57. Korea requests the Panel to "reconsider its understanding of the evidence presented by Korea in light of the argument Korea actually made and based on the precise content of the 'as such' measure challenged by Korea".[88] The United States objects to Korea's request, asserting that the Panel has not misunderstood the unwritten measure.[89]

2.58. We have modified the text of this paragraph and paragraph 7.672 (7.673) to provide further clarity in light of Korea's request. For reasons provided in paragraph 2.49. above, we see no need to further "reconsider" our understanding, as suggested by Korea.

2.1.27 Paragraph 7.671 (7.672)

2.59. Korea requests the Panel to "reconsider its approach to Korea's identification of the measure", because "Korea's argument was that as soon as a non-cooperation finding is made, the USDOC resorts to AFA" and "[w]hether that evaluation is sufficient to meet the obligations of the Anti-Dumping Agreement and the SCM Agreement is a matter to be examined in the context of Korea's claim of violation of the Agreement".[90] The United States objects to this request and considers that the Panel's explanation is "more than adequate to support the Panel's conclusion".[91]

2.60. We have modified the text of this paragraph to provide further clarity in light of Korea's request. For reasons provided in paragraph 2.49. above, we see no need to further "reconsider" our understanding of Korea's identification of the measure.

2.1.28 Paragraphs 7.678 (7.679), 7.680 (7.681), and 7.682 (7.683)

2.61. Korea requests the Panel "to reconsider its understanding of the facts and [its] findings" in these paragraphs "in light of the unwritten measure that Korea challenges".[92] Korea maintains that it has not argued that the USDOC selects replacement facts "without any further analysis", as suggested by the Panel, and the case of *Heavy walled rectangular welded carbon steel pipes and tubes from Turkey* shows the exact pattern that Korea challenges "as such" and supports its position.[93] The United States objects to this request as it is based on the "erroneous position that the Panel fundamentally misunderstood the alleged unwritten measures Korea was challenging".[94]

2.62. We have modified the text of paragraphs 7.680 (7.681) and 7.682 (7.683) to provide further clarity in light of Korea's requests. For reasons provided in paragraph 2.49. above, we see no need to further "reconsider" our understanding of the facts or our findings.

2.1.29 Paragraph 7.685 (7.686)

2.63. Korea requests the Panel to "reconsider its understanding of the facts and [its] findings" in this paragraph "[f]or the reasons specified above in relation to paragraphs 7.678, 7.680, 7.682".[95] Korea further requests the Panel to be more specific regarding its discussion of Korea's argument regarding the "kind of evaluation" provided by the USDOC when selecting replacement facts.[96] The United States objects to the first request and asserts that the Panel has not misunderstood the unwritten measure challenged by Korea. The United States also objects to Korea's second request and considers Korea's request for more specificity to be "unwarranted".[97]

[88] Korea's request for interim review, paras. 84-85.
[89] United States' comments on Korea's request for interim review, paras. 47-48.
[90] Korea's request for interim review, paras. 86-88.
[91] United States' comments on Korea's request for interim review, para. 49.
[92] Korea's request for interim review, para. 91.
[93] Korea's request for interim review, paras. 89-90.
[94] United States' comments on Korea's request for interim review, paras. 50-51.
[95] Korea's request for interim review, para. 92.
[96] Korea's request for interim review, para. 93.
[97] United States' comments on Korea's request for interim review, paras. 52-53.

2.64. We have modified the text of this paragraph to provide further clarity in light of Korea's request. For reasons provided in paragraph 2.49. above, we see no need to further "reconsider" our understanding of the facts or our findings.

2.1.30 Paragraph 7.693 (7.694)

2.65. Korea requests the Panel to reconsider the manner in which it presents Korea's argument, and thus to reconsider its related findings based on this argument, as Korea has not argued that the USDOC selects replacement facts "without engaging in any further analysis" after making a finding of non-cooperation.[98] The United States objects to Korea's request as it is based "on its erroneous position that the Panel fundamentally misunderstood the alleged unwritten measures" challenged.[99]

2.66. We have modified the text of this paragraph to provide further clarity, in light of Korea's request. For reasons provided in paragraph 2.49. above, we see no need to further "reconsider" the manner in which we present Korea's argument or our related findings.

2.1.31 Paragraph 7.694 (7.695)

2.67. Korea requests the Panel to modify the final sentence of this paragraph in order to more accurately reflect Korea's argument, and to reconsider its findings, as it "has not argued in this dispute that a comparative evaluation is required 'in all circumstances' when selecting replacement facts".[100] The United States objects to Korea's request as it is based on the erroneous position that the Panel has misunderstood the alleged unwritten measure challenges.[101]

2.68. For reasons explained in our analysis of Korea's comments on paragraph 7.20 of the Interim Report, we are unable to accede to Korea's request.

2.1.32 Paragraph 7.696 (7.697)

2.69. Korea requests the Panel to reconsider its finding that "the mere fact that there was 'some' evaluation means that Korea failed to establish the precise content of the measure", as Korea has not argued that the USDOC does "not engage in *any* evaluation when it selects the replacement facts".[102] The United States objects to this request.[103]

2.70. We have modified the text of this paragraph to provide further clarity in light of Korea's request. For reasons provided in paragraph 2.49. above, we see no need to further "reconsider" our analysis and findings in this paragraph.

2.2 The United States' specific requests for review

2.2.1 Paragraph 7.62

2.71. The United States requests the Panel to modify this paragraph in order to better reflect its arguments regarding Korea's claim that no necessary information was missing, and in particular concerning the exchange on the "alternative [calculation] methodology".[104] Korea objects to the requested modifications, noting that they do not present properly Korea's position on this matter, and they are in any event not relevant given the scope of Korea's challenge.[105]

2.72. We have modified the text of this paragraph for further clarity in light of the United States' request.

[98] Korea's request for interim review, para. 94. (emphasis omitted)
[99] United States' comments on Korea's request for interim review, para. 54.
[100] Korea's request for interim review, paras. 95-98.
[101] United States' comments on Korea's request for interim review, para. 55.
[102] Korea's request for interim review, paras. 100-102. (emphasis original)
[103] United States' comments on Korea's request for interim review, para. 56.
[104] United States' request for interim review, para. 1.
[105] Korea's comments on the United States' request for interim review, p. 2.

2.2.2 Footnote 241 (246) of Paragraph 7.81

2.73. The United States requests the Panel to modify footnote 241 (246) to this paragraph by including certain additional references, together with an explanation, in support of its argument that the USDOC had rejected Hyundai Steel's claims of difficulty.[106] Korea considers that the requested additions are not necessary.[107]

2.74. We have modified this footnote by adding the references proposed by the United States, but we do not consider it necessary to add any further explanatory text to these references.

2.2.3 Paragraph 7.100

2.75. The United States requests the Panel to modify this paragraph by including an additional argument in support of the United States' position that there was no "necessary" information missing.[108] Korea objects to this request, noting that the United States' argument is already reflected in the Panel's summary of arguments in this paragraph.[109]

2.76. We consider that the Panel's summary of arguments properly reflects the United States' arguments on this issue. For this reason, we are unable to accede to the United States' request.

2.2.4 Paragraph 7.202

2.77. The United States requests the Panel to modify this paragraph by including an additional argument in support of the United States' position that there was no "necessary" information missing.[110] Korea objects to this modification, noting that this paragraph concerns the hot-rolled steel anti-dumping investigation, while the requested addition is an argument made by the United States under the cold-rolled steel anti-dumping investigation.[111]

2.78. We are unable to accede to the United States' request because this paragraph is in the section summarizing the parties' arguments under the hot-rolled steel anti-dumping investigation, while the additional argument at issue, as Korea correctly points out, was made by the United States in the context of the cold-rolled steel anti-dumping investigation.[112]

2.2.5 Paragraph 7.258

2.79. The United States requests the Panel to modify this paragraph in order to reflect the United States' argument that "necessary" information regarding whether POSCO received FEZ benefits was missing.[113] Korea objects to this modification, noting that the Panel's summary of the position of the United States is accurate and complete.[114]

2.80. We have modified the text of this paragraph for further clarity in light of the United States' request.

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[106] United States' request for interim review, para. 2.
[107] Korea's comments on the United States' request for interim review, p. 3.
[108] United States' request for interim review, para. 3.
[109] Korea's comments on the United States' request for interim review, p. 4.
[110] United States' request for interim review, para. 4.
[111] Korea's comments on the United States' request for interim review, p. 4.
[112] United States' response to Panel question No. 12, para. 48 (referring to CRS supplemental Sections B-C questionnaire, (Exhibit USA-72 (BCI)), p. 3).
[113] United States' request for interim review, para. 5.
[114] Korea's comments on the United States' request for interim review, p. 5.

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF KOREA

I. INTRODUCTION

1. This dispute concerns the use of facts available and, more in particular, the use of adverse facts available (or "AFA") by the United States.

2. Korea challenges the use of AFA "as applied" in six proceedings as inconsistent with the obligations of the United States under relevant provisions of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") and the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"). In these proceedings, the United States Department of Commerce ("USDOC") resorted to the use of facts available even though the conditions for such use were not met. The USDOC also failed to respect the disciplines relating to the application of facts available, and the information selected to replace the allegedly missing "necessary" information was not the best information available to reach an accurate determination, but rather information that was particularly adverse to the interests of the Korean producers/exporters under investigation. For these reasons, Korea submits the United States acted inconsistently with Article 6.8 and Annex II of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement.

3. Korea also demonstrated that the "all others" rate applied by the USDOC in the 4th administrative review of the anti-dumping duties on Large Power Transformers ("LPT") from Korea was inconsistent with Article 9.4 of the Anti-Dumping Agreement. In particular, the USDOC failed to disregard the margins established based on facts available pursuant to Article 6.8 of the Anti-Dumping Agreement when setting the rate for non-examined producers.

4. In addition, Korea challenges the use of AFA "as such", as a rule or norm of general and prospective application and as a form of ongoing conduct, that violates the United States' obligations under the above-mentioned WTO Agreements. Indeed, the use of AFA in the challenged "as applied" proceedings are not stand-alone instances of violations of the relevant WTO obligations, but rather reflect an ongoing conduct of resorting to the use of AFA, as a rule or norm, whenever there is an alleged failure to cooperate to the best of a foreign producer or exporter's ability. Korea showed that, since August 2015, there are more than 300 proceedings that involve the use of AFA by the USDOC. In all these proceedings, the USDOC applied the AFA Rule or Norm, or AFA Ongoing Conduct, in a mechanistic manner and deliberately selected from the facts available on the record those facts that would lead to a result that was adverse to the interests of the foreign producer or exporter. In none of these cases did the USDOC undertake the required evaluation of the available facts in order to arrive at an accurate determination following a process of reasoning and evaluation. As soon as a determination of non-cooperation was made, the USDOC limited its search to finding those facts that would be adverse to the interests of the exporters concerned, rather than seeking to replace the allegedly missing necessary information with the most accurate information on the record. Korea presents relevant statistical information and substantive analysis of a sample of cases to support its "as such" claim in the first written submission.

II. "AS APPLIED" CLAIMS

II.1 ANTI-DUMPING DUTIES ON *CERTAIN CORROSION-RESISTANT STEEL PRODUCTS FROM KOREA*

5. In the corrosion-resistant steel products ("CORE") AD Investigation, the USDOC applied AFA to all further-manufactured sales because of an alleged failure by Hyundai Steel to provide verifiable information to calculate a dumping margin for these sales. The application of AFA turned the 3.51% anti-dumping margin from the preliminary determination into a 47.80% margin for the final determination. However, the resort to and application of AFA failed to comply with several disciplines under Article 6.8 and Annex II of the Anti-Dumping Agreement.

6. First, Hyundai Steel applied its best efforts to respond to the unreasonably burdensome information requests by the USDOC concerning its further-manufactured sales. Hyundai Steel provided timely and accurate information that was fully verifiable, including in particular all of the raw data on further-manufactured sales, which allowed the USDOC to apply whatever methodology it deemed appropriate, including its standard methodology or any alternative methodology.

7. The issue in this dispute related to the practical difficulty of applying the USDOC's standard methodology for dealing with further-manufactured sales. Indeed, the application of the USDOC's standard methodology was virtually impossible because the only way to determine the constructed export price ("CEP") for the further-manufactured sales was to strip out all intermediate further-manufacturing costs incurred for every individual further-manufactured sale, each involving several companies incurring costs related to their respective handling and/or manufacturing activities, until only the value of the subject CORE remained. The USDOC was clearly aware of the problem, but failed to instruct how Hyundai Steel could have reported properly under the standard methodology.

8. Hyundai Steel provided all its relevant raw data so that the USDOC could apply any alternative methodology, which allowed the USDOC to conduct the relevant analysis, including applying any alternative methodologies if it so wished. There was thus no "missing" necessary information, and Hyundai Steel applied its best efforts to cooperate and respond fully to the information requests. The conditions for resorting to facts available under Article 6.8 were not met.

9. Second, when applying facts available, the USDOC rejected verifiable information that had been appropriately submitted to the best of Hyundai Steel's ability in violation of paragraphs 3 and 5 of Annex II. The USDOC also failed to identify the specific information it required and the manner in which that information should be structured as soon as possible after initiation of the investigation, as required by paragraph 1 of Annex II, and, even if the USDOC were justified in rejecting the information (*quod non*), paragraph 6 requires that the interested party be informed thereof and be provided an opportunity to provide further explanations within a reasonable period. Both of these obligations were violated. Indeed, the USDOC did not request a Section E response as soon as possible after the initiation of the investigation, and certainly did not provide specific instructions on which information it required and how this information had to be structured in light of the practical difficulties encountered by Hyundai Steel.

10. Third, in selecting the facts available to replace the allegedly missing information, the USDOC failed to engage in the requisite analysis of the record evidence to ensure that the selected information is the "best" information available, that "reasonably replaces" the missing data, so that an "accurate" determination is made. In fact, the USDOC relied on information from a secondary source, i.e. the petition, which it used without special circumspection and without corroboration. The USDOC decided to draw "adverse inferences" from the alleged non-cooperation of Hyundai Steel and its selection of facts available was thus made with a view to ensuring a less favorable result for Hyundai Steel. The petition margin used for AFA was aberrational and unrepresentative. The USDOC never sought to confirm the accuracy of the margin from the petition. Rather, the USDOC satisfied itself that this margin was reliable because it had allegedly reviewed the accuracy of the petition information at the time of initiation, although the enquiry under Article 6.8 is clearly different from that under Article 5.3. In addition, the USDOC pointed to an isolated export transaction of coils in support of the relevance of the margin from the petition, completely ignoring the fact that the average margin of such coil exports was found to be *de minimis*. In so doing, the USDOC resorted to the use of facts available in a punitive manner to penalize Hyundai Steel for its alleged lack of cooperation despite Hyundai Steel's best efforts to comply with the USDOC's unreasonably burdensome requests.

11. In conclusion, by resorting to and applying AFA in this manner, the USDOC acted inconsistently with Articles 6.8 and Annex II of the Anti-Dumping Agreement and, as a result, the imposition of duties also violated Articles 1, 9.3, and 18.1 of the Anti-Dumping Agreement.

II.2 ANTI-DUMPING DUTIES ON *CERTAIN COLD-ROLLED STEEL FLAT PRODUCTS FROM KOREA*

12. In the Cold-Rolled AD Investigation, the USDOC applied AFA in respect of the following two issues (i) alleged failure to demonstrate market value of certain service transactions provided by an affiliated company, and (ii) alleged misreporting of certain product sales. The application of AFA resulted in the USDOC turning a 2.17% anti-dumping margin in the preliminary determination

into a 34.33% margin for the final determination. However, the resort to and application of AFA violated several disciplines under Article 6.8 and Annex II of the Anti-Dumping Agreement.

II.2.1 Affiliate-service transactions

13. First, in respect of the services provided by the related services provider, there was no basis to apply facts available given that no "necessary" information was missing. Hyundai Steel provided all the requisite information to establish the arm's-length nature of its transactions with the affiliated service provider. The USDOC's questionnaire provided for alternative ways to demonstrate the arm's-length nature of the transactions, and Hyundai Steel was not in a position to compel the affiliate to furnish specific information about its contracts with third parties, but provided all relevant information at its disposal that, in line with the United States' guidance, should have sufficed to establish the market value of the services.

14. Indeed, the affiliate outsourced many of the services to an unaffiliated service provider to which the affiliate added its own expenses and profit when charging Hyundai Steel for the services. This is one highly relevant indication of the arm's-length nature of the price paid by Hyundai Steel for the services provided. In fact, in the preliminary determination, the USDOC accepted Hyundai Steel's reported freight expenses without adjustment, indicating that it found these to be on an arm's-length basis, and notified Hyundai Steel of no issues with respect to its submissions prior to verification. It was only at the last juncture of the investigation, i.e. the on-site verification, that an unwarranted and significantly expansive request was made for additional information. The specific information requested was clearly not "necessary" since other information was available to confirm the arm's-length nature of the transactions. Certainly, an investigating authority must not be allowed to convert at will any information that has not been submitted by respondents into "necessary" missing information. Not every piece of "requested" information is *ipso facto* "necessary" information. This especially so when the USDOC confirmed the arm's-length nature of the transactions based on other information, as confirmed by the preliminary determination.

15. There was also no basis to consider that the good faith efforts made by Hyundai Steel to obtain proprietary information of a service provider with independent third parties amounted to "significantly impeding the investigation" or "refusing access" to information. The conditions for resorting to the use of facts available were thus not met and USDOC's contrary decision was inconsistent with Article 6.8 of the Anti-Dumping Agreement.

16. Second, the USDOC failed to respect the relevant substantive disciplines for the application of facts available. The record evidence confirms that Hyundai Steel acted to the best of its abilities in responding to the USDOC's information requests, and the only information Hyundai Steel was unable to provide at the on-site verification pertained to one sub-element of the overall information on affiliated service transactions. The USDOC could not have reasonably expected Hyundai Steel to be able to provide the information that was suddenly insisted on at the on-site verification without any prior notice, as required by paragraph 1 of Annex II. Therefore, there was no basis to disregard all of the other, verifiable information that was provided by Hyundai Steel to confirm the arm's-length nature of the transactions, which could have been used without undue difficulties, as demonstrated in the preliminary determination. The USDOC's contrary decision was inconsistent with paragraphs 3 and 5 of Annex II.

17. Third, in selecting information for use as "facts available", the USDOC failed to engage in the requisite analysis of the record evidence to ensure that the selected information for the application of facts available was the "best" information available, that "reasonably replace[d]" the missing data, so that an "accurate" determination was made. The USDOC simply rejected all of Hyundai Steel's expense data and applied AFA asymmetrically by substituting the rejected data with (i) the lowest reported expense values to the entire home-market database (thus increasing the normal value); and (ii) the highest reported values to the U.S. database (thus reducing the export price). The sole reason for selecting this particular information was its sufficiently adverse nature to the interests of Hyundai Steel.

18. The fact that this information is derived from Hyundai Steel's reported data, but related to entirely different situations, does not mean that there was no need to examine the accuracy of this information as a substitute for the allegedly missing information. There is a general obligation on investigating authorities to select information that reasonably replaces the missing information in question. This applies to every selection of information for application as facts available, irrespective

of the source of that information. Thus, if information provided by an investigated producer/exporter is selected for facts available, the investigating authority must ensure that this information is not an *unreasonable* replacement or that it results in an *inaccurate* determination. In the Cold-Rolled AD Investigation, the USDOC applied AFA adjustments to all of Hyundai Steel's sales irrespective of the actual circumstances of the transactions. For example, the USDOC used as AFA information that was 28 times the reported freight amount, and made AFA adjustments to transactions for which no freight were incurred, or for which Hyundai Steel used an unaffiliated service provider. Similarly, for international freight, the USDOC applied the highest rate by destination, thereby applying rates for container shipment whereas the vast majority of Hyundai Steel's shipments were made in bulk. The AFA adjustment was therefore aberrational and did not relate to the factual circumstances of the sales. The USDOC also did not even attempt to consider other information that was readily available to it even though such information would certainly have constituted more reasonable replacements. The USDOC thus acted in violation of Article 6.8 and paragraph 7 of Annex II.

II.2.2 Alleged misreporting of certain product sales

19. First, in respect of the alleged misreporting of certain product sales, this is not a situation where any information was missing, but rather an alleged failure by Hyundai Steel to correctly report certain information under the proper classification. It also concerned truly miniscule shares of total home-market and exports sales, and Hyundai Steel provided a reasonable explanation supporting the particular CONNUM classifications. Hyundai Steel's reporting was fully consistent with the USDOC's questionnaire requirements, namely to report CONNUM data on the basis of the physical coil as imported, and to report the product as sold in the United States in the PRODCODU field. Hyundai Steel's reporting was disclosed fully in its initial questionnaire response and the data, including instances where the CONNUM did not seem to match the PRODCODU, were on the record as of the initial response. The alleged missing information was clearly not "necessary" to complete the determination, and there was no basis for the USDOC to conclude that Hyundai Steel "significantly impeded" the investigation. The USDOC never notified Hyundai Steel of any perceived deficiencies or anomalies in its submission. Nor did the USDOC take issue with Hyundai Steel's CONNUM reporting until the post-verification reports. There was thus no basis for resorting to facts available.

20. Second, the USDOC failed to use all substantiated facts provided by Hyundai Steel that were on the record, and instead rejected the verified information for these CONNUMs and replaced them with adverse assumptions in violation of paragraphs 1, 3, 5, and 6 of Annex II. Indeed, the Hyundai Steel was never given an opportunity to address any perceived deficiencies, nor did the USDOC offer any assistance or guidance for resolving the differences. Rather, it was only in the verification reports that the USDOC identified a miniscule volume of U.S. and home-market sales that were considered to have inconsistent CONNUM data. There was no basis for the USDOC to reject the submitted and verified information that was on the case record of the investigation, as the record evidence showed that Hyundai Steel applied its best efforts in timely submitting the requested information, and the USDOC also failed to use all substantiated facts provided by Hyundai Steel that were on the record.

21. Third, there was no process of reasoning and evaluation by the USDOC as to how or why the facts used for AFA were reasonable replacements for the allegedly missing information. Instead, the USDOC simply assigned the highest-reported total cost of manufacturing for the home-market sales and the highest-calculated dumping margin for the U.S. sales, even applying these adverse assumptions to all other products of the same category, so as to lead to an adverse result. In so doing, the USDOC applied AFA to CONNUMs verified as being accurately reported, and the information used had nothing to do with replacing "missing information", but with using aberrational data to ensure an adverse result in violation of Article 6.8 and paragraph 7 of Annex II.

22. There was alternative information available on the record that the USDOC could have used in order to reach an accurate determination as opposed to selecting information to punish Hyundai Steel. Irrespective of the information chosen, the USDOC was under an obligation to select information that reasonably replaced the missing information to arrive at an accurate determination. This applies to every selection of information for application of facts available, irrespective of the source of that information. The USDOC failed to meet this obligation as it selected "facts available" on the sole basis of ensuring an adverse outcome, which is inconsistent with applicable WTO disciplines.

II.2.3 Conclusion

23. By resorting to and applying AFA on this basis and in this manner in respect of the affiliated-party transactions and the CONNUM issue, the USDOC acted in violation of Articles 1, 6.8 and Annex II, 9.3, and 18.1 of the Anti-Dumping Agreement.

II.3 COUNTERVAILING DUTIES ON *CERTAIN COLD-ROLLED STEEL FLAT PRODUCTS FROM KOREA*

24. In the Cold-Rolled CVD Investigation, the USDOC resorted to AFA on the following three grounds: (i) POSCO's alleged failure to report certain cross-owned input suppliers, (ii) POSCO's alleged failure to report a facility located in a free economic zone ("FEZ"); and (iii) DWI's alleged failure to report the full use of a certain loan program. The application of AFA resulted in the USDOC turning a *de minimis* CVD rate in the preliminary determination into a CVD rate of 59.72% for the final determination. However, the resort to and application of AFA violated Article 12.7 of the SCM Agreement.

II.3.1 Cross-owned input suppliers

25. First, POSCO did not refuse access to any necessary information. POSCO responded to the questionnaire that no affiliated company in Korea provided inputs to POSCO's production of subject merchandise. As a factual matter, and in light of the USDOC's practice of enquiring into affiliates that provide materials that are "primarily dedicated" to the production of the subject merchandise, this was an accurate, complete, and reliable response by POSCO. Importantly, the USDOC's question was not that POSCO report *any input* provided by an affiliate that *could be used* in the production of the product. The alleged necessary missing information concerned minimal input amounts supplied by four out of around 150 cross-owned affiliates. This information was not relevant and thus certainly not "necessary" for the USDOC when examining subsidies received by POSCO. This information was not essential from the perspective of U.S. law and practice for the potential attribution of subsidies. Nor can POSCO be said to have significantly impeded the investigation, as the evidence on the record showed that, if any inputs had been provided, these inputs were insignificant in terms of the cross-affiliates' total sales and POSCO's total cost-of-sales. Indeed, from the outset of the investigation, POSCO disclosed all of its cross-owned affiliates, including POSCO's majority share ownership in all of them. The value of the transactions with these cross-owned affiliates and the value of the transactions in relation to the cross-owned affiliates' sales were also on the record from the beginning. This information confirmed POSCO's consistent response that no affiliated company in Korea provided inputs "primarily dedicated" to the production of cold-rolled steel. Indeed, there were only trace amounts of certain inputs provided to POSCO that could be, but were not necessarily used, in the production of cold rolled steel during the POI.

26. The sole reason why information on input suppliers could be relevant is that producers of the subject merchandise could benefit from indirect subsidies, as a result of passing through of subsidies to input suppliers. The U.S. rule on "primary dedication" makes sense in this context, as authorities do not care about potential subsidies to marginal inputs into the production of the subject merchandise. In light of this rationale, nothing in the record, not even the alleged discovered information, supported a conclusion that necessary information was withheld or missing. Thus, including information about the four affiliates would not have affected any CVD determination given the truly insignificant amounts involved, and no possible subsidies to these affiliates could have benefited POSCO.

27. Second, the USDOC erred in the application of facts available by disregarding verifiable information that was appropriately submitted by POSCO and DWI to the best of their abilities. Relevant information about the four affiliate suppliers were readily available to the USDOC, as this was included in POSCO's affiliation chart and initial questionnaire response, including financial statements providing the value of POSCO's transactions with these cross-owned affiliates and the value of the transactions in relation to the cross-owned affiliates' sales. This information proved that any inputs provided by these cross-owned entities were in trace amounts, and therefore not relevant for the USDOC when making a determination. The USDOC therefore had received timely, appropriately submitted, and verifiable information from POSCO about the cross-owned affiliates, which it failed to consider.

28. Third, the USDOC failed to engage in a process of reasoning and evaluation in its selection of facts available. It failed to examine which facts available on the record could reasonably

replace the alleged missing necessary information, and it did not seek to corroborate the "facts" available that it decided to use. Instead, the selection of information by the USDOC was made with a view to obtaining a result that was sufficiently *adverse* to the interests of POSCO, as opposed to making an *accurate* determination. On this basis, the USDOC found that POSCO benefitted from all subsidy programs in the investigation by virtue of the cross-owned affiliates, and applied rates from prior CVD proceedings involving Korea. There was no factual basis for the determination that the affiliates benefitted from all programs on the record, nor any explanation of how using this information ensured an accurate determination. However, Article 12.7 of the SCM Agreement permits using "facts" available to replace allegedly missing necessary information, not speculation about use of subsidy programs by other companies in a different context. When there are no facts to support that any affiliates received subsidies and, even more importantly, when the facts on the record confirm that these affiliates did not provide inputs in any material way such that there is no likelihood of any possible pass-through of the subsidies, an authority is no longer using "facts available" but engaging in unwarranted speculation.

29. Moreover, in selecting the AFA rates from prior proceedings, the USDOC did not even evaluate whether these rates were reasonable replacements. Instead, the USDOC selected particularly adverse information available to penalize POSCO for its alleged lack of cooperation. This is evident from the USDOC assigning the highest-calculated rates possible for each subsidy program deemed countervailable without any further analysis of the accuracy of the information or the availability of better information on the record.

II.3.2 FEZ facility

30. First, POSCO stated throughout the investigation that it did not use or benefit from any FEZ subsidy programs. This was corroborated by the Government of Korea ("GOK") in its questionnaire response. There was never any necessary information missing, as the USDOC had received information from both POSCO and the GOK that no FEZ programs were used. This was accurate irrespective of whether or not POSCO had an affiliate R&D center located in the FEZ, since there was no basis in the facts on the record to suggest that a non-foreign company such as POSCO could benefit from FEZ subsidies nor that the R&D center could be involved in the production of the subject merchandise. There was therefore no information missing and no basis to use facts available.

31. Second, the USDOC also failed to use all substantiated facts on the record in respect of the FEZ programs. In fact, confirming POSCO's and the GOK's statements that POSCO was not eligible for any FEZ benefit would have been a simple and straightforward exercise, had the USDOC opted to verify. There was abundant record evidence from multiple sources demonstrating that POSCO did not obtain any FEZ benefits, that POSCO was not eligible for any FEZ programs, and that the R&D facility in any event was not involved in the production of cold-rolled steel and, therefore, irrelevant to the USDOC's subsidy determination. However, all of this information was disregarded, and the USDOC did not even bother to verify the statements by POSCO and the GOK.

32. Third, the USDOC failed to engage in a process of reasoning and evaluation in its selection of facts available. The selection of information by the USDOC was made with a view to obtaining a result that was sufficiently *adverse* to the interests of POSCO, as opposed to making an *accurate* determination. On this basis, the USDOC found that POSCO used two FEZ programs, although there was no factual basis for this finding.

II.3.3 DWI loans

33. First, DWI did not refuse access to, or otherwise failed to provide, any necessary information concerning the use of KORES loans. DWI responded timely to the joint initial questionnaire with POSCO, and attempted to supplement certain record facts upon learning of the additional KORES information. These corrections did not introduce new factual information about an unknown subsidy program, as they merely completed information already provided on KORES, and they were filed in time for the USDOC to verify the information. The record facts speak clearly of DWI acting in good faith in attempting to provide a full and accurate response to USDOC's information requests. Accordingly, there was no basis to find that DWI impeded the investigation.

34. In any event, the facts on the record confirm that DWI's use of certain KORES loans was entirely unrelated to POSCO's production of cold-rolled steel. This was evident from the mere title of the KORES loan programs, and by the repeated answers provided by POSCO/DWI that they do

not relate to the subject merchandise. There could be no subsidy benefit from these loans attributed to the investigated product. The USDOC actually never found otherwise, and no information on the record, such as the verification that took place at DWI, provided any information to the contrary. Therefore, there were no subsidy benefits to be attributed to the production of cold-rolled steel from the DWI's use of KORES loans.

35. Second, the USDOC failed to use all substantiated facts provided by DWI about the use of the KORES program that was on the record, and known from the start of the investigation based on its questionnaire responses. DWI's corrected data was also presented to the USDOC in time to be included as record evidence, but nonetheless was rejected by the USDOC. Indeed, the fact remains that the USDOC did not even attempt to verify the veracity of the answers provided by POSCO/DWI.

36. Third, the USDOC failed to engage in a process of reasoning and evaluation in its selection of facts available. It failed to examine which facts available could reasonably replace the alleged missing necessary information, and did not seek to corroborate the "facts" available that it decided to use. On this basis, the USDOC found that DWI's use of the KORES program was countervailable. There was no explanation by the USDOC about how this assumption, which had no factual basis on the record, could constitute a reasonable replacement to ensure an accurate determination.

37. In sum, the USDOC's application of adverse facts available in relation to the cross-owned affiliates, the FEZ facility, and the minor corrections regarding the use of KORES loans was a punitive use of facts available that lacked any factual foundation on the record. In fact, applying the 59.72% subsidization rate used by the USDOC to total sales would mean that POSCO received nearly USD 16 billion from the GOK – representing nearly 5% of the GOK's total budget or nearly four times its budget on diplomacy and unification. Such subsidy rates are obviously excessive and unrealistic. The United States fails to respond to the absurdity of the result of the USDOC's application of AFA. This absurd result was mainly driven by adversely inferring that four affiliated companies benefitted from 45 subsidy programs, when they at most provided *de minimis* amounts of input materials that *could* be used in the production of cold-rolled steel and absent any indication that they actually benefitted from any subsidies.

II.3.4 Conclusion

38. By resorting to and applying AFA on this basis and in this manner, the USDOC acted in violation of Article 12.7 of the SCM Agreement and its imposition of countervailing duties on this basis also violated Articles 10, 19.4, and 32.1 of the SCM Agreement.

II.4 Anti-Dumping Duties on Certain Hot-Rolled Steel Flat Products from Korea

39. In the Hot-Rolled AD Investigation, the USDOC applied AFA in respect of an alleged failure by Hyundai Steel to demonstrate the arm's-length nature of certain service transactions with two affiliates. The application of AFA resulted in turning the 3.97% anti-dumping margin in the preliminary determination into a 9.49% margin for the final determination. However, the resort to and application of AFA was inconsistent with several disciplines under Article 6.8 and Annex II of the Anti-Dumping Agreement.

40. First, there was no necessary missing information, and no failure to cooperate. In fact, Hyundai Steel provided information demonstrating the market value of its transactions with the affiliates so that the service-related information could be used without further adjustments. Specifically, Hyundai Steel provided contracts with its affiliates, contracts the affiliates maintained with sub-contractors, and analyses comparing the different freight rates. This showed that the affiliates passed on the full costs plus profit to Hyundai Steel. Hyundai Steel even managed to obtain cost data from the affiliate service providers – on a transaction-specific basis – showing that their charges to Hyundai Steel exceeded their costs and allowed for a profit. Thus, this information confirmed the arm's-length nature of the transactions.

41. All this reported information was verified fully and successfully by the USDOC. In the preliminary determination, USDOC used this information without any suggestion that Hyundai Steel failed to provide any requested information or otherwise impeded the investigation. However, during the sales verification, the USDOC requested, for the first time, that all contract information between Hyundai Steel's affiliated service providers and their unaffiliated customers be provided. These are transactions with no connection to the USDOC's questionnaire requests concerning the product under

consideration or to Hyundai Steel, as they concerned service transactions not involving hot-rolled steel from Hyundai Steel. At the late stage of the investigation, i.e. at verification and without prior warning, Hyundai Steel tried but was unable to obtain the requested information.

42. Thus, the conditions for resorting to facts available were not met. There was no "necessary" information missing that could have prevented the USDOC from making its determination. Hyundai Steel provided all requested information in an accurate and timely manner, including information about its affiliate service providers and the arm's-length nature of these transactions. The non-specific, third-party information did not constitute "necessary" information within the meaning of Article 6.8. There was also no basis to conclude that Hyundai Steel "significantly impeded" the investigation. Even if Hyundai Steel was unable to furnish the information in the surprise request at verification about its affiliates' third-party contracts, the record confirms that Hyundai Steel acted to the best of its ability and provided the USDOC with all available documentation that confirmed the arm's-length nature of the transactions.

43. Second, in applying facts available, the USDOC failed to specify in detail the information required as soon as possible after initiation of the investigation and also failed to provide a meaningful opportunity to Hyundai Steel to provide the information. The USDOC also failed to use all verifiable information and substantiated facts that were on the record regarding the arm's-length nature of the affiliated service transactions. Indeed, given that Hyundai Steel acted to the best of its abilities, the USDOC was under an obligation to take into account all verifiable and substantiated facts provided by Hyundai Steel, even if the USDOC may have considered this information incomplete or not ideal.

44. Finally, in selecting information to apply as facts available, the USDOC failed to engage in the necessary process of reasoning and evaluation to ensure the information used for facts available was the *best* information available to arrive at an *accurate* determination. The USDOC simply applied facts available with an adverse inference, and took the highest and lowest expense values to increase normal value and reduce the export price, respectively, thus ensuring that the dumping margin was the highest possible. Even if this information derived from Hyundai Steel's data, and as such not "secondary source" information, the USDOC did nothing to ensure that the selected information was the best available information. For example, there was verified information on the record that demonstrated the *actual* expenses incurred by Hyundai Steel for these affiliated service transactions. Nonetheless, the USDOC simply applied the highest/lowest value irrespective of context, thereby failing to provide the requisite reasoned and adequate explanation. The application of facts available was not objective or fair, but punitive in nature. Indeed, the basis for the selection was the USDOC's "standard practice" with a view to ensuring an adverse result.

45. In conclusion, by resorting to and applying AFA on this basis and in this manner in respect of the affiliated-party transactions, the USDOC acted in violation of Article 6.8 and Annex II, and the imposition of duties on this basis was thus also inconsistent with Articles 1, 9.3, and 18.1 of the Anti-Dumping Agreement.

II.5 COUNTERVAILING DUTIES ON HOT-ROLLED STEEL FLAT PRODUCTS FROM KOREA

46. In the Hot-Rolled CVD Investigation, the USDOC applied AFA for the following three issues: (i) POSCO's alleged failure to report certain cross-owned input suppliers, (ii) POSCO's failure to report a facility located in a FEZ, and (iii) DWI's alleged failure to report the full use of a certain loan program. Through the application of AFA, the USDOC turned the *de minimis* CVD rate from the preliminary determination into a 58.68% rate in the final determination. However, the resort to and application of AFA violated Article 12.7 of the SCM Agreement.

II.5.1 Cross-owned input suppliers

47. First, there was no necessary information missing and POSCO did not refuse access to any information, as it provided all relevant information about its relevant cross-owned affiliates within a reasonable period of time that allowed the USDOC sufficient time to verify. Over a month before verification, POSCO submitted certain clarifications, based on perceived concerns of the USDOC from the Cold-Rolled CVD Investigation, that it had affiliates providing negligible amounts of inputs that could potentially be used in production of hot-rolled steel. It was clearly explained that none of these affiliates provided inputs "primarily dedicated" to the subject merchandise. Thus, this information did not constitute "necessary" information, and was not essential from the perspective of U.S. law

and practice for the potential attribution of subsidies. Nor can POSCO be said to have significantly impeded the investigation, as it submitted all relevant evidence in time for verification, which also showed that any inputs provided were negligible and insignificant in terms of the cross-affiliates' total sales and POSCO's total COP. It was the USDOC that refused to accept such information, and thus deprived itself of the very information it claimed to be necessary.

48. Second, the USDOC erred in the application of facts available by disregarding verifiable information that was appropriately submitted by POSCO and DWI to the best of their abilities. Relevant information about the four affiliate suppliers was readily available to the USDOC from the outset in POSCO's affiliation chart and initial questionnaire response. Additional information was offered in submissions made more than a month prior to verification which further clarified that any inputs provided by the affiliates were in insignificant amounts and, therefore, not relevant to the USDOC's determination. Thus, the USDOC received timely, appropriately submitted, and verifiable information from POSCO about the cross-owned affiliates, which it failed to use.

49. Indeed, information was volunteered by POSCO in sufficient time before verification, but it was consistently rejected by the USDOC for formalistic, procedural reasons such as that it represented "unsolicited" information that were submitted "after the deadline". However, if information is considered "necessary" and submitted in time for it to be verified, it constitutes "verifiable" information that must be accepted and used. This is so even if the information is formally submitted after an investigating authority's deadlines.

50. Third, the USDOC improperly and punitively resorted to AFA to fill the alleged gaps of necessary information. It failed to engage in a process of reasoning and evaluation of which facts that would reasonably replace the alleged missing necessary information to arrive at an accurate determination, as well as to corroborate the "facts" available and apply the selected information with special circumspection. Instead, the application of AFA was made with the view to obtain a sufficiently *adverse* result to the interests of POSCO. On this basis, the USDOC found that POSCO benefitted from all subsidy programs in the investigation by virtue of the cross-owned affiliates.

II.5.2 FEZ facility

51. First, POSCO also stated throughout the investigation that it did not use or benefit from any FEZ programs, which was corroborated by the GOK's questionnaire response. There was never any necessary information missing, nor did POSCO significantly impede the investigation, as the USDOC received timely and accurate information from both POSCO and the GOK that no FEZ programs were used. Any concerns the USDOC had about a possible R&D center being located in the FEZ could have easily been verified, but USDOC preferred not to do so.

52. Second, The USDOC also failed to use all substantiated facts on the record concerning the use of FEZ programs. There was abundant record evidence from multiple sources demonstrating that POSCO did not obtain any FEZ benefits, that POSCO was not eligible for any FEZ programs, and that the R&D facility was not involved in the production of hot-rolled steel, and therefore irrelevant to the USDOC's determination. But, all of this information was disregarded. The same reasons of untimeliness led to the rejection of the clarifications offered by POSCO well before verification. The failure to use the verifiable information on the record meant that USDOC's application of facts available was based on non-factual assumptions and speculation.

53. Third, the USDOC failed to engage in a process of reasoning and evaluation in its selection of facts available. It failed to examine which facts available reasonably replace the alleged missing necessary information, and did not seek to corroborate the "facts" available that it decided to use. Instead, the application of AFA was made with the view to obtaining a sufficiently *adverse* result to the interests of POSCO. On this basis, the USDOC found that POSCO benefitted from two FEZ programs.

II.5.3 DWI loan

54. First, DWI did not refuse access to, or otherwise failed to provide, any necessary information concerning the use of KORES loans. DWI responded timely to the joint initial questionnaire with POSCO, and before verification attempted to supplement certain record facts upon learning of additional KORES information. These corrections only sought to clarify and supplement the initial response, but did not introduce new factual information about an unknown subsidy program.

Accordingly, there was no basis to find that DWI impeded the investigation. In any event, DWI's use of certain KORES loans was entirely unrelated to POSCO's production of hot-rolled steel; thus, there could be no subsidy benefit from these loans attributed to the investigated product.

55. Second, the USDOC failed to use all substantiated facts provided by DWI about the use of the KORES program that was on the record, and known from the start of the investigation based on its questionnaire responses, as well as supplemented for further clarification before the verification. There was no basis for the USDOC to reject the data submitted by DWI.

56. Third, the USDOC failed to engage in a process of reasoning and evaluation in its selection of facts available, as well as to corroborate the "facts" available and apply the selected information with special circumspection. Instead, the application of AFA was made with the view to obtaining a sufficiently *adverse* result to the interests of POSCO. On this basis, the USDOC found that DWI's use of the KORES program was countervailable. There was no explanation by the USDOC of how or why these assumptions, which had no factual basis on the record, constituted reasonable replacements to ensure accurate determinations.

57. In fact, the punitive nature of the use of facts available is confirmed by the significant increase in POSCO's CVD rate from 0.17% in the preliminary determination to 58.68% for the final determination. In fact, applying the 58.68% to POSCO's total sales would mean that POSCO received nearly USD 16 billion from the GOK – representing nearly 5% of the GOK's total budget or nearly four times its budget on diplomacy and unification. Such subsidy rates are obviously excessive and unrealistic.

II.5.4 Conclusion

58. By resorting to and applying AFA on this basis and in this manner, the USDOC acted in violation of Article 12.7 and its imposition of countervailing duties was thus inconsistent with Articles 10, 19.4, and 32.1 of the SCM Agreement.

II.6 ANTI-DUMPING DUTIES ON *LARGE POWER TRANSFORMERS FROM KOREA*

59. In the Large Power Transformers ("LPTs") from Korea, the USDOC applied AFA in several phases of the proceeding. Beginning with the final results for POR3 and extending through the preliminary results for POR5, including reconsideration of the final results for POR2, the USDOC has systematically applied AFA. However, the resort to and application of AFA violated several disciplines under Article 6.8 and Annex II of the Anti-Dumping Agreement.

II.6.1 POR2

60. The USDOC resorted to the use of AFA in relation to Hyundai Heavy Industries' ("HHI") reporting of service-related revenue, as part of the export price. There was no definition of such service-related revenue, thus HHI explained that it based its reporting on a methodology previously accepted by the USDOC, which was in the POR2 final results. It was only later that the USDOC abandoned the previously-accepted definition, and issued a re-determination finding that HHI failed to provide all necessary information that warranted application of AFA. However, there was no basis to resort to facts available, and the USDOC's application of AFA violated relevant disciplines of the Anti-Dumping Agreement.

61. First, the USDOC clearly did not lack "necessary" information with respect to service-related revenue of HHI's sales. In accordance with the USDOC's accepted definition of service-related revenue applied throughout the POR2 review, HHI correctly reported such services as part of the LPT sales price. Even the USDOC itself found that no necessary information was missing, or that HHI withheld requested information. Problems arose during the POR2 remand because the USDOC completely changed the definition of service-related revenue. Thus, to the extent "necessary information" was missing, it was due to the failure of the USDOC to meet its obligations of informing HHI of this change in approach.

62. Second, the USDOC failed to use verifiable information on the record and, thus, its application of facts available was based on non-factual assumptions and speculation. The USDOC found that there was information on the record, which enabled it to apply the standard capping methodology. The USDOC was under an obligation to use this record information, but instead completely

disregarded the information and resorted to adverse facts alleged by the petitioner. However, the information was verifiable, appropriately submitted so that it could be used without undue difficulties, as confirmed by the fact that the same type of information had been used before. In addition, there was no basis for considering that HHI did not act to the best of its ability, and thus there was no basis of the USDOC disregarding the information provided.

63. Third, when selecting information for application of AFA, the USDOC failed to engage in the necessary process of reasoning and evaluation supporting the decision why the highest calculated difference between HHI's reported service-related expenses and service revenues was a reasonable replacement for the allegedly missing information. There was no reasoned explanation from the USDOC, let alone the required comparative evaluation, as to how and why the USDOC's adverse inference was the *best* information available to fill the alleged missing information, resulting in an AFA margin that was over six times the margin assigned to HHI in the original POR2 Final Results. Rather, the information was selected to ensure a sufficiently adverse result to HHI.

64. By resorting to and applying facts available in this manner in POR2, the USDOC acted inconsistently with Articles 6.8, and Annex II of the Anti-Dumping Agreement and thus its imposition of duties on this basis also violated Articles 1, 9.3 and 18.1 of the Anti-Dumping Agreement.

II.6.2 POR3

65. In POR3, the USDOC resorted to the use of AFA in relation to HHI based on four reasons, namely that HHI: (i) should have reported service-related revenues separately from the gross unit price; (ii) failed to include the price of a single subject part in the price for a home-market sale of four LPTs; (iii) failed to separately report the price and costs for accessories; and (iv) was systematically selective in providing various documents to the USDOC and that there were discrepancies in the reported data. However, none of these reasons justified the USDOC's resort to facts available, and the USDOC's application of total AFA also violated relevant disciplines of the Anti-Dumping Agreement.

66. First, none of the four concerns raised by the USDOC supported the conclusion that "necessary" information was missing or that HHI significantly impeded the administrative review, as HHI had timely provided verifiable data. Thus, the requested information was on the record, and the significant efforts by HHI demonstrate that it cooperated to the best of its ability in the proceeding.

67. Second, in terms of applying facts available in POR3, the USDOC completely rejected all of the timely, verifiable, and substantiated facts submitted by HHI. The USDOC was under an obligation to use this record information, but instead completely disregarded the information and resorted to adverse facts alleged by the petitioner.

68. Third, when selecting information for application of AFA, the USDOC failed to engage in the necessary process of reasoning and evaluation as to how or why total AFA was a reasonable replacement for the alleged missing information concerning the four issues. In particular, the USDOC failed to corroborate why the *petition* information for use as total AFA was the *best* information available to arrive at an *accurate* determination. The only explanation for the selection of the petition rate was that "the highest transaction-specific rate related to sales by Hyosung" exceeded the petition margin, and that the petition information had been reviewed and found to be adequate during the "pre-initiation analysis". However, this explanation does not conform to the obligation to apply information for facts available with special circumspection. Indeed, the fact that *one aberrational margin of another producer* is higher than the highest petition margin is not a reasonable and consistent way of testing the accuracy of the information to be used for facts available. Similarly, simply considering the petition information was reliable and suitable for initiating the investigation does not satisfy this standard. The different procedural and substantive requirements for information to be sufficient to initiate the investigation under Articles 5.2 and 5.3 of the Anti-Dumping Agreement, on the one hand, and for making a final determination following an investigation under Article 6.8, on the other, confirm that such reliance on the limited test applied at initiation is insufficient. Thus, the USDOC's selection of information for facts available in POR3 was done to ensure that the result was adverse rather than accurate.

69. By resorting to and applying facts available in this manner in POR3, the USDOC acted inconsistently with Articles 1, 6.8, 9.3, 18.1, and Annex II of the Anti-Dumping Agreement.

II.6.3 POR4

70. In POR4, the USDOC resorted to the use of total AFA in relation to both HHI and Hyosung. As in POR3, the USDOC relied on minor issues to justify its finding of total AFA. In relation to HHI, total AFA was applied based on the allegations that HHI (i) failed to report separately the prices and costs of "accessories"; (ii) understated home-market gross unit prices because it did not report revenue for a single part; and (iii) failed to disclose a supposed affiliation with a US sales agent. In relation to Hyosung, the USDOC applied total AFA alleging that Hyosung failed to (i) report service-related revenue on its order acknowledgment forms; (ii) explain how an invoice covered multiple sales over multiple periods of review; and (iii) report certain discounts and price adjustments shown on its sales invoices. However, none of these reasons justified the USDOC's resort to facts available, and the USDOC's application of total AFA also violated relevant disciplines of the Anti-Dumping Agreement.

71. First, none of the concerns raised by the USDOC with respect to HHI and Hyosung supported the conclusion that "necessary" information was missing or that the Korean exporters significantly impeded the administrative review. The exporters did their outmost to provide the requested information in a timely manner. And, the alleged missing information was not in any way "necessary" information for the USDOC to complete its determination. There was also no basis to conclude that the exporters failed to cooperate to the best of their abilities given that verifiable, timely, and correct information were provided.

72. Second, in terms of applying facts available in POR4, the USDOC again unduly disregarded timely, verifiable, and substantiated information on the record when it applied AFA with respect to HHI and Hyosung. The USDOC was under an obligation to use this record information, but instead completely disregarded the information and resorted to adverse facts alleged by the petitioner.

73. Third, the USDOC's selection of information for application of total AFA in relation to both HHI and Hyosung was inconsistent with applicable disciplines of the Anti-Dumping Agreement, because the USDOC failed to engage in the requisite process of reasoning and evaluation as to how or why total AFA was a reasonable replacement for the alleged missing information. In POR4, the USDOC relied simply on analysis made in POR3 to corroborate the use of the petition margin for total AFA. By doing so, the USDOC built further on the error in POR3 in the context of POR4. The USDOC's application of AFA was also not objective or fair, but effectively punitive in nature; particularly adverse information was selected effectively to punish HHI and Hyosung.

74. In sum, by resorting to and applying facts available in this manner in POR4, the USDOC acted inconsistently with Articles 6.8 and Annex II, and the imposition of duties on this basis thus also violated Articles 1, 9.3 and 18.1 of the Anti-Dumping Agreement.

75. In addition, the United States acted inconsistently with Article 9.4 of the Anti-Dumping Agreement in POR4 by calculating the "all others" rate by relying on margins established using facts available. Alternative, reasonable methodologies were available to the USDOC to calculate the "all others" rate, such as relying on the margins assigned to these producers in prior reviews. However, the USDOC calculated the margin for the non-selected Korean producers based on information derived from applying facts available, and therefore violated Article 9.4.

III. "AS SUCH" CLAIMS – AFA RULE OR NORM, AND/OR AFA ONGOING CONDUCT

76. The use of AFA by the USDOC in situations of non-cooperation is a rule or norm of general and prospective application, or a form of ongoing conduct, given its repeated application and the likelihood that it will continue in the future. In cases of alleged non-cooperation, the USDOC does not engage in a process of reasoning and evaluation of the facts on the record to arrive at an accurate determination, but rather selects from among the facts available those facts that would lead to an adverse result.

77. The precise content of the AFA Rule or Norm, or AFA Ongoing Conduct, both in terms of what it involves (i.e. the selection of "adverse" facts available triggered by the procedural circumstance of non-cooperation) is clear from the statistics presented by Korea as well as from the practice of the USDOC, and is confirmed by the US courts. The drawing of adverse inferences in this manner is the USDOC's "standard practice", based on the text of Section 776 of the Tariff Act, as amended by

Section 502 of the 2015 TPEA. The drawing of such adverse inferences is also reflected in USDOC determinations presented by Korea, and in judgments of U.S. courts recognizing this practice.

78. The statistics submitted by Korea confirm that, under the AFA Rule or Norm, or AFA Ongoing Conduct, whenever a finding of failure to cooperate is made, the USDOC draws adverse inferences and selects facts that are sufficiently adverse rather than accurate to replace the allegedly missing information. The AFA Rule or Norm, or AFA Ongoing Conduct, applies mechanistically in all cases without the USDOC undertaking any comparative evaluation and assessment of whether the selection of facts available in light of all substantiated facts on the record leads to an accurate determination. Therefore, this AFA Rule or Norm, or AFA Ongoing Conduct, is inconsistent with the obligations imposed by Article 6.8 and Annex II of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement.

79. A substantive review of USDOC determinations since the 2015 TPEA amendments further confirms this lack of proper evaluation. In this period, the USDOC resorted to the use of AFA in more than 300 cases. In all of these cases, there was a substantive finding by the USDOC that the interested parties in question failed to cooperate followed by the use of AFA. Korea also notes there are about 200 references in these more than 300 cases referring to the term "practice" when resorting to AFA, as well as a number of references to the use of AFA as a "rule".

80. However, irrespective of the number of times the USDOC refers to its own use of AFA as a "practice" or "rule", the fact that such rule, norm, or ongoing conduct exists is clear. The use of AFA is *not* something that is determined on a case-by-case basis with the USDOC sometimes applying AFA after having made a finding of non-cooperation and on other occasions not doing so. These statistics corroborate, therefore, Korea's claim that non-cooperation equals the use of AFA, which in turn results in the use of information that is sufficiently adverse to the interests of the interested party, rather than accurate.

81. Moreover, as the substantive analysis of the representative sample of 12 cases out of the most "conservative" 90 cases show (i.e. filtering out NME cases, and complete lack of participation), the selection of adverse facts available under the AFA Rule or Norm, or AFA Ongoing Conduct, does not ensure that an accurate determination is made following a comparative evaluation of the record facts so as to find the best information available. Rather, the reason for the selection of the facts available is that they are sufficiently adverse to the interest of the producer or exporter in question. It also becomes clear from these cases that the USDOC may collect data, or even check for anomalies, aberrations, or the need for adjustments, but that it never engages in the required comparative evaluation and assessment to ensure that the facts used to replace the allegedly missing information will lead to an accurate determination, in violation of Article 6.8 and Annex II of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement.

82. Whereas all investigating authorities will draw inferences from the record facts of a proceeding, that is not what the USDOC does when it resorts to and applies AFA. Rather, whenever it makes a finding of non-cooperation, that door closes and another door opens that is based on 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.

83. In addition, Korea provided examples of three specific iterations of the United States' AFA Ongoing Conduct, which are applied mechanistically and without further evaluation of the accuracy of the facts selected. These specific methodologies are geared to reach an adverse result rather than an accurate result, and further support Korea's demonstration that the AFA Ongoing Conduct is "as such" inconsistent with the Anti-Dumping Agreement and, where relevant, the SCM Agreement.

84. In sum, Korea demonstrated that the AFA Rule or Norm, or AFA Ongoing Conduct, are inconsistent "as such" with Article 6.8 and Annex II of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement. The United States is demonstrably unable to refute the *prima facie* case of "as such" violation that Korea has established in this dispute.

ANNEX B-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS
OF THE UNITED STATES

EXECUTIVE SUMMARY OF US FIRST WRITTEN SUBMISSION

I. INTRODUCTION

1. Korea launched this massive dispute to challenge disparate issues in six anti-dumping proceedings and two countervailing duty proceedings. To the extent that there is any relationship between the various issues raised by Korea, it is that in each case a sophisticated, well-represented Korean respondent made repeated decisions not to cooperate with clear and repeated requests for information from the United States Department of Commerce ("USDOC", "Commerce", or "the Department"), and as a result, the Korean companies were unsatisfied with the final results reached by USDOC in each of the proceedings.

2. In essence, Korea is asking the panel to conduct a *de novo* review of each of the challenged determinations, in an attempt to attain modifications of objective and unbiased USDOC determinations. The Korean companies were well aware that refusal to cooperate in an administrative proceeding may have consequences.

3. Korea's panel request also purports to challenge unwritten measure as inconsistent "as such" with Article 6.8 and Annex II of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement. However, as explained in the U.S. preliminary ruling request, Korea's panel request failed to specify the unwritten measure Korea purports to challenge. Accordingly, no measure subject to an as such challenge is within the Panel's terms of reference. No subsequent submission can cure this deficiency.

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

4. Korea argues that USDOC's use of facts available in its calculations of antidumping duty margins in the Cold-Rolled Steel, Hot-Rolled Steel, and Corrosion-Resistant Steel investigations, and Large Power Transformers administrative reviews was inconsistent with Article 6.8 or Annex II of the Anti-Dumping Agreement. In each proceeding, USDOC acted in accordance with Article 6.8 and Annex II of the Anti-Dumping Agreement by selecting a reasonable replacement for necessary information that was missing from the record due to the responding companies' failure to cooperate.

A. USDOC's Application of Facts Available in the Investigation of Corrosion-Resistant Steel (CORE) Was Consistent with Obligations under the Anti-Dumping Agreement

5. Korea fails to demonstrate that USDOC's application of facts available in the LTFV Investigation of corrosion resistant steel (CORE) was inconsistent with Article 6.8 or Annex II of the Anti-Dumping Agreement. The record shows that USDOC provided Hyundai Steel multiple opportunities to respond adequately to its requests for information, relied on facts available where necessary information was missing from the record, and selected reasonable replacements from among Hyundai Steel's own reported information. Thus, Korea has no basis for arguing that USDOC's application of facts available was inconsistent with Article 6.8 and Annex II.

6. Korea's claim that the information on further-manufactured sales requested by USDOC was not "necessary" and claims of difficulty are unsupported by the record. Similarly, Korea's allegations that USDOC failed to specify the requested information within the guidelines established by Article 6.8 and paragraph 1 of Annex II grossly mischaracterize the record facts. The record demonstrates that USDOC informed Hyundai as soon as possible that a response may be necessary, specified in detail the necessary information it was requesting, provided Hyundai with clarifications and additional guidance, and provided Hyundai with a reasonable period of time to respond.

7. Korea's claims that USDOC failed to provide a meaningful opportunity to provide further explanations and failed to give reasons for rejecting the information provided have no merit. The record also shows that USDOC properly determined it could not verify Hyundai's information and acted in accordance with both paragraph 3 and paragraph 5 of Annex II of the Anti-Dumping Agreement. Additionally, the record demonstrates that USDOC properly determined that Hyundai did not act to the best of its ability in responding to USDOC's requests for information. Moreover, USDOC used special circumspection in selecting from the facts available, properly corroborated the replacement information, and selected reasonable replacements for the missing necessary information, in accordance with its obligations under Article 6.8 and paragraph 7 of Annex II of the Anti-Dumping Agreement.

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

8. Regarding the CRS and HRS investigations, Korea has failed to demonstrate that USDOC failed to comply with the requirements of Article 6.8 and Annex II when resorting to the use of facts available in filling the gaps created by Hyundai with respect to affiliated service providers and missing CONNUM data. The records shows that Hyundai failed to provide necessary information relating to the arm's length nature of its transactions with its affiliated service provider. Accordingly, USDOC was unable to verify the arm's length nature of the transactions. Korea's argument that it provided USDOC with the information to calculate any necessary arm's length adjustments, and that the information was verified by USDOC without issue, sidesteps the issue. The question is not whether Hyundai correctly reported its expenses for the transactions with the affiliated party, but rather whether those transactions were at arm's length.

9. Similarly, USDOC determined that because of all of the errors and inconsistencies identified in Hyundai's reported CONNUMs, it could not rely on the reported information for those classes of products. Based on the errors and inconsistencies contained in Hyundai's databases, USDOC made an unbiased and objective determination to disregard the information Hyundai submitted and resort to facts available. Korea has failed to show that the Anti-Dumping Agreement requires anything different.

10. The record demonstrates that USDOC properly determined that Hyundai failed to cooperate to the best of its ability in the investigations. Additionally, USDOC selected reasonable replacements for the missing information by relying on data Hyundai itself provided. Korea's assertion that USDOC acted inconsistently with Article 6.8 and paragraph 7 of Annex II when selecting the replacements for the missing necessary information on the record has no merit. Korea similarly argues that USDOC's selected facts resulted in a determination that was "punitive in nature". However, that the outcome is less favorable than Korea would have liked does not mean the application of facts available was punitive or otherwise inconsistent with Article 6.8 and Annex II.

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

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

1. Second Administrative Review on LPTs

12. Korea argues that in using facts available, USDOC did not meet the conditions for resorting to facts available, failed to use verifiable information on the record, based its determination on non-factual assumption and speculation, and failed to engage in the necessary process of reasoning and evaluation in demonstrating how its selection of replacement information was reasonable. However, Korea's arguments are unsupported by the evidence and fail to demonstrate an inconsistency with Article 6.8 and Annex II of the Anti-Dumping Agreement.

13. The record shows that as necessary information was missing from the record regarding HHI's service-related revenues and because HHI significantly impeded the proceeding by failing to report the necessary information relating to its service-related revenues, USDOC appropriately resorted to using the facts otherwise available pursuant to Article 6.8 and Annex II. Additionally, HHI did not act to the best of its ability in responding to USDOC's requests for information. Record evidence indicates that HHI possessed the information necessary to report specific service-related revenues for specific service-related expenses, but failed to do so, despite USDOC's request for the information.

14. Finally, Korea's argument that USDOC's selected replacement information was somehow "punitive" is without merit. That the outcome is less favorable than Korea would have liked does not mean the application of facts available is inconsistent with Article 6.8. Indeed, USDOC replaced the missing information with record information based on HHI's own purchase orders. This information was a reasonable replacement for the missing necessary information, given its relevance and reliability, and is consistent with Article 6.8 of the Anti-Dumping Agreement.

2. Third Administrative Review on LPTs

15. Korea fails to demonstrate that USDOC's determination that HHI failed to cooperate by not acting to the best of its ability in providing the Department with necessary information in a timely manner was inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement. The record shows, and as Commerce explained, HHI: (1) overstated U.S. price by failing to report separately service-related revenues, which prevented USDOC from deducting excess revenue amounts from HHI's reported U.S. price in accordance with domestic law; (2) understated its home market price by excluding a part that is required to assemble a complete large power transformer from its reported gross unit price in the home market; (3) failed to separately report the price and cost for accessories and; (4) had been systematically selective in providing various documents to the Department, thereby impeding the course of the review.

16. Considering the totality of HHI's failure to report separately service-related revenues and expenses, failure to adequately explain its exclusion of a certain subject part from its home market gross unit prices, failure to report separately the prices and costs of "accessories", and collective failure to provide complete sales documentation, USDOC appropriately satisfied the conditions necessary to resort to facts available. Korea has not otherwise provided any evidence to the contrary, and, therefore, fails to demonstrate an inconsistency with Article 6.8 and Annex II of the Anti-Dumping Agreement.

17. Additionally, as USDOC determined that HHI failed to act to the best of its ability, its rejection of HHI's reported information was not inconsistent with its obligations under Annex II or Article 6.8. In finding that HHI had not acted to the best of its ability, USDOC noted, "{i}n addition to the "selective reporting" issues identified above, these three issues demonstrate that {HHI} has engaged in a pattern of behavior that leaves {USDOC} with a response that, taken as whole, is unreliable". Moreover, 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. Finally, USDOC's selection of the petition rate as a reasonable replacement for the missing necessary information, was in accordance with paragraph 7 of Annex II. Korea's claim to the contrary is without merit.

3. Fourth Administrative Review on LPTs

18. The record shows, USDOC acted consistent with Article 6.8 and Annex II of the Anti-Dumping Agreement in applying facts available to HHI and Hyosung. Korea's arguments to the contrary are unsupported by the evidence and fail to demonstrate an inconsistency with Article 6.8 and Annex II of the Anti-Dumping Agreement.

19. With respect to HHI, USDOC resorted to facts available because HHI had withheld requested information and otherwise impeded the review to provide USDOC with the prices and costs of "accessories", provided inconsistent reporting of an identical component in different sales as foreign like and non-foreign like product, calling into question the reliability of its reporting of home market sales, and failed to report an affiliated sales agent. USDOC noted that collectively, these issues demonstrate how HHI impeded the review. Moreover, by failing to provide this information, "collectively, these issues demonstrate how Hyundai has impeded this review".

20. With respect to Hyosung, USDOC resorted to facts available because Hyosung had withheld requested information and significantly impeded the review by failing to report service-related revenues, failing to explain an invoice covering multiple sales of subject merchandise over multiple administrative periods of review, and failing to report all relevant price adjustments and discounts. Taken together, with these failures the record lacked necessary information and called into question the entirety of Hyosung's reporting. Further, USDOC determined "the record is incomplete and the lack of explanation regarding all three issues renders Hyosung's reporting unreliable", and that Hyosung, therefore, significantly impeded the proceeding. In sum, the record supports Commerce's resorting to facts available with respect to HHI and Hyosung.

21. Despite the many flaws USDOC identified in HHI's and Hyosung's information, Korea asserts that USDOC's application of facts available was inconsistent with Article 6.8 and paragraphs 3 and 5 of Annex II because USDOC improperly rejected all of HHI's and Hyosung's reported information. Korea's assertions are unsupported by the record. USDOC determined that neither HHI nor Hyosung acted to the best of its ability because of each company's failure to provide, in a timely manner, the information necessary for USDOC to calculate a weighted-average dumping margin for exports of subject merchandise. As USDOC determined that HHI and Hyosung each failed to act to the best of its ability, USDOC's rejection of HHI's and Hyosung's reported information was not inconsistent with its obligations under Annex II or Article 6.8.

22. Similarly, the record does not support Korea's assertions that USDOC did not select the "best" information to replace HHI's and Hyosung's missing information, did not provide adequate reasoning and explanation for its selection of the petition rate as the replacement rate, did not sufficiently corroborate that rate, did not use special circumspection in selecting the rate, and finally, that its use of the rate was punitive. That the outcome is less favorable than Korea would have liked does not mean USDOC's application of facts available inconsistent with Article 6.8.

D. Korea's Dependent Claims under Articles 1, 9.3 and 18.1

23. Korea's allegations that the United States is in breach of Articles 1, 9.3, and 18.1 of the Anti-Dumping Agreement are entirely consequential—that is, dependent on its substantive claims under Article 6.8 and Annex II of the Anti-Dumping Agreement. At the end of its arguments with respect to each anti-dumping investigation, Korea argues that, if the Panel accepts its separate substantive claim, this breach "automatically" results in the breach of Articles 1, 9.3, and 18.1. Korea offers no argument or evidence to support any independent breach of those provisions.

24. If the Panel rejects Korea's substantive claims, then by Korea's own consequential logic and the absence of any argumentation or evidence, there would be no basis to find a breach of Articles 1, 9.3, or 18.1 of the Anti-Dumping Agreement. On the other hand, if the Panel agreed with Korea's substantive allegations, there would be no basis to decide Korea's consequential claims under Articles 1, 9.3, and 18.1 of the Anti-Dumping Agreement.

III. KOREA HAS FAILED TO ESTABLISH THAT USDOC'S APPLICATION OF FACTS AVAILABLE WAS INCONSISTENT WITH ARTICLE 12.7 OF SCM AGREEMENT

A. Cold-Rolled Steel and Hot-Rolled Steel

25. In the CRS and HRS investigations, USDOC applied facts available to POSCO for: (1) its failure to report certain cross-owned input suppliers; (2) the discovery at verification of facilities located in a free economic zone (FEZ); (3) and DWI's failure to report certain loans. The missing necessary information was discovered at the CRS verification. Following the discovery of the missing information in the CRS investigation, POSCO attempted to submit the information in the HRS investigation, but USDOC properly rejected the information as untimely and unsolicited.

26. Korea alleges that USDOC acted inconsistently with Article 12.7 of the SCM Agreement in resorting to facts available with respect to POSCO's failure to provide necessary information. Korea's claims are completely unsupported by the records in the investigations, and are thus without merit. With respect to the cross-owned input suppliers, Korea argues that it was inappropriate to apply adverse facts, given the negligible amounts that it claims the input suppliers provided. However, nothing on the record indicates that the amounts were in fact negligible. POSCO also claims, that the inputs were not "primarily dedicated" to the production of cold rolled steel. However, as USDOC

notes, whether an input product is primarily dedicated to the production of a downstream product is a decision that can only be made by USDOC. Because POSCO refused to provide the information when requested, the amounts provided by the affiliated companies were never reported and USDOC never had the opportunity to verify the data or decide whether the input product was primarily dedicated to CRS. Similarly, Commerce never had the opportunity to verify the information regarding POSCO's FEZ and DWI's additional loans because POSCO failed to provide the information when requested.

27. Additionally, USDOC's application of facts available was consistent with Article 12.7. Korea's arguments to the contrary are unsupported by the records in the investigation, as well as by the text of the SCM Agreement. Regarding Korea's claim that USDOC's selection of facts available was with a view to obtaining a result adverse to the interests of POSCO, rather than making an accurate determination, Korea points to nothing on the record to demonstrate that USDOC's determination is not accurate. Moreover, Article 12.7 of the SCM Agreement, properly interpreted, "acknowledges that non-cooperation could lead to an outcome that is less favourable for the non-cooperating party".

28. Finally, with respect to Korea's claim that in the HRS investigation USDOC failed to use the relevant "verifiable" information on the record, as discussed above, the information submitted prior to the HRS verification, but months after the deadline for new factual information, was properly found to be unsolicited and untimely. Accordingly, the information was not, as Korea postulated, verifiable information on the record.

B. Korea's Dependent Claims Under Articles 10, 19.4 and 32.1

29. Korea's allegations that the United States is in breach of Articles 10, 19.4, and 32.1 of the SCM Agreement are entirely consequential—that is, dependent on its substantive claims under Article 12.7 of the SCM Agreement. At the end of its arguments with respect to each countervailing duty investigation, Korea argues that, if the Panel accepts its separate substantive claim, this breach "automatically" results in the breach of Articles 10, 19.4, and 32.1. Korea offers no argument or evidence to support any independent breach of those provisions.

30. If the Panel rejects Korea's substantive claims, then by Korea's own consequential logic and the absence of any argumentation or evidence, there would be no basis to find a breach of Articles 10, 19.4, and 32.1 of the SCM Agreement. Therefore, if the Panel rejects Korea's claim under Article 12.7 of the SCM Agreement, Korea's consequential claims under Articles 10, 19.4, and 32.1 necessarily fail. On the other hand, if the Panel agreed with Korea's substantive allegations, there would be no basis to decide Korea's consequential claims under Articles 10, 19.4, and 32.1 of the SCM Agreement. Therefore, if the Panel were to find a breach of Article 12.7 of the SCM Agreement, there is no basis to decide Korea's claims under Articles 10, 19.4, and 32.1.

IV. KOREA'S PURPORTED "AS SUCH" CHALLENGE TO AN ALLEGED UNWRITTEN MEASURE

A. Legal Framework: "As Such" Claims against Unwritten Measures

31. To succeed on an "as such" claim, Korea must show that the relevant measure" will necessarily be inconsistent with {the United States'} WTO obligations". Moreover, a challenge to an unwritten measure must meet a particularly high threshold, as the existence of an unwritten measure cannot be lightly assumed. Furthermore, "{d}epending on the specific measure challenged and how it is described or characterized by a complainant, however, other elements may need to be proven".

32. Korea also has raised the possibility of an unwritten measure in the form of so-called "ongoing conduct", but only in the alternative. The United States would note that it has serious concerns about the rationale articulated by the Appellate Body in *US – Continued Zeroing* for finding an entirely new type of "measure" to be subject to WTO dispute settlement. In any event, Korea identifies no elements of proving the existence of ongoing conduct that differ from those necessary to prove the existence of a rule or norm, rendering it moot.

B. Korea Fails to Establish Any "As Such" Breach of Article 6.8 and Annex II of the Anti-Dumping Agreement or Article 12.7 of the SCM Agreement

33. As Korea acknowledges, a Member attempting to challenge an unwritten measure "as such" must first establish the existence of the alleged unwritten measure, which requires showing (1) the precise content of the alleged rule or norm; (2) that this alleged measure is attributable to the responding Member; and (3) that this alleged measure has general and prospective application. Moreover, if a complaining Member can establish the existence of an unwritten measure, to substantiate a breach "as such", the Member must demonstrate that the measure "—not only in a particular instance that has occurred, but in future situations as well—will ***necessarily*** be inconsistent with {the responding} Member's WTO obligations". As discussed in the U.S. preliminary ruling request and first written submission, Korea fails to provide a coherent argument regarding an as such claim against an alleged unwritten measure.

34. Moreover, Korea argues that the findings in the *US – Antidumping Methodologies* Appellate Body report confirm the precise content of the alleged unwritten measure here. This is absurd. The precise content of the unwritten measure in *US – Anti-dumping Methodologies* was related to NME-wide entities and the producers/exporters included in it. This measure has no relevance to this dispute, as USDOC has never treated Korea as a non-market economy. Therefore, there is no reasoning that would suggest the precise content of the measure in that dispute somehow proves different precise content supposedly at issue in this dispute. Thus, Korea's discussion of this report offers no support to its "precise content" argument.

35. The analysis of attribution to the United States highlights the procedural unfairness of forcing the United States to mount a defense of an undefined measure. It is nearly impossible to rebut a claim without knowing what the unwritten measure might be.

36. Korea's argument on general and prospective application underscores again the utter incoherence that stems from Korea's failure to challenge an unwritten measure with consistent precise content. In attempting to establish that the alleged unwritten measure has ***general*** application, Korea argues that "{n}othing in the U.S. statute limits the application of AFA to certain producers only". But Korea is not challenging the U.S. statute! This argument is completely silent on whether some unwritten measure has general application.

37. Korea confuses the issue further by arguing next that 306 cases involving the use of adverse inferences when resorting to facts available cover a broad range of products and producers. This argument, at best, is relevant to whether the use of adverse inferences when resorting to facts available has general application. If Korea is challenging the use of adverse inferences when resorting to facts available generally (*i.e.*, without more)—something that is clearly not in its panel request—it would need to be consistent throughout the analysis of various other elements required for sustaining an as such claim. Korea would need to demonstrate, *inter alia*, that the use of adverse inferences when resorting to facts available necessarily breaches Article 6.8 and Annex II of the AD Agreement and Article 12.7 of the SCM Agreement.

38. Conversely, if Korea intends to show that a more narrow rule or norm or ongoing conduct necessarily breaches these conditions, it would first need to show that this more narrow unwritten measure has general application. Korea utterly fails to attempt to substantiate its claim with any consistency in terms of the precise content of the alleged unwritten measure. Its argument regarding the supposed general application of the unwritten measure represents a part of this failure.

39. Korea's argument regarding ***prospective*** application suffers from the same flaws of addressing a written statute rather than the supposed unwritten measure and vacillating between different formulations of the supposed measure that do not match the panel request. The United States reiterates that Korea's submission simply fails to present a coherent as such claim and deprives the United States of a fair opportunity to provide a clear legal rebuttal. Finally, Korea is obviously incorrect in stating that the measure at issue in *US – Antidumping Methodologies* and the one Korea purportedly challenges here share the "identical content"

40. Korea argues that "{i}n the alternative, should the Panel consider that the use of AFA does not meet the criteria for being a rule or norm of general and prospective application, Korea considers that it in any case constitutes a form of 'ongoing conduct'". Korea argues that the elements for

establishing the existence of an unwritten measure in the form of ongoing conduct overlap completely with the elements for establishing the existence of an unwritten measure in the form of a rule or norm with general and prospective application. If the inquiry does not include even a single condition that is not already covered by the rule or norm inquiry, it is of no utility and is, therefore, moot. Moreover, Korea errs in asserting that the "reasoning" from other cases involving different measures applies in this case.

C. Korea's Argument that an Unwritten Measure Breaches Article 6.8 and Annex II of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement Suffers from Several Additional Flaws

41. Korea argues that statistics confirm the existence of some sort of unwritten measure. The statistics Korea discusses, however, are wholly incapable of supporting Korea's conclusion. Furthermore, by focusing on a few specific factual cases and characterizing what occurs "sometimes", Korea effectively argues for a finding of WTO inconsistency "as applied", despite that it is attempting to support its as such claim.

42. Korea's approach is incapable as a logical matter of supporting the conclusion it draws regarding the existence of some sort of unwritten measure. Korea started with cases in which adverse inferences allegedly were applied. The fact that—according to Korea—all but 13 cases included some language regarding failure to cooperate simply shows the frequency of non-cooperation findings in those 319 cases. However, it is incapable of establishing the frequency with which USDOC applies adverse inferences when it finds non-cooperation. At minimum, one would need to start with the universe of instances in which USDOC found non-cooperation, and then measure how often within the context of those instances USDOC applied adverse inferences in resorting to facts available. (Moreover, the fact that—according to Korea's own data—over a dozen of the cases did not cite a failure to cooperate refutes Korea's argument).

43. Korea next filters out cases until 90 remain, and then asserts that, in all cases 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. Korea cites to no evidence to support its assertion and provides no explanation of how it reached this conclusion. Korea provides no further analysis of these 90 cases or the available facts on the 90 separate records. Korea's conclusory statement has no probative value regarding any question that might be relevant to a panel's analysis.

44. Korea does, however, make multiple assertions that misunderstand the function of an as such challenge. Korea's statement that it "seeks to focus on the most egregious situation where the {alleged unwritten measure} is in any case not consistent with the relevant WTO obligations of the United States", implies that there are less egregious situations in which the alleged unwritten measure (whatever it is) is consistent with the United States' WTO obligations. Korea implies that perhaps among these are "situations of a complete lack of response or a complete failure to participate". But this is the hallmark of a measure that is ***not*** WTO inconsistent "as such". Rather, Korea is describing a measure that arguably is WTO inconsistent "as applied" in "the most egregious situation".

45. Elsewhere, Korea appears to recognize that the use of adverse inferences in cases of fraud or total lack of cooperation would be justified. But, again, this is just another way of arguing that the use of facts available is justified in some situations, and not "as applied" in others. This argument effectively concedes that there is no measure that could be an "as such" breach.

46. Korea provides what it refers to as a "substantive analysis". Korea argues on the basis of a table created by Korea that purports to summarize certain factors related to 12 of the 90 determinations Korea previously discussed. Identifying 12 determinations, out of hundreds that Korea itself cites, simply cannot support the existence of some sort of unwritten measure of general and prospective application.

47. Korea then puts forward four arguments it derives from this table. First, according to Korea, USDOC in those 12 determinations resorted to the use of adverse inferences without considering the specific facts that led to the finding of non-cooperation. Korea criticizes USDOC for failing to

distinguish between, for example, "total lack of cooperation" and where requested information was not provided for reasons USDOC considered invalid. However, Korea never even attempts to argue that the Anti-Dumping Agreement or the SCM Agreement requires investigating authorities to make such a distinction. Moreover, none of the many formulations of the alleged unwritten measure have described a prohibition on USDOC considering the facts surrounding the finding of non-cooperation.

48. Second, Korea argues that USDOC's approach to facts available and adverse inferences serves a "punitive function". Korea offers no evidence of this. U.S. courts have stated unambiguously that, under U.S. law, application of adverse inferences in resorting to facts available ***cannot be punitive***.

49. Third, Korea argues that the facts selected invariably are adverse to the interests of the non-cooperating producer. It is unsurprising that, when reviewing adverse inference cases, USDOC invariably applies adverse inferences.

50. Fourth, Korea alleges that the sampled determinations show that at no point in these determinations does USDOC engage in a comparative evaluation and assessment or seek to corroborate the information with a view to arriving at an accurate determination. This again, however, is a conclusory characterization from Korea with nothing more. It cites no evidence. It discusses no details of any of the determinations. Korea does allege that, "{s}ometimes, the USDOC does not even refer to any corroboration, in line with Section 776 of the Tariff Act of 1930, as amended, which does not require corroboration". To state the obvious, "sometimes" is insufficient for an as such claim. An as such claim requires demonstrating that a measure ***necessarily*** breaches the covered the agreements.

51. Korea returns to the three alleged methodologies or "practices" it now labels "the 'Total AFA – Highest Dumping Margin' practice, the 'Expenses AFA – Highest / Lowest Expenses' practice, and the 'Subsidy Program – Highest Rates AFA' practice". However, Korea offers nothing more than conclusory statements about these alleged practices. The differences between these three alleged practices make clear that Korea cannot possibly be challenging a single measure, and none of these three alleged practices was included in Korea's panel request.

EXECUTIVE SUMMARY OF U.S. OPENING STATEMENT AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

52. The United States addressed one additional argument by Korea in the U.S. Opening Statement at the First Substantive Meeting. A summary of the U.S. argument is below. The Executive Summary of U.S. First Written Submission covers the remainder of the U.S. arguments.

I. KOREA'S ARTICLE 9.4 CLAIM

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

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

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

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

EXECUTIVE SUMMARY OF U.S. SECOND WRITTEN SUBMISSION

I. INTRODUCTION

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

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

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

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

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

A. Corrosion Resistant Steel Products

61. Korea has failed to establish that USDOC acted inconsistently with Article 6.8 and Annex II of the Anti-Dumping Agreement in applying facts available in the investigation on corrosion resistant steel products. Korea's additional arguments to the contrary ignore USDOC's findings, mischaracterize the record, or based on the untenable proposition that authorities are obligated to adopt methodologies favored by foreign producers or other interested parties. Specifically, Korea's response to panel questions focuses entirely on Hyundai Steel's purported efforts and difficulty in

providing the requested information and faults Commerce for not adopting a methodology proposed by Hyundai Steel for reporting further manufactured sales. Thus, Korea's response does not advance Korea's position that necessary information was not missing. Additionally, contrary to the arguments in Korea's responses to panel questions, consistent with paragraphs 1 and 6 of Annex II of the Anti-Dumping Agreement, USDOC provided Hyundai Steel with guidance, a reasonable time to provide specified information, and meaningful opportunity to provide further explanation. Korea's arguments to the contrary mischaracterize the record and are an attempt to blame USDOC for Hyundai Steel's failures.

62. Moreover, the record shows that USDOC took into account Hyundai Steel's alleged reporting difficulties. However, Hyundai Steel's credibility with respect to reporting difficulties was significantly undermined by repeated instances in which Hyundai Steel was able to subsequently respond to questions it had previously indicated were too complicated or to which it otherwise could not respond. Thus, USDOC reasonably concluded, "{t}he record demonstrates that Hyundai Steel has: submitted a series of inaccurate value added calculations with respect to the sales at issue; made claims of difficulty in gathering data which were inaccurate; and submitted Section E responses that were unusable, unreliable, and unverifiable".

63. In its responses to Panel questions, Korea challenges Commerce's use of petition rates as facts available to replace the missing information. However, Korea's arguments are not grounded in either the relevant WTO obligations, or in the record of the proceeding. Contrary to Korea's assertion in its responses to Panel questions, USDOC did provide an "explanation in terms of the relevance or representativeness", of the petition rates.

B. Cold-Rolled Steel and Hot-Rolled Steel

64. Korea failed to establish that USDOC acted inconsistently with Article 6.8 and Annex II of the Anti-Dumping Agreement in applying facts available with respect to Hyundai Steel's failure to provide necessary information regarding affiliated service providers and to accurately report certain product specifications and the relevant CONNUMs.

65. The record shows that USDOC reasonably found that information submitted by Hyundai Steel with respect to affiliated party transactions was insufficient to show that the transactions were at arm's length. Korea has failed to demonstrate that USDOC's resort to facts available with respect to Hyundai Steel's affiliated service providers was inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement. Moreover, USDOC properly determined in both the CRS and HRS investigations that Hyundai Steel failed to cooperate by not acting to the best of its ability in its responses to USDOC's requests for necessary information regarding its affiliated service providers.

66. Regarding Hyundai Steel's misreported CONNUM information, in its response to panel questions, Korea attempts to characterize the misreported sales information as "not necessary" and "not required for USDOC to complete its determination" because they involved a small volume of sales. This is yet another instance of Korea – without any legal basis in the Anti-Dumping Agreement – arguing that the USDOC was somehow required to accept the self-evaluation of an interested party as to what information was "necessary" to complete a determination.

67. Given the inconsistencies with respect to Hyundai Steel's reporting of certain CONNUMs, Korea presents no argument or evidence as to why USDOC's determination that the relevant CONNUM information could not be verified could not have been made by an unbiased and objective authority. Finally, Korea's characterization of USDOC's replacement information as having been selected "for the sole purpose of reaching an adverse result" is unsupported by the record. As USDOC explained, because Hyundai Steel did not provide sufficient or plausible explanations at verification as to why it had failed to accurately report information, USDOC found that Hyundai Steel had failed to cooperate to the best of its ability and used an adverse inference when selecting the reasonable replacement information. USDOC ultimately replaced the missing necessary information with values reported by Hyundai Steel itself for the relevant CONNUM product specifications. That the outcome is less favorable than Korea would have liked does not mean the application of facts available was punitive or otherwise inconsistent with Article 6.8 and Annex II.

C. Large Power Transformers

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

69. Korea fails to establish that USDOC's treatment of Hyundai's service-related revenue in POR2 and POR3 breaches the Anti-Dumping Agreement. Notably, Korea makes no argument that USDOC's requirement to cap service-related revenue is inconsistent with any WTO obligation. Nor does Korea dispute that capping revenue by the amount of expenses is necessary to obtain an accurate, undistorted dumping margin. Moreover, Korea fails to acknowledge that USDOC capped the other respondent's (Hyosung) revenue in the same manner.

70. Korea continues to insist that USDOC is to blame for Hyundai's refusal to provide the requested information pertaining to the "accessories" that Hyundai sold to its customers. This position is baseless. As we demonstrated in our first written submission and in our responses to Panel questions, once Commerce made the request for information, Hyundai either had to report the requested information pertaining to accessories, or accept that its non-cooperation would result in the application of facts available.

71. Korea challenges the rates USDOC applied in POR3 and POR4, claiming both determinations were inconsistent with the requirements of Article 6.8 and paragraph 7 of Annex II of the Anti-Dumping Agreement. USDOC examined the information obtained from a cooperating in POR3 (*i.e.,* from Hyosung), which comports with the directive in paragraph 7 to check the information with "information obtained from other interested parties during the investigation". In this case, that meant the same review—*i.e.*, POR3.

72. With respect to POR4, Korea claims the USDOC incorrectly justified its reliance on the margin from the petition by the fact that it was relied upon in POR3. Once again, Korea's argument is meritless. USDOC encountered repeated failures to cooperate in successive reviews. The petition rate used in the previous review remains valid—and perhaps predictable—for purposes of facts available in the ensuing review. If information indicates the petition rate is no longer valid, USDOC is free to consider that information and reject the petition rate, where warranted, for use as facts available. However, Korea is unable to point to any information on the record of POR4 that was not considered and calls into question the validity of the petition rate. Accordingly, again in this "as applied" challenge to USDOC's application of the rate from the petition, Korea has failed to demonstrate USDOC's determination was inconsistent with the requirements of Article 6.8 and Annex II of the Anti-Dumping Agreement.

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

III. KOREA HAS FAILED TO ESTABLISH THAT USDOC'S APPLICATION OF FACTS AVAILABLE WAS INCONSISTENT WITH ARTICLE 12.7 OF THE SCM AGREEMENT

A. Cold-Rolled Steel and Hot-Rolled Steel

74. In its responses to Panel questions Korea challenges USDOC's resort to facts available on the basis that POSCO followed USDOC's regulations and supposed "practice" to determine for itself that POSCO's affiliated input suppliers did not produce inputs "primarily dedicated" to the production of the downstream product, and thus the information requested by USDOC regarding POSCO's affiliated input suppliers was not relevant to the investigation. However, Korea's assertion—that Commerce was required to accept POSCO's decision that it could refuse to cooperate based on POSCO's own evaluation of what information Commerce required—is untenable.

75. Korea also fails to establish that USDOC's reliance on facts available with respect to POSCO's facility located in a Free Economic Zone is inconsistent with Article 12.7 of the SCM Agreement. With respect to the CRS investigation, USDOC was unable to confirm POSCO's statement "that it has no facilities located in an FEZ and, therefore, {that POSCO} did not receive benefits under this program", USDOC resorted to facts available. With respect to the HRS investigation, nothing in the SCM Agreement requires USDOC to accept information submitted well after the factual deadline. Despite the additional arguments Korea presents, Korea fails to establish that USDOC's resort to facts available with respect to the FEZ facility was inconsistent with Article 12.7 of the SCM Agreement.

76. Korea also fails to establish that USDOC reliance on facts available concerning additional loans to POSCO's cross-owned affiliate DWI was inconsistent with Article 12.7 of the SCM Agreement. Indeed, USDOC's determination that, due to "the magnitude of change in the reported lending under the specified program", the additional loans submitted at verification did not constitute a minor correction and instead constituted new factual information, evidences no bias or lack of objectivity. Thus, Korea has failed to show that USDOC's determination in this respect is inconsistent with Article 12.7.

77. With respect to the HRS investigation, Korea asserts that, in the hot-rolled steel investigation, POSCO submitted requested information regarding (1) affiliated input suppliers, (2) the existence of an R&D facility located in an FEZ, and (3) additional loans to DWI within a reasonable period of time. The record shows otherwise, and USDOC's decision to reject POSCO's untimely data was consistent with Article 12.7 of SCM Agreement. Specifically, USDOC found that POSCO's information was untimely, an objective fact based on published deadlines according to published regulations. Korea's view—without regard to USDOC's need to run an orderly investigation that is fair to all parties—that USDOC was obligated to make a *sui generis* exception for POSCO is not supported by Article 12.7 (or any other provision) of the SCM Agreement.

IV. KOREA'S "AS SUCH" CLAIM AGAINST AN ALLEGED UNWRITTEN MEASURE

A. Korea Fails To Establish the Existence of the Alleged Unwritten Measure

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

78. In its preliminary ruling, the Panel explains that the unwritten measure challenged by Korea "as such" that is within the Panel's terms of reference is described in Section I.C of Korea's panel request. However, Korea's arguments bounce around wildly, addressing a multitude of "measures" that do not match the one in its panel request—the lone alleged measure within the Panel's terms of reference. The existence of a measure in *US – Anti-dumping Methodologies* offers no support for the existence the markedly different alleged measure in Korea's panel request. The same is true regarding *US – Supercalendered Paper*.

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

80. Furthermore, Korea raises three alleged "methods" or "practices" regarding USDOC's selection of AFA in distinct and narrow factual circumstances that fail to address the existence of the alleged measure that is actually within the Panel's terms of reference, and therefore also are irrelevant to Korea's as such claim.

81. Korea's panel request gives no indication that the enactment of the TPEA provides any such cut-off for assessing its claim. Korea is not permitted to amend its claim in this respect during the pendency of proceeding. Moreover, various elements of the TPEA discussed by Korea do not apply to all cases, which would mean even a WTO inconsistency in a subset of cases would not warrant the as such finding Korea seeks. To be clear, the United States strongly maintains that no provision in the TPEA breaches the covered agreements.

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

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

83. In rejecting the proposal to mandate adverse inferences for all instances of non-cooperation, USDOC explained that USDOC "does not agree that the imposition of adverse inferences is mandatory" and emphasized the use of the term "*may*" in the governing statutory provision. In fact, in *US – Carbon Steel*, the Appellate Body examined the relevant statutory and regulatory provisions and found that they are not "as such" inconsistent with Article 12.7 of the SCM Agreement. The TPEA did not change the discretionary nature of the statute.

84. Furthermore, and perhaps most importantly, the record evidence in this dispute does not support that USDOC has adopted some sort of unwritten measure that requires the use of adverse inferences whenever a respondent fails to cooperate. To the contrary, numerous examples (both before and after the enactment of the TPEA)—such as *Stainless Steel Bar from Italy*, *Olives from Spain*, *Aluminum Extrusions from China*, *Welded Line Pipe from Korea*, *Korea CRS CVD* and *Korea Hot-Rolled CVD*, *Non-Oriented Electrical Steel from Taiwan*, and *Softwood Lumber from Canada*—prove that Korea simply is incorrect that whenever USDOC makes a finding that a producer or exporter has failed to cooperate by not acting to the best of its ability, it automatically adopts adverse inferences. Accordingly, its as such claim must be rejected.

3. Korea is Wrong that, in Cases of Non-Cooperation, USDOC Ceases To Reason Regarding the Information Likely to Lead to an Accurate Result and Instead Uses the Adverse Inference as the "Sole Basis" for Selecting Facts

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

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

87. Furthermore, upon finding non-cooperation, USDOC does not abandon all reasoning and pursuit of an accurate result in favor of selecting facts solely on the basis of an adverse inference. The numerous cases cited above, as well as *Certain Cold-Rolled Steel Flat Products from the Russian Federation*, *OCTG from Korea*, *Certain Uncoated Paper from China*, *Large Residential Washers from Korea*, *Certain Uncoated Paper from Indonesia*, show, Korea is simply wrong that, whenever USDOC finds a failure to cooperate, it abandons all reasoning and pursuit of an accurate result in favor of selecting facts solely on the basis of an adverse inference. This provides yet another independent basis for finding that Korea's as such claim must fail.

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

88. Korea alleges that the purported unwritten measure "has general and prospective application". Yet, Korea has offered no rebuttal in the wake of the United States' demonstration that Korea failed to establish this element of its claim. Thus, in its first written submission, Korea failed to make out a *prima facie* case that the alleged unwritten measure that is within the Panel's terms of reference has general and prospective application. In its oral statement at the first substantive meeting, Korea included only a cursory, conclusory statement on this point, with no reasoning or evidence.

Accordingly, Korea has failed to establish the general and prospective nature of the alleged unwritten measure alleged in its panel request. This provides yet another independent reason why Korea's as such claim must fail.

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

89. As the United States pointed out in its first written submission, Korea's "statistical analysis" is logically incapable of demonstrating what Korea purports to show. Korea has offered no rebuttal to explain this fatal flaw. Therefore, Korea's statistical analysis unequivocally fails from its conception. Moreover, Korea's argument includes a second consequence allegedly associated with the trigger—that USDOC "will select particularly adverse facts to replace the allegedly missing information". "Particularly adverse" is inherently relative and fact-specific and, thus, not amenable to a statistical analysis. Korea further errs in its execution. Of the 319 cases listed in Exhibit KOR-216, Korea double counts 59 cases. Moreover, despite not discussing the facts or reasoning of the individual cases, Korea fails to place the vast majority of these cases on the record of this dispute. Thus, Korea's "statistical analysis" lacks an evidentiary basis.

90. Korea's "substantive analysis" essentially continues Korea's effort to demonstrate the existence of an unwritten measure. Because the alleged unwritten measure is vaguely defined, Korea appears to have collapsed elements of the measure with the rationale for the alleged breach. This further underscores the incoherence of Korea's argumentation. Moreover, in both its first written submission and oral statement at the first meeting, the United States discussed a multitude of error's in Korea's "substantive analysis". Korea has failed to even attempt a rebuttal. Furthermore, the United States previously demonstrated that, not only does the Anti-Dumping Agreement not prohibit an investigating authority from considering the fact of a party's non-cooperation, it acknowledges the validity of such consideration, and Korea agrees.

91. For these reasons, Korea's "substantive analysis" fails to establish a breach.

EXECUTIVE SUMMARY OF U.S. OPENING STATEMENT AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

92. The Executive Summary of U.S. Second Written Submission covers the arguments contained in the US Opening Statement at the Second Substantive Meeting of the Panel.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

I. Introduction

1. Brazil provides the following executive summary of its participation during the panel proceedings in this dispute.

II. The proper interpretation of Article 6.8 of the Antidumping Agreement and of Article 12.7 of the SCM Agreement and the recourse to "facts available"

2. Brazil does not take a position as to whether the United States acted inconsistently with Articles 6.8 of the Antidumping Agreement and 12.7 of the SCM Agreement in the course of the eight investigations challenged by Korea, nor does Brazil take a position regarding Korea's "as such" claims.

3. However, Brazil notes that both Article 6.8 of the Antidumping Agreement and Article 12.7 of the SCM Agreement should be interpreted in a similar manner, and that the goal of both Articles is to prevent an investigation from being hindered by providing the investigating authorities with a tool to fill in gaps in the information necessary for a determination.

4. Nothing in the wording or context of these provisions suggests they should be used in a punitive manner. On the contrary, the Panel in *EC – Countervailing Measures on DRAM Chips*[1] found that Article 12.7 of the SCM Agreement allows an authority to make determinations on the basis of the facts available, but not on the basis of mere assumptions or inferences. In fact, when the provisions of the Covered Agreements allow for the possibility to draw adverse inferences, these are foreseen for explicitly in the text, such as in paragraph 7 of Annex V to the SCM Agreement.

5. Brazil understands that a proper reading of Article 6.8 of the Antidumping Agreement and of Article 12.7 of the SCM Agreement leads to the conclusion that recourse to facts available is possible only with the purpose of identifying replacements for the "necessary information" that is missing from the record. The facts available selected by the investigating authority, therefore, must reasonably replace the information that an interested party failed to provide.

6. In addition, both Articles allow for the use of "<u>the</u> facts available"[2] and not merely "facts available". This reinforces the interpretation that <u>all</u> facts available to the authority would have to be considered when assessing how to fill in the gap of the missing information. Consequently, the investigating authority is not allowed to select only those facts that would lead to a biased determination of dumping or subsidy, which would be tantamount to infusing a punitive nature into the provision.

7. In response to a question by the Panel, Brazil also clarified that, in its view, Article 6.1 of the Antidumping Agreement and Article 12.1 of the SCM Agreement impose on investigating authorities the duty to award ample opportunity for interested parties to reply to requests of information made by investigating authorities "even when the investigation is at an advanced stage".

8. In replying to another question by the Panel, Brazil also explained that it considers the resort to "facts available" to be permissible only in order to arrive at an accurate subsidization or injury determination. The task of analyzing and selecting among the facts available those that best replace the necessary missing information is, in Brazil's view, a case-by-case endeavor. In this sense, the application of a predetermined rule of selection among the different available facts can lead to the selection of facts that may not be those best suited to reasonably replace the necessary missing information. Brazil, therefore, considers that application of such predetermined rule of selection would violate the investigating authority's duty to conduct an evaluative assessment to determine,

[1] Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.245.
[2] Emphasis added.

in practice and in each specific case, which facts are best suited as replacements for the necessary missing information.

9. Finally, in response to a different question by the Panel, Brazil clarified that Korea's list of 319 investigations carried out by the USDOC includes countervailing duty investigations carried out between 2015 and 2016 of cold-rolled and hot-rolled steel from Brazil (Cases Nos. C-351-844 and C-351-846). Regarding those investigations, Brazil's view is that they represent instances in which USDOC resorted to "adverse facts available" in an automatic and unjustified manner, therefore acting inconsistently with Article 12.7 of the SCM Agreement.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE
ARGUMENTS OF CANADA

I. CERTAIN CONSIDERATIONS DISCIPLINING THE USE OF FACTS AVAILABLE

1. The use of facts available serves the dual function of providing investigating authorities with as broad an evidentiary basis as possible to ensure that an investigation is not hampered by a lack of information, while guaranteeing certain due process rights for interested parties. The use of facts available thus requires a careful balance between the rights and obligations of both investigating authorities and interested parties.

2. Article 6.8 of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement specify the finite circumstances under which an investigating authority may resort to "facts available"; that is, if an interested party: (1) refuses access to necessary information within a reasonable period; (2) fails to provide necessary information within a reasonable period; or (3) significantly impedes the investigation. The use of facts available is further disciplined by the guidance provided in Annex II of the Anti-Dumping Agreement.

3. Canada highlights three considerations in the use of the facts available provisions.

4. First, the use of "facts available" is limited to identifying replacements for "necessary information" missing from the record that is needed to arrive at an accurate determination. Information does not become necessary simply by virtue of being required or requested by an investigating authority. As such, investigating authorities have the onus of establishing that the information was necessary to complete its determination before resorting to facts available.

5. Second, an investigating authority does not have unlimited discretion to reject information provided by interested parties, and to resort to facts available to replace such information. Rather, such an exercise of discretion is disciplined by the general obligation of the investigating authority under Article 6.6 of the Anti-Dumping Agreement (and similarly, Article 12.5 of the SCM Agreement) to satisfy itself as to the accuracy of the information supplied by interested parties; and further disciplined by paragraphs 3 and 5 of Annex II of the Anti-Dumping Agreement.

6. Paragraph 3 of Annex II specifies that *verifiable information* that can be used in the investigation without undue difficulties, and which was supplied in a timely manner, should be taken into account by the investigating authority. If the conditions of paragraph 3 are met, investigating authorities are *not* entitled to reject the information.

7. Verifiability has both a substantive and procedural component. Panels have considered information to be "verifiable" when the accuracy and reliability of the information can be assessed by an objective process of examination. Whether information is verifiable must be a conclusion reached on a case-by-case assessment of the particular facts at issue, including not only the nature of the information submitted but also the steps, if any, taken by the investigating authority to assess the accuracy and reliability of the information.

8. Paragraph 5 of Annex II further provides that where an interested party acted to the best of its abilities to provide the necessary information, the fact that the information "may not be ideal in all respects […] should not justify the authorities from disregarding it". Reading paragraphs 3 and 5 of Annex II in conjunction, past panels have found that information of a very high quality, although not perfect, must not be considered unverifiable solely because of its minor flaws, so long as the submitter has acted to the best of its ability.

9. Third, the use of facts available does not permit the selection of facts with the aim of punishing non-cooperation or a failure to provide the necessary information. The Appellate Body in *US – Carbon Steel (India)* confirmed that while non-cooperation could lead to an outcome that is less favourable than had the party cooperated, it does not mitigate the obligation of the investigating authorities to engage in a process of reasoning and evaluation when selecting the alternative sources of facts.

10. Nevertheless, Canada recalls that the Appellate Body did not preclude the use of adverse inferences in all situations. The permissibility of using such an inference will be derived from the procedural circumstances in which the information is missing. An investigating authority using such an inference is still required to provide an explanation in its published report sufficient to allow a panel to assess whether the use of facts available resulted from a process of reasoning and analysis, including an assessment of whether the use of an inference comported with the relevant legal standard.

II. CHALLENGES TO UNWRITTEN MEASURES

11. The disciplines of the GATT and the WTO, as well as the dispute settlement system, are intended to protect the security and predictability of future trade. The aim of challenging an unwritten measure is generally to prevent future disputes by seeking an end to the use of the WTO-inconsistent measure, and thus to avoid a multiplicity of litigation against future instances of its application. Members must be allowed to challenge both written and unwritten measures on a basis broader than "as applied", or this objective would be frustrated.

A. Establishing the Existence of an Unwritten Measure

12. Canada disagrees with the United States that circumstances for finding an unwritten measure that can be challenged, however characterized, to be narrow.

13. The term "measure" in the Dispute Settlement Understanding (DSU) is broad enough to encompass various types of acts and omissions attributable to a Member. This broad interpretation arises because the DSU permits a Member to bring a dispute whenever the Member considers that the benefits accruing to it under the covered agreements are being impaired. A measure need not be written, nor be legally binding, to be subject to WTO dispute settlement.

14. The Appellate Body and panels have used various analytical tools over the years to facilitate the understanding of certain unwritten measures, whether characterized as rules or norms of general and prospective application, ongoing conduct, concerted action or practice, or a measure of systematic application. While these analytical tools may assist this Panel in determining the existence of a measure, the Appellate Body held in *US – Anti-Dumping Methodologies China* that measures need not be compartmentalized into these categories in order to be challenged in WTO dispute settlement. As the Appellate Body has explained in *Argentina – Import Measures*, these analytical tools do not constitute rigid legal standards or criteria.

15. When challenging a measure, the Appellate Body in *Argentina – Import Measures* held that a complaining Member must establish the precise content of the challenged measure, and attribute the measure to the responding Member. The additional elements that may need to be demonstrated will depend on the particular characteristics or nature of the measure being challenged.

16. The precise content of a measure may be established by first describing the specific acts and/or omissions the measure consists of, followed by demonstrating that the measure exists based on available evidence. This may include evidence of the measure being repeatedly applied, the responding Member's public descriptions of the measure, and, to the extent relevant, specific legal instruments in which the use of such measure is reflected or enabled.

17. Where an alleged measure can be evidenced as being carried out by a government entity of the responding Member, establishing attribution is straightforward.

18. Depending on the characteristics of the measure challenged, other elements in addition to precise content and attribution may need to be substantiated to prove its existence. Where a complaining Member has defined the measure at issue as a rule or norm of general and prospective application, that Member must demonstrate that the evidence establishes the general and prospective application of the measure. Where a Member has characterized a measure as ongoing conduct, that Member must provide evidence of the measure's repeated application and the likelihood that such conduct will continue.

19. A measure's future application could be clear from the constituent elements of the measure, or may be demonstrated through factors such as: the existence of an underlying policy that is implemented by the measure; the systematic and repeated application of the measure; the design,

architecture, and structure of the measure; the extent to which the measure provides administrative guidance for future conduct; or, the expectations it creates among economic operators that the measure will be applied in the future.

20. An unwritten measure can be challenged as long as a complaining Member clearly describes and characterizes the precise content of the measure, presents evidence of its constituent elements, attributes it to the responding Member, and evidences other required elements of the measure depending on how it has been characterized by the complaining Member.

B. Legal Instruments as Evidence of Unwritten Measures

21. Canada considers that to the extent that provisions of laws or regulations enacted by a responding Member may evidence constituent elements of an alleged measure, it is not always necessary—or appropriate—for a challenge to be brought against the legal instrument itself. An enabling law or regulation may not in and of itself be WTO-inconsistent, in that it still allows a responding Member to act in a manner consistent with its WTO obligations. It may be in the application of a law or regulation that the measure leading to the infringement of a Member's obligation arises.

22. Where the challenge concerns an unwritten measure, the relevant enabling law or regulation may rightly be viewed as evidence of a measure. In some instances, the formulation of an underlying law or regulation may provide evidence of administrative guidance towards the use of a particular methodology or practice, which creates expectations among the public and among private actors towards its future application. The legal instrument may thus have "normative value", in that it reflects, or perhaps legitimizes, a long-standing policy or practice.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1. The EU is aware that there is no rule of precedent under the WTO law. However, continuity and consistency in the jurisprudence serve to provide security and predictability to WTO Members and the multilateral trading system as a whole. Providing security and predictability is precisely the objective of the dispute settlement system of the WTO and it serves the promotion of international trade. Therefore, departures from the legal clarifications contained in previous reports (notably of the Appellate Body) should be avoided unless there are cogent reasons.

2. Korea challenges, in the present case, the use of adverse facts available in six sets of proceedings as inconsistent with the obligations of the United States under the relevant provisions of the ADA and the SCMA, notably Article 6.8 and Annex II of the ADA and in Article 12.7 of the SCMA. With regard to Korea as applied claims, the Panel will have to assess the explanations provided by the USDOC as the basis for its facts available determinations. These explanations should be sufficient to allow the Panel to assess whether and to what extent the available facts employed by the USDOC were reasonable replacements for the allegedly missing information, and also shed light on the comparative assessment the USDOC performed whenever different sets of information were available.

3. With regard to these claims the EU has recalled a number of principles that have been clarified by the jurisprudence and help in understanding the legal standard for the use of facts available. As a first point, it should be recalled that the legal standard under Article 12.7 SCMA and under Article 6.8 and Annex II of the ADA is essentially the same. The second is that the idea underlying the disciplines concerning the use of facts available is that of striking a balance between the IA's need to conduct the investigation in an orderly manner and the due process rights of the interested parties. Therefore, the Panel should look at the arguments of both parties through these lenses.

4. With regard to the mentioned general principles, both the ADA and the SCMA indicate that an IA may resort to facts available if some information that is necessary for the completion of the investigation is missing. In that scenario, an IA needs to use facts available otherwise it would not be capable of completing the investigation. Moreover, facts available can only be applied against an interested party if the authorities had requested the relevant facts from this interested party, making it aware that, if it does not supply the information within a reasonable time, the investigating authority will be free to resort to those facts that are available. Sometimes an IA can assess the necessity of the missing information only once it has collected it. It must thus have the right to request information that might turn out not to be relevant from an ex-post perspective. However, the latitude of the investigating authority in determining what information is necessary is tempered by a clear burden on the authority to be prompt and precise in identifying the information it needs. The information request, must be made as soon as possible after the initiation of the investigation, but late requests remain possible. In that case, due process requires the IA to give the interested party ample opportunity to present in writing all evidence that the latter considers relevant although it can be expected that when the investigation is at an advanced stage, the deadline for replying will be relatively short.

5. Likewise, IAs can impose time-limits for the submission of the requested information as the IA is responsible to close the investigation within tight deadlines. At the same time, those time-limits are not necessarily absolute and immutable but can and must be extended upon cause shown by an interested party where it is practicable, i.e. if the interested parties submits the information within a reasonable period of time. However, since timeliness is essential for an orderly conduct of the investigation, a tardy submission of information can constitute an instance of non-cooperation. In this connection, in order to inform interested parties of the constraints faced by the investigating authority, it is good practice to publish the schedule of each investigation, indicating clearly all the procedural steps that must take place until its conclusion.

6. There is a clear preference for the use of data provided by the respondent, which is particularly clear from paragraphs 3 and 5 of Annex II of the ADA. However, the same provisions show that this

obligation is not absolute. On the one hand, the obligation to take into account non-ideal data submitted by a respondent applies only in case of a fully cooperating respondent (acting to the best of its ability). On the other hand, even in case of a fully cooperating respondent, the data it submits must only be used insofar as it meets the criteria in paragraph 3 of Annex II, i.e. it is verifiable, appropriately submitted and supplied in a timely fashion (i.e. within a reasonable period).

7. In this vein, the EU considers important to raise the issue of use of partial datasets, notably when the interested party partially reports information that should be in its possession. Flaws or gaps of part(s) of a dataset may taint other parts of it or make them unreliable or unusable, and in such cases, the other parts can be discarded as well. This has nothing to do with a "punitive" use of facts available. It is simply common sense. Where only part of overall sales data is reported, the omission on the other part(s) may, and will often, cast legitimate doubts on the data that has been selectively submitted, or simply make reconciliation impossible. In a situation where an interested party partially reports data that should normally be in its possessions, using that information may be overly difficult within the meaning or in paragraph 3 of Annex II. Moreover, it will be difficult to conclude that the interested party acted to the best of its ability, as required by paragraph 5 of Annex II. Therefore in this scenario the data should be complete and accurate and (exception made only for minor clerical errors) any gaps or inconsistencies may be enough to authorise the investigating authority to consider that the interested party has not cooperated and that the use of facts available is justified in that case. By contrast, if the collection of the information requested requires a significant effort on the part of the interested party, it is understandable that some of the data may be imprecise or missing.

8. It is also established that IAs must use the most fitting or "most appropriate" information available in the case at hand, and therefore it must assess carefully all facts on the record in order to choose the most appropriate ones, and take into account all procedural circumstances in which specific information is missing. During the investigation the IA and the interested party must make a joint effort to cooperate in order to obtain the requested information. That explains why the procedural circumstances in which information is missing can be relevant to an investigating authority's use of facts available. As clarified by the Appellate Body, there is nothing unreasonable or anomalous in drawing inference also from the procedural circumstances, including from the non-cooperation of the interested party. The drawing of an inference, including from the refusal to provide information, is an ordinary aspect of the legal reasoning. In the absence of any evidence gathering powers, the possibility of drawing certain inferences from the failure to cooperate plays a crucial role in inducing interested parties to provide the necessary information. This does not mean that non-cooperation provides a blank cheque for simply basing a determination on speculative assumptions or on the worst information available, or for punishing the un-cooperative party. Ultimately, the determination has to be based of the available facts and additionally the best available facts, and not on mere speculation. Hence, two extremes should be avoided: an IA should neither choose to apply facts that are manifestly and disproportionately adverse, nor should it be requested to speculate about the fact that the interested party would have submitted if it had cooperated. All that it is required is that the information is a reasonable replacement for the missing one.

9. Korea also argues that the United States' use of adverse facts available (AFA) is inconsistent "as such" with its WTO obligations. According to Korea, the United States' use of AFA operates as a rule or norm of general and prospective application or, in the alternative, constitutes a form of "ongoing conduct" that can be challenged "as such" before the panel.

10. A challenge to a WTO inconsistent measure "as such" contributes to a more efficient use of the dispute settlement system by obviating to the need to start individual proceedings each time the measure is applied in a specific case. Moreover, the AB has clarified that the discretionary nature of the measure is no barrier to a challenge "as such". Still Korea bears the burden of introducing evidence as to the content of the measures it challenges. The EU finds that the content of the measure challenged by Korea is not different from the content of the statutory language of Section 776 of the Tariff Act of 1930, as amended by the TPEA of 2015. Korea argues that on that basis there is a constant practice of the USDOC of resorting to adverse facts available in a manner that is inconsistent with the United States' obligations.

11. In order to prove that the USDOC invariably adheres to rules set out in Section 776, despite the discretionary language used in that statute, Korea may avail itself of individual decisions showing the consistent and systematic application of the statutory provisions in individual proceedings, the

pronouncements of domestic courts on the meaning of such provisions, the opinions of legal experts or the writings of recognized scholars.

12. However, whether a measure that allows an IA to resort to facts available and to use adverse inferences whenever it finds that the exporter has not sufficiently cooperated may be WTO inconsistent will depend on whether or not it respects the principles recalled above concerning the discipline on the use of facts available under the ADA and the SCMA. In this connection, the EU considers also that it would be extremely difficult, if not impossible, to define a predetermined rule of selection of facts that would comply with the obligation of the IA authority to conduct an evaluative assessment. Unless that predetermined rule of selection were a restatement of the general principles on the use of facts available identified by the jurisprudence, resorting to a predetermined rule of selection would hinder the investigating authority's ability to evaluate and select those facts that are most appropriate in view of reaching an accurate determination in a particular investigation in light of all the relevant circumstances.

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. INTRODUCTION

1. Japan focuses on the use of facts available under the Anti-Dumping Agreement and the SCM Agreement, and notably a core issue in dispute concerning the use of adverse facts available ("AFA"). Japan clarifies that it does not take any specific positions on the factual aspects of the dispute, including whether the specific AFA determinations issued by the U.S. Department of Commerce in the relevant investigations are WTO-consistent or not.

II. THE USE OF FACTS AVAILABLE

2. Japan believes that any consideration of the proper interpretation and application of Article 6.8 of the Anti-Dumping Agreement and Annex II therewith, as well as Article 12.7 of the SCM Agreement, must begin with the understanding that these provisions serve a limited purpose related to overcoming a lack of information necessary to a determination. In both contexts, "facts available" are a tool for investigating authorities to arrive at a "reasonable" and "accurate" determination, even when certain information may not be available.[1]

3. Importantly, although there are slight textual differences between Article 6.8 of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement, the Appellate Body has interpreted Article 12.7 of the SCM Agreement in a manner similar to Article 6.8 of the Anti-Dumping Agreement. Thus, to the extent Japan addresses text and previous cases in relation to Article 6.8 and Annex II of the Anti-Dumping Agreement, or conversely Article 12.7 of the SCM Agreement, Japan's comments should be interpreted as applying in both contexts.

A. "Facts Available" Serve A Remedial, Not Punitive Function

4. As reflected in both Article 6.8 / Annex II of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement, the provisions on "facts available" strike a balance between assuring investigating authorities' access to necessary information (and thus encouraging exporters and foreign producers' cooperation) on the one hand, and ensuring that exporters and foreign producers are not treated unfairly or arbitrarily by investigating authorities on the other. To this end, there is perhaps no more important principle to guide the Panel in this dispute than appreciating that the use of "facts available" is not a means to punitive action, but instead serves a remedial purpose to reasonably fill gaps in the record of an investigation.

5. As a textual matter, none of the provisions at issue, whether Article 6.8 and, Annex II of the Anti-Dumping Agreement, or Article 12.7 of the SCM Agreement, refer to "adverse facts available" or "adverse inferences".[2] To the contrary, Paragraph 7 of Annex II merely states 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 statement expresses the obvious proposition that secondary sources of information that an authority may use in the event of non-cooperation could be less favorable to the respondent than information that would have been obtained from a cooperating party; it does not, however, permit the authority to use *any* information. As the panel in *Korea – Certain Paper (Article 21.5 – Indonesia)*

[1] *See* Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416 and Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 294.

[2] Japan acknowledges that Paragraphs 7 and 8 of Annex V to the SCM Agreement permits the use of "adverse inferences" when developing information concerning serious prejudice, but this discretion is expressly limited to panels, and reinforces the understanding that the drafters understood the difference between adverse inferences on the one hand, and facts available on the other. Had the drafters intended to provide Members recourse to adverse inferences in the context of anti-dumping and countervailing duty investigations more generally, they would have made that clear, as they did in Annex V for panels addressing issues of serious prejudice.

stated, Paragraph 7 "does not justify arbitrary selection of the data to be used in the place of the missing data".[3]

6. By extension, although Paragraph 7 recognizes that a non-cooperating respondent may be subject to determinations based on facts on the record that may be less favorable than the facts that the respondents would have submitted, it does not permit an investigating authority to engineer a punitive outcome that does not reasonably reflect an accurate margin calculation based on the available facts of the case. The panel in *China – GOES* saw "no basis in Annex II for the drawing of adverse inferences".[4] Instead, "*the purpose of the facts available mechanism is not to punish non-cooperation* by interested parties. ... . While non-cooperation triggers the use of facts available, non-cooperation does not justify the drawing of adverse inferences".[5] Rather, as noted by the Appellate Body in *US – Carbon Steel (India)*, "facts available" serves the sole purpose "of replacing information that may be missing, in order to arrive at an accurate …. determination".[6]

7. This discretionary authority to draw "adverse inferences", however, is expressly limited to panels, and reinforces the understanding that the drafters understood the difference between "adverse inferences" on the one hand, and "facts available" on the other. The phrase "less favourable" in Paragraph 7 does not convey the same punitive character as "adverse", and thus emphatically does not authorize inferences so extreme as to be "adverse". Such textual provision should be given appropriate weight.

8. In this regard, even when the investigating authority adequately determines that an exporter/foreign producer is not cooperating and/or impeding the investigation, such a finding is not a basis to apply adverse inferences. Again, the use of facts available should not be a punishment for non-cooperation. And while the Appellate Body has observed that Paragraph 1 of Annex II of the Anti-Dumping Agreement "suggests that the knowledge of a non-cooperating party of the consequences of failing to provide information can be taken into account by an investigating authority", it remains the case that "an investigating authority must nevertheless evaluate and reason which of the 'facts available' reasonably replace the missing 'necessary information', with a view to arriving at an accurate determination".[7]

9. A case-by-case assessment would be required to determine whether an interested party's conduct, offering information that the investigating authority rejects due to its untimeliness, can be treated as an instance of "non-cooperation" and whether the investigating authority may consequently resort to the use of "facts available". Factors such as the type and volume of information offered, the information already available to the investigating authority, or the communication that had occurred between the investigating authority and the interested party, as well as the actual untimeliness of the provision of the information should all be taken into consideration.

10. In Japan's view, the investigating authority would consider the nature and degree of an interested party's non-cooperation when determining whether or not it can obtain necessary information from that interested party. If it can reasonably conclude that it cannot obtain necessary information from that party, the investigating authority may resort to other facts available, following the set rules.

11. Japan therefore submits that the Panel should carefully examine whether the investigating authority's use of "facts available" was guided by adverse inferences (as distinguished from an adverse outcome) or by the reasonable replacement of necessary information with a view to arriving at an accurate determination. Only the reasonable replacement of necessary information with a view to arriving at an accurate determination is consistent with Article 6.8 and Annex II of the Anti-Dumping Agreement, and Article 12.7 of the SCM Agreement.

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

[4] Panel Report, *China – GOES,* para. 7.302.

[5] *Ibid.* (emphasis added) See *also* Panel Report, *Mexico – Anti-Dumping Measures on Rice,* para. 7.238; Panel Report, *China – Broiler Products,* paras. 7.311-7.312 (citing Panel Report, *China – GOES*, para. 7.302 *supra).*

[6] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416.

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

B. "Necessary Information"

12. Neither the Anti-Dumping Agreement nor the SCM Agreement define "necessary information". But the Appellate Body has made clear that the term "necessary" in conjunction with "information" means that neither Article 6.8 of the Anti-Dumping Agreement nor Article 12.7 of the SCM Agreement is directed at just "any" information or "unnecessary" information, "but is rather concerned with overcoming the absence of information required to complete a determination".[8] In other words, necessary information is at least the one which would be required for investigating authorities to complete or make a determination.

13. Previous panels have further distinguished "necessary" information from that information that is merely requested or required by investigating authorities. Only the former permits use of "facts available".[9] To that end, any finding of fact that necessary information is missing must be undertaken in an objective and unbiased manner and a reasoned and adequate explanation is required.[10]

14. More specifically, to resort to facts available permissibly, investigating authorities must determine affirmatively that the respondent producers/exporters have in fact failed to provide necessary information. A finding by the investigating authority of what information is necessary to complete and make a determination may differ depending on the circumstances of a particular case. But considering the purpose of Article 6.8 of the Anti-Dumping Agreement to "arrive at an accurate ... determination",[11] Japan considers that investigating authorities are required to assure that they have examined whether there is sufficient basis for its application of "facts available".

15. The nature of such examination by the investigating authority is guided by Annex II of the Anti-Dumping Agreement. First, Paragraph 1 of Annex II, established that the burden is first on the investigating authority to be clear what information it requires. Second, Paragraph 3 of Annex II establishes that whether and to what extent necessary information is lacking is dependent on whether information that is provided can be verified and other conditions. Third, Paragraph 5 further clarifies that information may not be disregarded simply because it is not complete or imperfect where a party has acted to the best of its ability. In addition, Paragraph 6 refers to explanations by investigating authorities of the reasons that should be provided to respondents for refusing to accept evidence or information, and opportunities for respondents to provide further explanations.

16. These provisions in Annex II underscore that the due process rights of interested parties are to be taken into account when considering resort to facts available. At the same time, Japan does not take the view that whether information is "necessary" should be strictly determined based on a single standard before resorting to facts available. The investigating authority has certain discretion about how to proceed with its investigation. The information that may be considered as "necessary" may differ, for example, depending on each Member's domestic law for addressing certain issues or the type of information that is missing. But even though "necessity" of information may vary depending on the Member and the circumstances of a particular case, every Member must in every case respect the due process rights of the interested parties.

17. In order to respect the due process rights of interested parties, the interested parties should not simply self-determine what is "necessary" and dismiss the relevance of the required information. For example if the interested party insists that the required evidence is not necessary, despite the relevance of the information that is objectively clear, the investigating authority may reasonably use facts available. On the other hand, if it is objectively clear that the requested information can be obtained by the investigating authority easily through its own sources, and is not directly relevant to key issues in the investigation, then it could be unreasonable to disregard the burden of asking more detailed information or to find interested parties as "non-cooperative" and thus to resort to facts available.

18. For a smooth investigation process, it would be reasonable to expect reasonable communication between the investigating authority and the interested party. If the interested party decides to refrain from providing the requested information, based on its own determination that

[8] *See* Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416.

[9] *See* Panel Report, *Egypt – Steel Rebar*, para. 7.155 and Panel Report, *US – Supercalendered Paper*, para. 7.174.

[10] *See* Panel Report, *US – Supercalendered Paper*, paras. 7.174–7.177.

[11] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416.

the information is insufficiently relevant to be "necessary", the investigating authority may reasonably resort to facts available if it is objectively clear the information is relevant.

19. In short, a balance between the investigating authority's right to investigate and interested parties' rights to due process should be taken into account within the investigation process. In this regard, Japan views that it would be required to provide interested parties an "ample opportunity" to present such information, even at an advanced stage of the investigation. However, what would constitute an "ample opportunity" would depend on the factual situation within each individual investigation proceeding.

20. Needless to say, and to avoid any doubts, what constitutes "necessary information" should be determined objectively and an investigating authority must have sufficient basis to assert that the requested or required information is in fact necessary.

21. In turn, this Panel must examine whether "the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective", as set out in Article 17.6(i) of the Anti-Dumping Agreement. This basic principle applies to the authorities' determinations of what information is necessary.

C. Selecting "Best Information Available"

22. Annex II is incorporated by reference into Article 6.8.[12] Annex II is titled "Best Information Available in Terms of Paragraph 8 of Article 6". Thus, the language in its title confirms that Annex II requires that the "facts available" ultimately applied by an investigating authority must be the "best" information available under the circumstances. "{E}ven where the investigating authority is unable to obtain the 'first-best' information as the basis of its decision, it will nonetheless base its decision on facts, albeit perhaps 'second-best' facts".[13]

23. What information constitutes the "best" information available in a particular case will depend on the circumstances, including factors such as what information is missing. And while the manner of the evaluation to be undertaken by the investigating authority would be left to the investigating authority's discretion, the Appellate Body has made clear that discretion is not a substitute for evaluation.

24. This confirms that the use of "facts available" must take place within specific restraints requiring investigating authorities to reasonably replace missing information with a view to arriving at an accurate determination. The use of "facts available" starts with the premise that actual substantiated facts are considered, and this pool of substantiated facts is evaluated to ensure the accuracy of any determination based on upon such facts.

25. The panel's finding in *US – Supercalendered Paper* merely confirms panels' views presented in previous cases concerning the use of arbitrary information to fill gaps in necessary information. Indeed, even in circumstances of non-cooperation, the use of "facts available" still requires "special circumspection" in the pursuit of accuracy, as reflected in Paragraph 7 of Annex II.[14]

26. Japan therefore submits that the Panel should carefully examine whether the "facts available" used by the investigating authority reflect an evaluation, taking into consideration all substantiated facts available on the record to determine the "best" information for purposes of making an accurate determination. Japan does not necessarily consider that a "comparative evaluation of [all] 'evidence available'"[15] is required in each and every case, but at least, the investigating authority should be able to explain, with sufficient basis, what evaluation it undertook. Any selection of arbitrary facts, or selection of facts without evaluating all facts on the record, would be inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement, and Article 12.7 of the SCM Agreement. Moreover, a failure to explain the evaluation process in selecting among facts available, or to do so post hoc, would be inconsistent with Article 12.8 of the SCM Agreement and Article 6.9 of the Anti-Dumping Agreement.

[12] Appellate Body Report, *US – Hot-Rolled Steel*, para. 75.
[13] Panel Report*, US – Hot-Rolled Steel*, para. 7.55.
[14] Panel Report, *Korea – Certain Paper (Article 21.5-Indonesia)*, para. 6.26.
[15] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.289.

27. The steps to ensure the accuracy of the information being used will vary case-by-case. What information constitutes the "best" information available in a particular case will depend on the circumstances. The investigating authority has the discretion regarding the manner it takes to ensure the accuracy of the information. In any case, it is clear that such discretion is not a substitute for evaluating whether the information the investigating authority will use is the "best" and that there is no better information available.

28. Japan notes that although the investigating authority has discretion in determining what specific steps to take, at least, it should be able to explain, with sufficient basis, what evaluation it undertook. If the investigating authority uses information unchanged, without undertaking such a process and without explaining why it used such facts as the "best" information, the accuracy of such use may be questioned.

29. In this regard, it cannot be determined whether having a "predetermined rule" is WTO consistent or not in the abstract but only through a case by case analysis. Additionally, the assessment will necessarily vary depending on the substance of such predetermined rules. If a predetermined rule of selection is applied to reach a predetermined conclusion, such a rule may be WTO-inconsistent. On the other hand, if a predetermined rule of selection provides neutral guidance on how to reach the "best" information, setting out reasonable steps to examine the evidence being considered, it may not necessarily be WTO-inconsistent. Whether a predetermined rule is mandatory or discretionary is not a decisive element in considering whether its application by the investigating authority complies with the obligation to conduct an evaluative assessment.

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF MEXICO

1. Mexico welcomes the opportunity to present its views in this dispute. In general, Mexico disagrees with certain arguments presented by the United States in section I of its first written submission.

2. Among other things, the United States raises aspects related to the jurisprudence of the dispute settlement system. The United States asserts that "a panel may refer to [prior Appellate Body or panel] reasoning in conducting its own objective assessment of the matter. But considering an interpretation in a prior […] report is very different from a statement that the interpretation is controlling or 'precedent' in a later dispute".[1]

3. For the reasons set out below, Mexico considers that these assertions are incorrect and seek to minimize the role played by what is now called "jurisprudence".

4. The interpretation of the United States implies that a panel has complete discretion whether or not to take account of precedents when they are applicable, thereby reducing their degree of importance and relevance. This interpretation means that it is totally at a panel's discretion whether or not to take into consideration determinations made by the Dispute Settlement Body (DSB) since, according to the United States, even when these determinations have been found to be persuasive the panel is not obliged to consider them in its own analysis of the matter.

5. Mexico is of the view that this interpretation is somewhat radical and does not correspond closely to how dispute settlement system precedents function. Even though panels have a certain freedom to develop their interpretations, it is essential to take into account that when the interpretation to be given to the matter concerned in a precedent-based legal system is left totally at the discretion of the judge or arbitrator, then by definition precedents are meaningless, and this has an adverse effect on predictability. Such total discretion would negate any certainty regarding the results that might be expected.

6. Given that existing precedents on the subject in WTO jurisprudence do not favour the United States' position, we understand that its strategy involves seeking to persuade the panel that it has absolutely no obligation to consider the precedents that are perfectly applicable in this dispute, and that even if the panel takes them as the basis of its analysis, it would be failing to meet the obligations laid down in the Dispute Settlement Understanding (DSU) to make an objective assessment of the matter. However, Mexico considers that the importance of the predictability of the dispute settlement system greatly outweighs the interests of one of the parties to the dispute.

7. Article 3.2 of the DSU makes it clear that the dispute settlement system of the WTO is a "*central element*" in providing *security and predictability* to the multilateral trading system. This is also reflected in Article 3.3, which states that "[t]he prompt settlement of situations […] is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members". Both provisions indicate the *contribution* made by the dispute settlement system and hence its *function* and its *component parts* within the WTO framework.

8. Article 3.2 refers to the recognition by Members of the *preservation* of rights and obligations and the *clarification of existing provisions*. Security and predictability cannot exist if there is uncertainty over what Members' rights and obligations entail. Nor can there be security or predictability or any balance between rights and obligations if there is no *clarity* regarding their meaning. This same provision states that clarification of provisions is carried out in accordance with *customary rules of interpretation of public international law*. Hence it cannot be claimed that a dispute settlement system was created that seeks to provide security and predictability, the prompt settlement of disputes and the maintenance of the balance between the rights and obligations of

[1] United States' first written submission, p. 4, para. 19.

Members, comprising panels and an Appellate Body, without its ultimate task entailing interpretative work.

9. Choosing to refer in the text to customary rules of interpretation in the clarification of existing provisions reflects the understanding that the dispute settlement system entails interpretative work regarding the resolution of disputes, the meaning of commitments made, the applicability of agreements, the conformity of measures with those agreements, etc.

10. With regard to precedents in the dispute settlement system, the United States' attempt to reduce the importance and applicability of precedents is contrary to the recognized role of those precedents. We observe that in *US – Oil Country Tubular Goods Sunset Reviews*[2], the Appellate Body determined that "following the […] conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same" (emphasis added).

11. Furthermore, in *US – Stainless Steel (Mexico),* the Appellate Body indicated that "[i]t is well settled that Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties. This, however, does not mean that subsequent panels are free to disregard the legal interpretations and the *ratio decidendi* contained in previous […] reports that have been adopted by the DSB".[3]

12. Moreover, in *Japan – Alcoholic Beverages II*, the Appellate Body determined that "[a]dopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute".[4]

13. There are other disputes in which both the panels and the Appellate Body have put forward arguments similar to those mentioned.[5] It is not our intention to give an exhaustive account on this occasion but we wish to emphasize that no interpretation was undertaken in any of these determinations that was similar to the one set out by the United States in its first written submission. It suffices to compare the language of the United States' characterization with that used by the Appellate Body in the above-mentioned precedents, and it is quite clear that the degree of discretion with regard to taking account of previous determinations is much less in the latter case, as shown below.

14. In *US – Stainless Steel (Mexico)*, the Appellate Body determined that "the legal interpretation embodied in [adopted panel and Appellate Body] reports becomes part and parcel of the *acquis* of the [WTO dispute settlement system]. Ensuring 'security and predictability' in the [dispute settlement system], as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case" (emphasis added).[6]

15. The above finding expresses once again the expectation of resolving the same legal issues in the same way and also spells out that the only exception justifying resolution in a different way is the existence of "cogent reasons".

16. In fact, Mexico considers the recent interpretation in *US – Differential Pricing Methodology* (DS534) to be erroneous, where the panel merely stated in a single paragraph, without in-depth analysis, that "we have […] found convincing or cogent reasons to arrive at conclusions different from those of the Appellate Body in *US – Washing Machines* as well as the panels in *US – Washing Machines* and *US – Anti-Dumping Methodologies (China)*".[7] This action must not be repeated and we hope that it will be rectified on appeal.

17. Furthermore, the United States indicates that the rules of interpretation of the Vienna Convention "do not assign to interpretations given as part of dispute settlement a

[2] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews* (DS268), para. 188.
[3] Appellate Body Report, *US – Stainless Steel (Mexico)* (DS344), para. 158 (emphasis added).
[4] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 14 (emphasis added).
[5] Appellate Body Report, (recourse to Article 21.5 of the DSU), *US – Shrimp* (DS58), para. 107; Appellate Body Report, *US – Continued Zeroing* (DS350), para. 362; Panel Report, *US – Countervailing and Anti-Dumping Measures (China)* (DS449), para. 7.315.
[6] Appellate Body Report, *US – Stainless Steel (Mexico)* (DS344), para. 160 (emphasis added).
[7] Panel Report, *US – Differential Pricing Methodology* (DS534), para. 7.107.

precedential value for purposes of discerning the meaning of agreement text. A panel is not permitted under its terms of reference as established by the DSB or under the DSU to ignore this task and instead simply treat prior panel or Appellate Body reports as binding 'precedent'".[8]

18. In this regard, there are three aspects that we consider important:

(a) In principle, under the terms of Article 3.2 of the DSU, the interpretations of panels and the Appellate Body must be based on the rules of interpretation of the Vienna Convention, and it can be presumed that they comply with this characteristic, unless proven otherwise. A single Member cannot designate itself as being the only one that can determine in which cases precedents should or should not be followed.

(b) The United States' assertion does not make sense. The Vienna Convention does not state that the result of its implementation becomes a rule of interpretation, because this would not make sense. Precedents do not derive their value from being the result of application of an instrument but, since they result from the application of rules, they can be fully presumed to be applicable in similar cases. If they are deliberately and dogmatically set aside, as suggested by the United States, this would constitute an implicit rejection of their having been created in accordance with the said rules, since there would otherwise be no reason to set them aside.

(c) Its interpretation implies that whenever a panel or the Appellate Body settles a dispute, it should apply the rules of the Vienna Convention and reach an outcome without taking account of what it has concluded in previous cases, in which, precisely, the same instrument was applied. In this regard, if the conclusions of previous cases, which are based on the same instrument, are applied, we do not see how there could be any breach of the DSU rules.

19. Moreover, the general rule of interpretation of treaties invoked by the United States provides, firstly, that "a treaty shall be interpreted in good faith". In a scenario where (i) multiple interpretations exist that concur on the meaning given to a particular provision; (ii) such interpretations comply with the general rule of interpretation of treaties; (iii) they have been issued by dispute settlement system bodies; (iv) they have been adopted by the DSB; and (v) no interpretation exists that has given a contrary meaning, Mexico considers that a new interpretation that does not take account of these previous interpretations and, furthermore, is manifestly contrary to them cannot be considered as being "in good faith" but quite the opposite.

20. The aim of providing security and predictability to the multilateral trading system cannot be achieved if we, the Members, are the ones who undermine the effectiveness of the dispute settlement system, by belittling the previous determinations made by panels and the Appellate Body which have been approved by the DSB.

21. It is therefore an extremely serious matter that any Member should seek to disregard the interpretations given by the adjudicatory bodies of the dispute settlement system, interpretations which, ultimately, clarify and give concrete substance to the provisions of the covered agreements.

22. Lastly, Mexico welcomes the opportunity to present its views on this dispute and expresses its full willingness to respond to any questions from the panel. I would also like to thank the interpreters for their work.

[8] United States' first written submission, p. 4.

ANNEX C-6

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF NORWAY

1. INTRODUCTION

1. Norway welcomes this opportunity to present its views as a third party in this case concerning a disagreement between the Republic of Korea (Korea) and the United States of America (the US), regarding the conformity with the covered agreements of anti-dumping and countervailing duties imposed by the US on certain products and the use of facts available.

2. Norway will not address all the legal issues upon which there is disagreement between the parties to the dispute in this third party submission. As a starting point, Norway would like to reiterate that anti-dumping investigations involve a process whereby an authority makes a series of factual and legal determinations. These determinations can adversely affect the position of interested parties, including through the imposition of anti-dumping duties. In order to protect the interests of interested parties, the *Anti-Dumping Agreement (ADA)* requires the investigating authority to conduct its investigation, collect information and make its determinations in accordance with certain minimum standards of procedural justice and fairness. Norway attaches great importance to these procedural rules, as vital safeguard mechanisms for transparency and the rule of law.

3. One of the principles governing anti-dumping investigations is the goal of objective decision-making based on facts. Article 6.8 and Annex II aim to uphold that principle in the event that necessary information is not provided by the respondent company to an investigation. In this third party submission, Norway will comment on the interpretation of "necessary information" and the duty of cooperation in the ADA Article 6.8 and Annex II.

2. INTERPRETATION OF THE ADA ARTICLE 6.8 AND ANNEX II

2.1 Introduction

4. The ADA Article 6.8 reads:

> "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."

5. The last sentence of paragraph 7 of Annex II states that:

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

6. In its first written submission, Korea holds that a failure by a company to provide requested information to the investigating authority because it did not have control over a separate legal entity, does not in itself mean that the company failed to provide "necessary information" in the meaning of the ADA Article 6.8.[1] The US, on the other hand, claims that legal separation is not the issue, but rather whether two legally distinct companies are affiliated. The US refers to the companies in question as being "affiliated parties via control by a 'group', which has the ability to directly or indirectly control its group members".[2] Korea claims that the US has not explained how a *group member* has the ability to control other group members.[3]

[1] Korea's First Written Submission, para. 263.
[2] US' First Written Submission, para. 156.
[3] Korea's First Written Submission, para. 259.

7. Whilst not taking a stand in the dispute at hand, Norway would like to comment on the interpretation of "necessary information" and the duty of cooperation in the context of affiliated companies.

2.2 "Necessary information" and the duty of cooperation

8. Several panels and the Appellate Body have interpreted the term "necessary information" in the ADA. It is clear that "necessary information" refers to information which is relevant to the determination to be made by the investigating authority.[4] Moreover, it is, in the first instance, left to the discretion of the investigating authority to determine what information it deems necessary for the conduct of its investigation.[5] The provisions of Annex II "shall be observed" in the application of Article 6.8. They are mandatory.[6]

9. In Norway's view, Annex II informs the interpretation of the obligation to provide "necessary information" in the context of affiliated companies. The Appellate Body addressed this subject in its report in *US – Hot-Rolled Steel*. In this case, the Appellate Body assessed the situation where a company that was 50% owned by the respondent company, in a joint venture with a third company, did not provide the information the investigating authority asked for. In paragraph 99, the Appellate Body stated that:

> "Paragraph 7 of Annex II indicates that a lack of 'cooperation' by an interested party may, by virtue of the use made of facts available, lead to a result that is 'less favourable to the interested party than would have been the case had that interested party cooperated. We note that the Panel referred to the following dictionary meaning of 'cooperate: to 'work together for the same purpose or in the same task.' This meaning suggests that cooperation is a *process*, involving joint effort, whereby parties work together towards a common goal. In that respect, we note that parties may very well 'cooperate' to a high degree, even though the requested information is, ultimately, not obtained. This is because the fact of 'cooperating' is in itself not determinative of the end result of the cooperation. Thus, investigating authorities should not arrive at a 'less favourable' outcome simply because an interested party fails to furnish requested information if, in fact, the interested party has 'cooperated' with the investigating authorities, within the meaning of paragraph 7 of Annex II of the *Anti-Dumping Agreement*". (emphasis original, underlining added, footnotes omitted)

10. The Appellate Body further, in paragraph 102, underlined that:

> "We, therefore, see paragraphs 2 and 5 of Annex II of the *Anti-Dumping Agreement* as reflecting a careful balance between the interests of investigating authorities and exporters. In order to complete their investigations, investigating authorities are entitled to expect a very significant degree of effort – to the 'best of their abilities' – from investigated exporters. At the same time, however, the investigating authorities are not entitled to insist upon *absolute* standards or impose *unreasonable* burdens upon those exporters." (emphasis original, underlining added)

11. Thus, it is already established case law that the investigating authorities cannot insist on absolute standards or impose unreasonable burdens upon respondent companies. This must, in Norway's view, be taken into account by investigating authorities when they require information relating to affiliated companies.

12. There are a number of different ways that companies can be affiliated and company law may vary in the national law of WTO Members. Thus, whilst bearing in mind the very high standard of cooperation expected from respondent companies, the investigating authority must have a sensitivity to the fact that a respondent company may still not be able to provide every piece of information requested from an affiliated company. An investigating authority may not demand that

[4] Panel Report, *US – Steel Plate,* para. 7.55, Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416.

[5] Panel Report, *Egypt – Steel Rebar*, para. 7.155.

[6] Panel report, *US – Steel Plate*, para. 7.56

a respondent company has "exhausted all legal means at its disposal to compel [an affiliated company] to divulge the requested information, within the short time-limits of the investigation".[7]

13. At the same time, it must be recalled that the investigating authority itself also has an obligation to cooperate with the respondent company. Cooperation is a two-way process involving a joint effort, cf. also the ADA Article 6.13, after which the investigating authority "shall take due account of any difficulties experienced" by respondent companies and "provide any assistance practicable". Article 6.13 thus entails that an investigating authority cannot disregard difficulties that a respondent company has, e.g. in providing the requested information, and it also obliges the investigating authority to assist the respondent company. Moreover, there is nothing in the ADA preventing an investigating authority from asking an affiliated company of a respondent party directly for information.[8] The efforts of the investigating authority is to be taken into account, on a case by case basis, as a part of the circumstances under which the responent company's cooperation in the sense of paragraph 7 of Annex II is assessed.[9]

14. In sum, it is Norway's view that if the standard of cooperation in paragraph 7 of Annex II is met, an investigating authority may not conclude that "necessary information" has not been provided,[10] even if, in the end, the requested information is not provided. Accordingly, the ADA Article 6.8 would not allow the investigating authority to make determinations on the basis of the facts available in such a situation.

3. CONCLUSION

15. Norway respectfully requests the Panel to take account of the considerations set out above in interpreting the relevant provisions of the covered agreements.

[7] Appellate Body Report, *US – Hot-Rolled Steel*, para. 108.
[8] Appellate Body Report, *US – Hot-Rolled Steel*, para. 106.
[9] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 105-109.
[10] Panel Report, *US – Steel Plate*, para. 7.55.