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

(DS539)

COMMENTS OF THE UNITED STATES ON KOREA'S RESPONSES TO THE QUESTIONS FROM THE PANEL FOLLOWING THE SECOND SUBSTANTIVE MEETING

March 20, 2020

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* Exhibits that are new with this submission begin with Exhibit USA-113.

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EC – Bed Linen (AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001
EC – Tube and Pipe Fittings (AB),	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003
Egypt – Steel Rebar (Panel)	Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted 1 October 2002
India – Patents (US) (AB)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998
Mexico – Anti-Dumping Measures on Rice (AB)	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005
Mexico – Anti-Dumping Measures (Panel)	Panel Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/R, adopted 20 December 2005, as modified by Appellate Body Report WT/DS295/AB/R
US – Carbon Steel (AB)	Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 19 December 2014
US – Hot-Rolled Steel (Panel)	Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, adopted 20 May 1996, as modified by Appellate Body Report WT/DS2/AB/R
US – Supercalendered Paper (AB)	Appellate Body Report, *United States – Countervailing Measures on Supercalendered Paper from Canada*, WT/DS505/AB/R, adopted 5 March 2020

GENERAL

1. The United States appreciates this opportunity to comment on Korea's responses to the Panel's second set of questions to the parties. Many of the points that Korea raises have already been addressed by the United States in prior written or oral submissions or are not relevant to the Panel's resolution of this dispute. In the comments below, the United States focuses largely on points or statements that Korea raises that have not been addressed in prior U.S. submissions. The absence of a U.S. comment on any statement, response, or aspect thereof appearing in Korea's responses should not be understood as agreement with the statement, response, or aspect thereof.

1 GENERAL QUESTION

Question 48 (Both parties)

Please provide an update on the status of all the measures at issue. Given that certain USDOC determinations at issue have been followed by USCIT decisions and/or redeterminations pursuant to remand, do these measures challenged "as applied" continue to exist?

U.S. Comment:

2. The United States notes that the table in Korea's response contains "Subsequent Reviews." The Panel's question, however, does not call for this information and the subsequent reviews are not relevant to the determinations that are the subject of this dispute. Further, Korea does not contend (nor could it) that the "Subsequent Reviews" are within the Panel's terms of reference. The terms of reference in this dispute, as established by DSU Article 7.1, are those measures in existence at the time of panel establishment that Korea identified in its panel request.

2 INTERPRETATIVE ISSUES

Question 49 (Both parties)

Is there an obligation for an investigating authority to select the "best information available"? How should the title of Annex II be taken into account?

U.S. Comment:

3. As the United States explained in its response to this question, the title of Annex II does not provide a separate legal obligation or legal standard by which Commerce's determinations should be assessed. Rather, the substantive obligations in Annex II are set out in the provisions contained in paragraphs 1 through 7.

4. The Appellate Body reports that Korea cites in its response do not support the proposition that the title of Annex II creates a separate legal obligation.[1] Indeed, in not one of the paragraphs Korea cites does the term "best information" appear. Korea's additional reliance on *US – Hot-*

[1] Korea RPQ 49, para. 3 and fn. 1, citing *US – Carbon Steel (India) (AB)*, para. 4.426; *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 294; and *US – Supercalendered Paper (AB)*, paras. 5.81-5.82.

Rolled Steel for support is misplaced. The panel in *US – Hot-Rolled Steel* noted that when requested information is missing (the "first best" facts), an investigating authority must continue to use facts, "albeit perhaps 'second-best' facts."[2] Contrary to what Korea implies, the panel did not invent a new legal requirement, nor could it have. Dispute settlement findings may not add to or diminish the rights and obligations of WTO Members.[3]

5. Korea's reliance on *Mexico – Anti-Dumping Measures on Rice* is similarly misplaced. It too does not find the existence of a separate legal requirement under the title of Annex II. Consistent with Article 6.8 of the Anti-Dumping Agreement, which explicitly states, "{t}he ***provisions*** of Annex II shall be observed in the application of this paragraph" and makes no reference to the title of Annex II,[4] *Mexico – Anti-Dumping Measures on Rice* only notes the Annex as containing the "obligations the investigating authority has to comply with in order for the use of facts available in a given cases to be in accordance with Article 6.8 of the AD Agreement."[5] Notably, this sentence appears in the same paragraph as the long quote contained in Korea's response, but Korea omits it. In sum, nothing Korea cites indicates that the title of Annex II provides a separate legal obligation.

Question 50 (Korea)

Insofar as the degree of non-cooperation of an interested party can be taken into account by an investigating authority during the selection of facts available, do you maintain that an investigating authority is always under the obligation to select the "best information available" to replace the missing "necessary" information?

U.S. Comment:

6. Korea's response covers ground it has already covered elsewhere. And as the United States has explained, Korea is incorrect in asserting that the title of Annex II creates a separate obligation or standard by which Commerce's determinations should be assessed. Rather, all substantive obligations under Annex II are contained in paragraphs 1 through 7 and the title of Annex II provides no additional obligations.

7. Furthermore, Korea's response fails to address the tension between two of its arguments. On the one hand, Korea argues that an investigating authority must always select the "best" information available. Of course, as the United States has explained, there is no "best" information in terms of guessing what the respondent would have provided if it had chosen to cooperate. That information is unavailable, and simply not knowable. But Korea, without explanation, believes otherwise. Yet at the same time, Korea acknowledges that the degree of

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[2] *US – Hot-Rolled Steel (Panel)*, para. 7.55

[3] See Understanding on Rules and Procedures Governing the Settlement of Disputes, Articles 3.2 and 19.2.

[4] Emphasis added.

[5] *Mexico – Anti-Dumping Measures (Panel)*, para. 7.166.

cooperation may be considered and that an investigating authority may draw adverse inferences, which could result in "less favourable" rates.[6] This position appears to be inconsistent with Korea's position that some sort of best guess exists for the missing information. Or, on the other hand, if "best" information means the information that is most appropriate in light of all relevant facts and circumstances, including the degree of non-cooperation, the United States does not understand how Korea's interpretation would support its claims.

Question 51 (Both parties)

Does paragraph 7 of Annex II set out any obligations for the selection of facts available in instances where an investigating authority uses information from a primary source?

U.S. Comment:

8. As discussed in the United States' response to Question 51, paragraph 7 of Annex II does not set out any obligation for the selection of facts available when an investigating authority uses primary information.[7] Rather, paragraph 7 of Annex II addresses scenarios in which investigating authorities have to base their findings on information from a "secondary source."[8] Additionally, while the Anti-Dumping Agreement does not define "secondary sources," the issues in this dispute do not require a comprehensive definition of "secondary sources." Rather, it is sufficient to recognize that "secondary sources" includes information gathered outside the course of the subject investigation or review, including information supplied in the application for the initiation of the investigation.[9]

9. In its response Korea attempts to define "secondary sources" as sources for "{a}ny information that falls short of being the accepted necessary information."[10] In other words, "primary information" is the missing necessary information and all information used to replace the missing necessary information, including the respondents own information, is information from "secondary sources." There is no support for Korea's definitions.

10. To begin, Korea's definition of "secondary sources" as the only source of information in the application of facts available is not consistent with Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("Vienna Convention") and a plain reading of Article 6.8 and paragraph 7. Specifically, such a reading gives no meaning to the term "secondary sources" and its presence in paragraph 7. If the intent was to have paragraph 7 apply to all sources of information in the application of facts available, as Korea suggests, presumably there would have

[6] Korea RPQ 50, paras. 10-11.

[7] U.S. RPQ 51, para. 12.

[8] U.S. RPQ 51, para. 12.

[9] U.S. RPQ 52, para. 13.

[10] Korea RPQ 51, paras. 19-26.

been no reason to use the term "secondary sources" and the first sentence of paragraph 7 would have stated: "If the authorities have to base their findings, including those with respect to normal value, on **facts available**, including the information supplied in the application for the initiation of the investigation, they should do so with special circumspection." However, because the sentence makes reference to investigating authorities basing their findings on "secondary sources," as opposed to other sources, or facts available, presumably the term "secondary sources" has particular meaning.

11. In the alternative, Korea argues that a reading of paragraph 7 that applies only to "secondary sources" would not be a "good faith" interpretation of the terms used in paragraph 7. According to Korea, paragraph 7 must apply "implicitly" to primary information, as otherwise, information from primary sources "does not have to be used with special circumspection or does not need to be corroborated in terms of its accuracy and reliability for purposes of playing the role as 'best information available.'"[11] However, Korea's invocation of "good faith" is just Korea's excuse for presenting a policy argument on what Korea thinks the agreement should have said. The DSU, however, is clear that the agreement must be interpreted in accordance with customary rules of interpretation of public international law. [12] Those rules do not provide for rewriting an agreement to meet the policy preferences of any particular party.

12. Furthermore, Korea's policy argument fails. When, for example, investigating authorities use the respondent's own data, the investigating authority is using data that was submitted to it by the respondent, is on the record, and has been verified. Therefore, the accuracy, reliability, and relevance of the data has already been established and thus do not present the same need for "special circumspection" and corroboration as data from "secondary sources."

13. Second, we note that Korea has not always defined "primary sources" and "secondary sources" this way. Previously, Korea defined "secondary sources" and "primary sources" consistent with the United States. In providing its "Guiding Principles" on the application of facts available, Korea noted in its first written submission that, "the 'facts available' to the agency are generally limited to those that may reasonably replace the information that an interested party failed to provide. In certain circumstances, this may include information from secondary sources."[13] In other words there were "primary sources" and "secondary sources" for information. Similarly, Korea noted that "paragraph 7 of Annex II generally requires investigating authorities to exercise caution in their selection of facts available to ensure the information, especially from secondary sources, such as the petition, is sufficiently accurate to be

[11] Korea RPQ 51, paras. 28-29.

[12] See Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 3.2.

[13] Korea FWS, para. 79.

used."[14] Regarding USDOC's use of Hyundai's own data in the application of facts available, Korea states:

> {T}he USDOC failed to exercise the requisite caution in selecting which facts available to use. The information used by the USDOC for AFA was the highest and lowest reported expense values by Hyundai Steel for the service transactions in question. Even if this information was reported by Hyundai Steel, and as such not "secondary source" information, the USDOC did nothing to ensure that the selected information was the best available information.[15]

14. Even in its second written submission, Korea stated that information reported by the respondent and used for facts available, was "as such **not** 'secondary source' information."[16] In sum, while Korea may now define "secondary sources" as the only source of information in the application of facts available, previously Korea recognized that facts available could come from either "primary sources" or "secondary sources."

Question 52 (Both parties)

What information amounts to "information from a secondary source" within the meaning of paragraph 7 of Annex II? In which instances, in each of the six proceedings challenged as applied, did the USDOC not use "information from a secondary source" as facts available?

U.S. Comment:

15. Korea's response to this question is based on Korea's proposed definition of "information from a secondary source" as including "{a}ny information that falls short of being the accepted necessary information."[17] Based on this proposed definition, Korea asserts that for **all** of the determinations, Commerce used "information from a secondary source" **every time** Commerce resorted to facts available. Korea's response to this question thus confirms what the United States explained above in the comments on Question 51: that is, Korea's purported definition is incorrect because it would make the term "secondary sources" a nullity.

Question 53 (Both parties)

The second sentence of paragraph 7 requires an investigating authority to "check the information from other independent sources". What does this task of "checking" entail? Does it refer to checking for reasonableness? Does it necessarily entail a comparison?

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[14] Korea FWS, para. 183.

[15] Korea FWS, para. 510 (cites removed, emphasis added).

[16] Korea SWS, para. 213.

[17] Korea RPQ 51, paras. 19-26.

U.S. Comment:

16. When an investigating authority selects as facts available information from a secondary source, the second sentence of paragraph 7 provides: "In such cases, the authorities should, where practicable, check the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation."

17. Korea asserts that the second sentence of paragraph 7 of Annex II requires an investigating authority to "evaluate whether the secondary source information is the *best information*" and refers to "checking for 'reasonableness' and 'accuracy' by way of comparing the secondary source information with the independent information or information from other interested parties."[18] This proposed interpretation has no support in the text of the agreement and is thus not permissible. As the Appellate Body stated:

> {t}he duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the Vienna Convention. But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.[19]

18. The United States has already addressed Korea's arguments with respect to the title of Annex II and the creation of additional obligations for administrative authorities to find the best information available and will not do so again here. Further, there is no basis in paragraph 7 for a "reasonableness" standard as Korea asserts. The United States notes the terms "reasonable," "unreasonable," or "reasonableness" are not in the text of paragraph 7 of Annex II and, thus, cannot be adopted so as to create an additional, unwritten obligation under that provision.

19. The context of the second sentence of paragraph 7 of Annex II further shows the fallacy in Korea's contention that a reasonableness test should be imputed. Three of the seven paragraphs of Annex II reference the term "reasonable," while the other four (including paragraph 7, which is at issue here) do not. For example, paragraphs 1 and 6 refer to "reasonable time" and "reasonable period", respectively, while paragraph 2 refers to "reasonable ability", "unreasonable extra burden", and "unreasonable cost and trouble." In contrast, paragraphs 3, 4, 5, and 7 do not reference the terms "reasonable," "unreasonable" or "reasonableness." The express reference to the terms "reasonable" or "unreasonable" in certain provisions of Annex II and omission of such terms from other provisions of the same Annex (including paragraph 7)

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[18] Korea RPQ 53, para. 40 (emphasis in the original).

[19] *India – Patents (AB)*, para. 45, quoted in *EC – Bed Linen (AB)*, para. 83 and *EC-Tube and Pipe Fittings (AB)*, para 98.

indicates that the provisions, which do not contain such terms, do not create an additional requirement to check the secondary information for reasonableness.[20] The detailed nature of the obligations under Annex II and the omission of any reference to "reasonableness" standard in paragraph 7 further confirms that the treaty negotiators did not agree to an additional requirement beyond those that the text of paragraph 7 contains.

20. Moreover, Article 6.8 of the Antidumping Agreement, which requires observance of provisions of Annex II, does not contain the term "reasonable" or other similar terms. The use of the term "best information available in terms of paragraph 8 of article 6" in the title of Annex II similarly does not create an additional obligation beyond specific obligations in the provisions of Annex II. If an investigating authority fully complies with the provisions of Annex II, then the selected facts available are, by definition, the best available information available in terms of paragraph 8 of Article 6.

21. Generally, the United States does not disagree with Korea's statement that "checking" secondary information against other sources of information is part of the assessment of secondary information.[21] Indeed, as the United States explained in para. 100 of its first written submission, the Appellate Body has written that:

> {W}hen culling necessary information from secondary sources, the agency should ascertain for itself the reliability and accuracy of such information by checking it, where practicable, against information contained in other independent sources at its disposal, including material submitted by interested parties.[22]

22. The second sentence of paragraph 7 of Annex II requires investigating authorities to check the secondary information against information from independent sources. However, as the United States explained in its answer to this question, the provision recognizes that there may not be such other independent information readily available, as the checking is only called for if "practicable." Once the investigating authority has checked such information for reliability or accuracy, the obligations under the second sentence are satisfied.

23. With respect to the Panel's question whether "checking" necessarily involves comparison, Korea appears to suggest that comparison is a form of corroboration.[23] However, the United States would note that while a comparison may help in accessing the accuracy of the

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[20] *Cf. EC – Tube and Pipe Fittings (AB)*, para. 101 ("The negotiators' express reference to sales outside the ordinary course of trade and to low-volume sales in Article 2.2, and the omission of a reference to low-volume sales in the chapeau of Article 2.2.2, confirms our view that low-volume sales are not excluded from the chapeau of Article 2.2.2 for the calculation of SG&A profits.").

[21] Korea RPQ 53, para. 44.

[22] *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 7.289.

[23] Korea RPQ 53, para. 40.

secondary information, information from "other independent sources" is likely to provide both direct and indirect support for the accuracy of the secondary information. In cases where "other independent sources" provide indirect support for secondary information, a direct comparison is not likely to be possible.

Question 54 (Both parties)

When is it "not practicable" to undertake the exercise set out in the second sentence of paragraph 7?

U.S. Comment:

24. Korea acknowledges that there may be situations, when it is not practical to undertake the exercise set out in the second sentence of paragraph 7 of Annex II.[24] Korea acknowledges that in some cases it would be impossible to do so.[25] However, Korea asserts that even when it is not practical, it does not relieve the authorities from carrying out "the more basic exercise of comparative evaluation among the 'evidence available' or facts otherwise available."[26]

25. Korea's assertions are wrong as a matter of law. First, Korea does not provide any textual basis for the so-called "more basic exercise of comparative evaluation."

26. Second, the second sentence of paragraph 7 has important qualifying language; namely, it provides that an investigating authority *should* do so "where practicable." Thus, regardless of the legal basis for the "more basic" exercise Korea contemplates, there may be no inconsistency with the second sentence of paragraph 7 of Annex II, if the "not practicable" limitation applies.

27. Third, the example provided by Korea undercuts its own theory. In that example, there is no information about the respondent and no information from other independent sources. In these circumstances, there would exist no such "other information" to use in the "more basic" exercise that Korea proposes.

28. Fourth, Korea's interpretation of circumstances when it would not be practicable to undertake the exercises set forth in the second sentence of paragraph 7 is overly restrictive. For example, if the record contains certain facts about the respondent, but the investigating authority determines that the facts are unreliable or inaccurate, it would not be appropriate to conduct the exercise on the basis of such "facts." Whether it is "not practicable" will depend on the specific circumstances and facts of each individual case. There is no rigid bright-line rule. Paragraph 7 does not say that the limitation only applies when there are "no facts," but rather uses a broader, more flexible term "practicable," which could encompass a variety of different scenarios,

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[24] *See e.g.,* Korea RPQ 54, para. 46.

[25] Korea RPQ 54, para. 46.

[26] Korea RPQ 54, para. 48.

including situations in which a respondent selectively submits partial facts, the reliability and accuracy of which is highly questionable.

29. Finally, Korea asserts that "the second sentence of paragraph 7 seeks to ensure that the investigating authorities *specifically search for* and checks {sic} against 'other independent sources' or information from other parties'. . . ."[27] Korea's position is inconsistent with the text of Annex II. The second sentence of paragraph 7 provides: "In such cases, the authorities should, where practicable, check the information from other independent sources *at their disposal*, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation."[28] The second sentence requires investigating authorities to check against other independent sources "at their disposal." It does not impose an obligation to "specifically search for" additional independent sources. Korea's response thus makes clear that, rather than adhering to the text agreed to by the Members, Korea starts with the result it seeks, and works backward to create corresponding obligations without regard to the absence of any textual basis.

Question 55 (United States)

Do you consider that the last sentence of paragraph 7 permits the selection of facts available for the purpose of creating an incentive for cooperation?

Question 56 (Korea)

If all information on the record is more favourable than other information in the possession of an interested party, what incentive does the interested party have to disclose that information to the investigating authority?

U.S. Comment:

30. The Panel has asked Korea a simple, straightforward question: what incentive an interested party might have to disclose information to the investigating authority, if all information on the record is more favorable than the information in the possession of an interested party. Of course, if the more favorable facts will be used to replace the missing information, there is no incentive for an interested party to provide unfavorable information to the investigating authority. Not surprisingly, Korea has provided a long-winded and evasive answer, which *fails to identify a single incentive* that such an interested party would have to provide the necessary information under such circumstances.[29] Korea's failure to identify any incentive to provide such information is telling.

[27] Korea RPQ 54, para. 48.

[28] Emphasis added.

[29] Korea RPQ 56, paras. 49-57.

31. As an initial matter, Korea asserts that Korea "is not certain" that a situation posed by the Panel would ever arise.[30] Whether Korea is certain or not, such situations can and do arise. Most exporters maintain sophisticated accounting systems and know their own costs and prices or the amounts of subsidies they received from their respective governments. When involved in trade remedy proceedings, an exporter normally hires an experienced legal counsel and economic consultants, which routinely calculate expected dumping or countervailing duty rates on the basis of the company's own information before their initial questionnaire responses and supplemental questionnaire responses are due. They also normally have access to the cost and pricing information submitted by other respondents. Korea's professed lack of "certainty" as to whether an exporter can ever know if its own information is less favorable than the other information on the record is both irrelevant and unpersuasive.

32. Second, Korea asserts that there is "a general incentive for exporters to participate in the investigation" and potentially obtain an individual dumping margin of zero and that total non-cooperation means that the interested party loses all control over the determination of the margin.[31] However, the possibility of a zero margin does not depend on a roll of dice. It depends on the company's information, which is in the company's possession and, as discussed above, can be assessed prior to submission of questionnaire responses. If that data is likely to result in a zero margin, of course it is incentivized to cooperate. But such a scenario would not meet the conditions set out by the question, where the company's information is ***worse*** than all other information on the record.

33. Moreover, it is simply incorrect for Korea to imply that the exporter would be denied an individual dumping margin, when it does not cooperate. Even in cases of total non-cooperation, the respondent receives an individual dumping margin based on facts available, which could be more or less favorable to the non-cooperating party depending on the facts and circumstances of each individual case. By refusing to provide the necessary information, the exporter gives up the right to have its own information, which it withheld, from being used in the calculations, but retains its other rights, including the right to comment and defend its interests. In the scenario presented by the Panel's question, all information on the record is more favorable to the exporter than its own information. Accordingly, it is difficult to see any plausible incentive for the exporter to provide such less favorable information to the investigating authority and Korea has not identified any such incentive in its answer.

34. Finally, Korea has taken the position that an exporter "is entitled to decide" not to participate in the investigation and refuse to provide information, while the investigating authority may not select facts available to replace the missing information if such facts create an incentive to cooperate. It is difficult to accept that the drafters of the WTO agreements would craft a system that incentivizes non-cooperation, and such an outcome is absolutely not reflected

[30] Korea RPQ 56, para. 49.

[31] Korea RPQ 56, para. 49.

anywhere in the WTO Agreement. To the contrary, the last sentence of paragraph 7 of Annex II expressly recognizes that non-cooperation may have consequences. Further, Korea's radical interpretation would undermine the goal of reaching accurate determinations and create perverse incentives for exporters to game the system.[32]

Question 57 (Both parties)

What constitutes reasonable time under paragraph 1 of Annex II? What is the relevance of the 30 days period under Article 6.1.1 of the Anti-Dumping Agreement for purposes of determining "reasonable time" within the meaning of paragraph 1 of Annex II?

U.S. Comment:

35. Korea appears to agree with the United States that "reasonable" is a relative term that depends on the particular factual circumstances of each case.[33] However, Korea suggests that there could be circumstances when a party misses the administrative deadline established by the administrative authority, but nonetheless provides information within a reasonable period of time.[34]

36. As an initial matter, paragraph 1 of Annex II does not contain a substantive obligation for an investigating authority to provide a party "reasonable time" to supply information. Rather, the provision states that the investigating authority should inform a party that it could make a determination on the basis of facts available if the party does not supply information within a reasonable time. An investigating authority could meet this obligation by including a brief statement regarding the potential consequences if the party fails to provide the information by a specific deadline. Exporters and other interested parties are not free to ignore the administrative deadlines on the basis of paragraph 1 of Annex II.

37. Korea further states that Article 6.1.1 of the Antidumping Agreement provides context for interpreting the term "reasonable time" in paragraph 1 of Annex 2. As the United States explained in its answer to this question, Article 6.1.1 is of only limited use in terms of providing context. As a prior panel found, Article 6.1.1 applies to the initial questionnaire at the outset of an investigation,[35] and does not apply to other requests for information.[36] As Korea acknowledges, "reasonable" is a relative term that depends on particular circumstances of each case. An investigating authority is not required to allot the same time period for responding to an

[32] For additional discussion of this issue, the United States refers the Panel to U.S. RPQ 55, paras. 20-22.

[33] Korea RPQ 57, para. 53 ("Korea submits that what is considered 'reasonable time' will vary from situation to situation.").

[34] Korea RPQ 57, para. 53.

[35] *See Egypt – Steel Rebar (Panel)*, paras. 7.275-7.279.

[36] *See Egypt – Steel Rebar (Panel)*, paras. 7.275-7.279, 7.285-7.295.

extensive multi-section questionnaire in the antidumping investigation and a shorter supplemental questionnaire in a different type of proceeding.

38. Finally, Korea contends that the time given to Hyundai Steel to provide information regarding further manufactured sales in response to Section E of the initial questionnaire was 17 days, which Korea asserts was half of the time required by Article 6.1.1 for responding to the entire initial questionnaire.[37]

39. Korea's assertions lack merit. First, Article 6.1.1 provides the period required for replying to the *entire* initial questionnaire. Where, as here, the initial questionnaire is split into multiple parts issued at separate times, the staggered response periods to the various parts may need to be aggregated to determine whether at least 30 days were provided for responding to the entire questionnaire. In this case, the time given to respond to the entire initial questionnaire far exceeds the time that Article 6.1.1 requires. Second, after putting Hyundai on notice in its initial questionnaire in July that it may yet require Hyundai to submit a Section E response,[38] following USDOC's request in October for Hyundai to submit a Section E response, USDOC, over a nearly four month period, provided Hyundai multiple opportunities to respond adequately, including several supplemental requests for the same information.[39]

3 ANTI-DUMPING DUTIES ON CERTAIN CORROSION-RESISTANT STEEL (CORE) PRODUCTS FROM THE REPUBLIC OF KOREA (USDOC INVESTIGATION NUMBER A-580-878)

Question 58 (United States)

Korea "strongly rejects the suggestion that the USDOC provided guidance" in the meetings of 27 October and 24 November 2015, as reflected in the memoranda of these meetings (Korea's SWS para. 35). Hyundai Steel, in its questionnaire response dated 2 November 2015, stated that the only indication given by the USDOC in the meeting dated 27 October 2015 was that Hyundai Steel "should do its best to adapt the reporting requirements to the complex factual pattern presented here" (KOR-15 (BCI), p. 6). Is there any other information on the panel record indicating that the content of these meetings was different from what is indicated in Hyundai Steel's questionnaire response?

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[37] Korea RPQ 57, para. 56.

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

[39] Certain Corrosion-Resistant Steel Products (CORE) from the Republic of Korea (Korea): Hyundai Steel Company's Exclusion Request (October 15, 2015) (Exhibit KOR-11); Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products (CORE) from the Republic of Korea (Korea): Second Supplemental Questionnaire to Sections B&C, and First Supplemental to Further Manufacturing (November 19, 2015) (Exhibit USA-5 (BCI)); Antidumping Duty Less Than Fair Value Investigation of Certain Corrosion-Resistant Steel Products from the Republic of Korea: Supplemental Questionnaire to Section E (2nd) (December 15, 2015) (Exhibit USA-10 (BCI)); Antidumping Duty Less Than Fair Value Investigation of Certain Corrosion-Resistant Steel Products from the Republic of Korea: Supplemental Questionnaire to Section E (3rd) (February 5, 2016) (Exhibit USA-9).

Question 59 (United States)

In engaging with Hyundai Steel's request to be exempt from filing a Section E response, i.e., before its decision dated 15 October 2015, to what extent did the USDOC consider and respond to the specific reporting difficulties identified by Hyundai Steel for filing its Section E response – as opposed to the information concerning the value added in the United States for purposes of the exemption request? Where in the record can we find the guidance offered by the USDOC to Hyundai Steel on how to complete the Section E response in light of the reporting difficulties identified by it?

Question 60 (Both parties)

In its first supplemental questionnaire, the USDOC asked Hyundai Steel to report "each component" as a separate sale "as originally instructed by the Department" (KOR-18 (BCI), p. S-10). Are we correct in understanding that the USDOC's original instruction was that "[e]ach computer record submitted should contain the information requested concerning the product sold" (KOR-18 (BCI), p. S-10)? What, if any, is the difference between "each component" and a "product sold" for purposes of this proceeding?

U.S. Comment:

40. The United States agrees with Korea's description of the difference between "each component" and a "product sold", as well as with Korea's statement that Hyundai Steel was required, by the Section E and Further Manufactured Sales supplemental questionnaire, to submit a data file where each record would correspond to each of the constituent subject components contained in the product sold.[40]

41. We further note that Korea agrees that Hyundai Steel understood Commerce's direction to "report each component as a separate sale," such that USDOC would be able to "calculate a dumping margin for each further manufactured component of CORE,"[41] and that Hyundai Steel considered its response reasonable for purposes of responding to the supplemental questionnaire.[42]

42. However, Korea's explanations of what Hyundai Steel "would have needed to" do or know in order to respond to the question are inappropriate *post hoc* arguments to the extent it differs from what Hyundai Steel itself said before Commerce.[43] We refer the Panel to our previous submissions on this point detailing Commerce's determination that Hyundai Steel's

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[40] Korea RPQ 60, paras. 57-60.

[41] Korea RPQ 60, para. 59 ("USDOC's requested 'component' reporting required Hyundai Steel to allocate a portion of the price of the after-service part to each of the subject 'components.'"). *See also Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Second Supplemental Questionnaire to Sections B&C, and First Supplemental to Further Manufacturing (November 19, 2015), p. 2 (Exhibit USA-5 (BCI)).

[42] Korea RPQ 60, para. 57.

[43] Korea PRQ 60, para. 59.

provision of information was deficient and unusable, and therefore necessary information was missing from the record.

Question 61 (United States)

In its second supplemental questionnaire dated 15 December 2015 the USDOC requested an explanation for the downward change in the reporting of a fully processed TWB cost in Hyundai Steel's Section E response (i.e. from the initial to the first supplemental response), and asked Hyundai Steel to "update [its] further manufacturing cost file, if necessary" (KOR-19 (BCI), p. 4). The USDOC further instructed Hyundai Steel to provide, if necessary "a new further manufacturing cost database which incorporates all changes resulting from the questions above" (KOR-19 (BCI), p. 10).

On what basis did the USDOC determine that Hyundai Steel submitted an "unsolicited, revised U.S. sales database which contained significant changes to the further manufacturing expense (FURMANU) it reported for its sales of skelp, sheet, and blanks" (KOR-20, p. 2), while in its 15 December 2015 questionnaire it had requested Hyundai Steel to submit a new database to incorporate the changes resulting from the USDOC's questions? In other words, please explain how the revised database was not related to the USDOC's questions.

Question 62 (United States)

Korea argues that whether an interested party has acted "to the best of its abilities" also depends upon the cooperation of the investigating authority and the "joint efforts" of the two sides (Korea's FWS, paras. 179-180). Please respond to Korea's argument that the USDOC could not have found that Hyundai Steel had failed to act "to the best of its abilities", and should not have rejected the information submitted by Hyundai Steel in its entirety, because the USDOC itself failed to take into account the reporting difficulties faced by Hyundai Steel and did not provide any meaningful guidance.

Question 63 (Both parties)

In response to Panel question No. 6(b), Korea argues that there was no necessity for the USDOC to rely on the petition rate, and in support of its position Korea refers to the first administrative review in the CORE investigation, where the USDOC relied on "neutral facts available" by selecting the average margin of a closely resembling product as a reasonable replacement for the missing information. What is the relevance of the first administrative review in the CORE Investigation for purposes of assessing the USDOC's selection of facts available in the original final determination?

U.S. Comment:

43. Both the United States and Korea agree that the first administrative review is a different period of review and covers different facts, and that, to quote Korea, "what is determined in one review cannot necessarily be transposed to another review."[44]

[44] *See* Korea RPQ 63, para. 61.

44. However, Korea is wrong when it asserts that the first administrative review has *any* relevance to Commerce's selection of facts available in the investigation, or that any difference in treatment of information received in response to similar or identical questions in the first administrative review versus in the investigation should have *any* relevance to the Panel's assessment of Commerce's results in the investigation.[45] The two segments are entirely separate and distinct, and the findings in each segment are based on the records before Commerce at the time of the decision. Furthermore, there was no way for the investigation findings to be influenced by the first administrative review findings when the first administrative review was not commenced until months after the investigation was completed.

45. Korea's claim that Commerce should have made the same finding in the investigation as it did in the first administrative review is not founded on any legal argument and certainly is not supported by any obligation in the AD Agreement.[46] Korea merely highlights the difference in the records of the two segments of the proceeding – in the investigation, Commerce affirmatively found that Hyundai Steel failed to act to the best of its abilities and used an adverse inference in selecting from among the facts otherwise available,[47] whereas in the first administrative review, Commerce did not find that an adverse inference was warranted.[48]

46. The United States does not agree that Commerce "could have used the calculated rate for the sales for which the USDOC used Hyundai Steel's data as the basis for the margin calculations, and apply the calculated rate as neutral facts available."[49] As we stated in our response to Panel Question 63, the United States has no obligation to use the replacement facts that Korea prefers, and we once again draw the Panel's attention to the Anti-Dumping Agreement, Annex II, para. 7, which states that where an interested party has failed to cooperate, "this situation could lead to a result which is less favourable to the party than if the party did cooperate."

47. Korea is once again venting to the panel its frustrations with Commerce's decision, without making any cognizable claim under the AD Agreement.

Question 64 (United States)

In its response to Panel question No. 6(b), Korea argues that the USDOC erred in selecting, from the different rates provided in the petition, a rate that was based on constructed normal value instead of a rate based on the normal value derived from the domestic prices.

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[45] *See* Korea RPQ 63, paras. 61-63.

[46] *See* Korea RPQ 63, paras. 62-63.

[47] *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Issues and Decision Memorandum for the Final Determination (May 24, 2016), pp. 16-17 ("CORE I&D Memo") (Exhibit KOR-5).

[48] *Certain Corrosion-Resistant Steel Products from Korea*: I&D Memo for the Final Results of Antidumping Duty Administrative Review; 2016-2017, p. 37 (March 18, 2019) (Exhibit KOR-221).

[49] *See* Korea RPQ 63, para. 63.

Korea further notes that the constructed normal value rate was submitted by the petitioner based on the premise that home market sales were significantly below cost of production, while the USDOC confirmed that nearly [[***]]% of the sales were at prices significantly above the cost of production. Did the USDOC take into account this information when selecting the facts available?

Question 65 (United States)

Did the USDOC take into account in its final determination the comments made by Hyundai Steel in its request for reconsideration of the cancellation of verification?

4 ANTI-DUMPING DUTIES ON CERTAIN COLD-ROLLED STEEL FLAT PRODUCTS FROM THE REPUBLIC OF KOREA (USDOC INVESTIGATION NUMBER A-580-881)

4.1 Affiliated party transactions

Question 66 (United States / Both parties / Both parties / Both parties)

In Section D of its initial questionnaire dated 18 September 2015 (KOR-33, pp. D-4 – D-5), the USDOC requested Hyundai Steel to identify, among other items, the inputs that it received from affiliated parties and to indicate "whether the transfer price of the good or service [i.e., the input] reflects the market price of the item, in the market under consideration". With respect to "major inputs" from affiliated parties, the USDOC further required Hyundai Steel to provide "the average unit market value per unaffiliated supplier(s)". If there are no such purchases but an "affiliated supplier sells the identical input to unaffiliated customers in the market under consideration", USDOC asked for the "average price paid for the input by the unaffiliated purchasers". Finally, in cases where Hyundai Steel is unable to obtain a market value for the input, the USDOC asked for "the product specific per-unit cost of production incurred by each affiliated supplier producing the major input".

a. ***United States: Are we correct in understanding that the USDOC's request prescribes three possible and alternative ways for establishing that the transfer price for the inputs that Hyundai Steel received from its affiliates reflected market value?***

b. ***Both parties: Can the non-submission of information under one of these categories be sufficient to establish that "necessary" information was missing, even if information under one of the other two categories was provided.***

U.S. Comment:

48. We once again disagree with Korea's characterization of Commerce's reliance on Hyundai Steel's reported data regarding **[[***]]** as having been "confirmed, without adjustment" for the Preliminary Determination.[50] As we have previously explained, use of information in a preliminary determination does not indicate that such information is "confirmed" or "verified," as Korea has incorrectly claimed throughout this dispute. USDOC used Hyundai Steel's reported information for purposes of its preliminary determination simply because USDOC had

[50] Korea RPQ 66(d), para. 73.

not yet had the opportunity to review the accuracy and veracity of the information at verification.[51] And at verification, Hyundai Steel once again failed to provide requested information to demonstrate that transactions with Hyundai Steel's affiliated service providers were at arm's length, resulting in USDOC's resort to the use of facts available.[52]

49. We further disagree that no explanation was given as to why the information requested at verification was necessary. As detailed in our responses to Panel questions following the first substantive meeting of the parties, we remind the Panel that Hyundai Steel was asked to provide information demonstrating the arm's-length nature of its transactions with its affiliated service providers multiple times prior to verification, and each time, it failed to do so.[53] Further, as explained in the CEP Verification Report, Commerce officials repeated Commerce's earlier requests for the information that would permit Commerce to determine that the transactions in question occurred at arms-length; at verification, Hyundai Steel provided entirely new reasons for why such information was not possible to provide, and Commerce found these reasons to be unsupported by the record.[54]

50. Finally, again Korea presents arguments based on the unsupportable premise that respondents (or Korea itself) – and not the administering authority – may decide what information is or is not necessary to conduct an investigation. To the contrary, neither respondents, nor Korea *post hoc*, is entitled to substitute its judgment for that of the investigating authority. 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.

c. Both parties: We note that, in cases where Hyundai Steel is "unable to obtain" a market value for the input, the USDOC asked for "the product specific per-unit cost of production incurred by each affiliated supplier producing the major input". Does the USDOC's questionnaire require the respondent to demonstrate that it is "unable to obtain" a market value for the input? If so, how is a

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

[52] *Certain Cold-Rolled Steel Flat Products from the Republic of Korea,* Issues and Decision Memorandum (July 20, 2016), pp. 73-74 ("CRS I&D Memo") (Exhibit KOR-41).

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

[54] Department of Commerce, CEP Verification Report, Hyundai Steel (May 26, 2016), p. 42 (Exhibit KOR-47 (BCI)). *See also* CRS I&D Memo, pp. 73-74 (Exhibit KOR-41).

respondent required to establish this? Does the USDOC provide any instructions or guidance in this regard?

U.S. Comment:

51. The United States would refer the Panel to the U.S. response to this subpart.

d. Both parties: In your view, did the contracts between [[***]] and its subcontractors, demonstrating [[***]] profit, satisfy the USDOC's request for "the product specific per-unit cost of production incurred by each affiliated supplier producing the major input" (KOR-33, footnote 9 to p. D-5)? Did the USDOC examine whether this information was sufficient for its determination?

U.S. Comment:

52. We disagree with Korea's position that Hyundai Steel provided sufficient information, as detailed in our response to Panel Question 66(a) and Question 66(d).[55]

53. We again disagree with Korea's assertion that use of information in a preliminary determination amounts to a finding that such information is "confirmed without adjustment."[56] We refer the Panel to our comment on Korea's response to Panel Question 66(b) above.

Question 67 (United States)

In the course of the CRS Investigation Hyundai Steel initially claimed that it did not use unaffiliated suppliers for inland freight and warehousing, however, in the same response, it submitted such a contract with an unaffiliated supplier, [[***]] (KOR-36 (BCI), pp. B-30 – B-31 and exhibit B-15). In its rebuttal brief, Hyundai Steel stated that "Hyundai Steel ultimately identified a single instance in which it used an unaffiliated service provider" (KOR-29 (BCI), fn. 52 to p. 24).

Hyundai Steel thus appears to have submitted a contract with an unaffiliated supplier for inland freight and warehousing. Did the USDOC take into account this information? If not, did the USDOC explain why this information was not sufficient for its determination?

Question 68 (United States)

We note the USDOC's finding that it "cannot conclude that necessary information is not available on the record, nor can we conclude that Hyundai Steel withheld all cost and sales information requested by the Department, that it failed to provide such information in the form or manner requested, or that it acted to significantly impede the proceeding" (KOR-41, p. 46). At the same time, the USDOC found that "there are certain gaps in the record and other errors that we could not address with Hyundai Steel's responses" (KOR-41, p. 46). In light of these findings, please explain how the USDOC selected an AFA margin, having stated in its final determination that "Hyundai Steel has cooperated to the best of its ability

[55] U.S. RPQ 70, paras. 75-76.

[56] Korea RPQ 66(d), para. 73.

and has provided satisfactory explanations to the Department's supplemental questions" (KOR-41, p. 46).

Question 69 (United States)

We note that, for affiliated party transactions, the USDOC selected the lowest reported expense values for the home-market database and the highest reported values for the US sales database (KOR-41, p. 74). Did the USDOC provide any reasons for selecting these values, besides stating that "Hyundai Steel failed to provide the requested information or fully cooperate with the Department's request for this information"?

4.2 CONNUMs

Question 70 (Both parties)

With respect to the issue of CONNUMs, Korea argues that the selected margin was aberrational given that it was derived from sales of certain "phased out" products (Korea's response to Panel question No. 16(f)). Was this information available to and taken into account by the USDOC?

U.S. Comment:

54. Korea asserts that "the aberrational nature of the U.S. sales of "phased out" products was known by the USDOC when using the sales to apply AFA."[57] However, this is not true. As noted in the U.S. response, Korea's argument that these sales were aberrational was not presented until **after** Commerce's final determination.[58] Nor is there any basis in the record to support that the sales in question were "aberrational." The fact that Hyundai represented that these products were nearing the end of their life-cycle does not establish that the sales were "aberrational." Rather, Hyundai made these sales to a U.S. customer during the period of investigation, and it made these sales at less than fair value. Indeed, these sales represent an actual sale made by the respondent.

5 ANTI-DUMPING DUTIES ON CERTAIN HOT-ROLLED STEEL FLAT PRODUCTS FROM THE REPUBLIC OF KOREA (USDOC INVESTIGATION NUMBER A-580-883)

Question 71 (United States)

In order to demonstrate that warehousing services were provided by its affiliates at market value, Hyundai Steel submitted a contract with [[***]], arguing that it was the only unaffiliated supplier of this type of service during the POI. Furthermore, in order to demonstrate that marine insurance was provided by Hyundai Steel's affiliates at market value, Hyundai Steel submitted a contract with an unaffiliated supplier, [[***]]. Please explain why this information was not in accordance with the USDOC's request, in its initial questionnaire, to show market value of affiliated transactions by submitting "the average

[57] Korea RPQ 70, para. 75.

[58] U.S. RPQ 70, para. 91.

unit market value per unaffiliated supplier(s)". Did the USDOC evaluate this information and explain why it could not be used?

6 COUNTERVAILING DUTIES ON CERTAIN COLD-ROLLED STEEL FLAT PRODUCTS FROM THE REPUBLIC OF KOREA (USDOC INVESTIGATION NUMBER C-580-882)

6.1 Cross owned affiliate inputs

Question 72 (Korea / Korea / Korea / United States)

Korea argues that the USDOC could have determined that the inputs provided by cross-owned affiliates were not primarily dedicated to the CRS production as the value of POSCO's transactions in relation to the cross owned affiliates' sales were part of POSCO's consolidated financial statements, which were submitted early on in the investigation. POSCO also appears to have raised this argument in its case brief before the USDOC (KOR-83 (BCI), pp. 2-3).

a. Korea: Please explain how you derived the percentage of the inputs provided to POSCO as a percentage of the affiliates' total sales (ranging from [[***]] to [[***]]%), by reference to the information contained in the consolidated financial statements (Korea FWS paras. 347-350).

U.S. Comment:

55. Information in Korea's calculation is not based on POSCO's 2013-2014 consolidated financial statements. Rather, the information is from an exhibit that POSCO submitted at verification to demonstrate that four of POSCO's affiliates (POSCO Chemtech, POSCO P&S, POSCO M-Tech, and POS-HiMetal) provided POSCO with inputs.[59] Commerce rejected the information because it was "unable to verify this information . . . due to the untimely nature and large amounts of data required to fully establish the credibility of the submission."[60] In arguing that the affiliates' inputs were "negligible" and not primarily dedicated, Korea relies on information from the verification exhibit and each affiliate's total value of sales to POSCO from its consolidated financial statements to calculate a percentage.[61] However, this percentage is not relevant to Commerce's "primarily dedicated" analysis as explained in the United States' response to Question 72(d).

56. Indeed, Korea's response reveals that POSCO did not report the information Commerce could have allegedly relied on "early on in the investigation." Although the consolidated

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[59] Korea RPQ 72(a), para. 76; POSCO Verification Exhibit PVE-3: Affiliates Business Reports and Inputs, pp. 3-71 to 3-73 (KOR-76 (BCI)); *See Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Issues and Decision Memorandum (July 20, 2016), pp. 64-65 ("CRS I&D Memo (CVD)") (Exhibit KOR-77).

[60] *See* CRS I&D Memo (CVD), pp. 66-67 (Exhibit KOR-77).

[61] *See* POSCO Verification Exhibit PVE-3: Affiliates Business Reports and Inputs (KOR-76(BCI)) pp. 3-71 to 3-73; *Countervailing Duty Investigation, Certain Cold-Rolled Steel Flat Products from Korea*, Initial Questionnaire Response (October 23, 2015), pp. 660-61, Exhibit 20, n. 38 (Exhibit KOR-70 (BCI));

financial statements provide the total value of sales for each of POSCO's affiliates, they did not contain any information about whether each affiliate provided POSCO with inputs. Thus, even if Korea's percentages were relevant to Commerce's primarily dedicated analysis, which they are not, information pertaining to whether affiliates provided POSCO with inputs was not submitted until verification, thus not allowing Commerce sufficient time to issue supplemental questionnaires and develop the facts necessary for its primarily dedicated inquiry. Moreover, the value of inputs provided by the four affiliates to POSCO is not relevant to Commerce's fact intensive primarily dedicated analysis because the analysis considers whether an input is primarily dedicated not the value that is dedicated.[62]

57. In sum, contrary to Korea's assertions, the information in its calculation was not on the record and, nevertheless, the information is irrelevant to Commerce's primarily dedicated analysis.

b. Korea: Please also explain how you derived the percentage of the inputs provided when measured against POSCO's total cost of production of CR products (ranging from [[***]] to [[***]]% (Korea FWS paras. 347-350)? Are these figures derived from the consolidated financial statements?

U.S. Comment:

58. Similar to Korea's response to the preceding question, some of the information that Korea relied on to support its argument that POSCO's affiliates' inputs were not primarily dedicated was not contained in POSCO's consolidated financial statements, but in the same exhibit that POSCO submitted at verification, as identified in the immediately preceding question.[63] The percentage that Korea determined for this question is based on the relationship between the value of inputs that affiliates provided to POSCO and POSCO's total cost of sales.[64] Even if the percentages that Korea identified were information that Commerce could have relied on to determine whether inputs were primarily dedicated, which they are not, Commerce could not have known that POSCO's affiliates provided it with inputs because that information was not provided until verification.[65]

59. Moreover, Korea attempts to distort Commerce's primarily dedicated analysis by indicating that the proper analysis focuses on whether the inputs provided by POSCO's four

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[62] 19 C.F.R. § 351.525(b)(6)(iv) (Exhibit KOR-80).

[63] Korea RPQ 77(b), paras. 78-79; POSCO Verification Exhibit PVE-3: Affiliates Business Reports and Inputs, pp. 3-71 to 3-73 (KOR-76 (BCI)).

[64] Korea RPQ 77(b), paras. 78-79; *Countervailing Duty Investigation, Certain Cold-Rolled Steel Flat Products from Korea*, Initial Questionnaire Response (October 23, 2015), pp. 131, Exhibit 12, p. 5 (2014 and 2013) (Exhibit KOR-70 (BCI)).

[65] Korea RPQ 72(a), para. 76; POSCO Verification Exhibit PVE-3: Affiliates Business Reports and Inputs, pp. 3-71 to 3-73 (KOR-76(BCI)).

affiliates were a large percentage of POSCO's total cost of sales for 2014. As explained in Commerce's response to Question 72(d) and the preceding question, Commerce's primarily dedicated analysis does not consider the value of inputs or the relationship between the value and a respondent's total cost of sales. Rather, Commerce's primarily dedicated analysis is a fact intensive inquiry that considers the extent that an input is dedicated to production of downstream products. In short, Commerce's analysis does not rely on numerical values. For this reason, POSCO's inaccurate response to Commerce's question, regarding whether any affiliates provided inputs to POSCO that could be used in subject merchandise, deprived Commerce of the ability to issue supplemental questionnaires and determine the facts relevant to its primarily dedicated inquiry—whether the four affiliates' inputs were primarily dedicated to downstream products.

c. Korea: Could the USDOC determine, on the basis of the consolidated financial statements alone, that certain inputs were provided by cross-owned affiliates, and whether these inputs were "primarily dedicated"?

U.S. Comment:

60. As Korea's response indicates, it was not possible on the basis of the consolidated financial statements alone to perform Korea's analysis of whether certain inputs provided by cross-owned affiliates were primarily dedicated. As Korea recognizes, in addition to the consolidated financial statements, Korea's analysis required additional information that was submitted by POSCO at verification. Nonetheless, as discussed above, Korea's analysis is irrelevant to Commerce's "primarily dedicated" inquiry.

d. United States: What specific information did the USDOC need in order to determine that the inputs at issue were not primarily dedicated to the production of the downstream product? Is the focus of the USDOC's inquiry on inputs as a percentage of the affiliates' total sales, or on inputs as a percentage of POSCO's total cost of production? Please explain by reference to US law and the USDOC's practice for determining the "primarily dedicated" standard.

Question 73 (Both parties)

We note Korea's argument that there was sufficient information on the record to demonstrate that the inputs at issue were not "primarily dedicated" to the production of the "subject-merchandise". Does the determination to be made by the USDOC for the purpose of attributing subsidies concern the production of the "subject merchandise" or the

"downstream product"? What, if any, are the implications of the difference between "subject merchandise" and "downstream product" for purposes of the USDOC's analysis?

U.S. Comment:

61. Korea states that the term "downstream product" is synonymous with "subject merchandise."[66] This is incorrect. As explained in the United States' response to this question, downstream products are subject merchandise *plus* intermediate inputs into subject merchandise. As such, downstream products also encompass products that are produced from the input and then used as an input into subject merchandise, thus allowing Commerce to attribute subsidies to inputs and inputs incorporated into inputs to the respondent.

Question 74 (United States)

At verification, POSCO submitted a document that listed the inputs used in the production of cold-rolled steel, the providers for such inputs, and the values of such inputs.

a. Are we correct in understanding that the USDOC relied upon this document to find that the inputs provided by the cross-owned affiliates could be used in the CRS production?

b. Are we correct in understanding that the USDOC refused to take into account the input purchase quantities that POSCO attributed to cold-rolled steel production indicated in the same document? Was the information accepted different in nature from the information not taken into account?

6.2 FEZ

Question 75 (United States)

We note that in its questionnaire to the Government of Korea, the USDOC required it to indicate, for each program, if no companies under investigation or cross-owned companies "applied for, used, or benefited from that program during the POI" (KOR-84 (BCI), p. 3 (emphasis added)). As AFA, the USDOC determined that Hyundai Steel and POSCO "received this subsidy during the POI" (KOR-77, p. 35). Given the respective scopes of the USDOC's query as well as its determination, please explain why you consider the GOKs statement to be "ambiguous" as to meaning of the "period of investigation" (United States response to Panel question No. 26).

6.3 DWI loans

Question 76 (Both parties)

In response to Panel question No. 28, the United States appears to suggest that the USDOC determined that the KORES loans were not tied to non-subject merchandise. Did the USDOC determine that the KORES loans to DWI were not tied to non-subject merchandise? Please

[66] CRS I&D Memo (CVD), pp. 66-67 (Exhibit KOR-77).

explain your answer by reference to the USDOC's determination on the record (KOR-87, p. 24).

U.S. Comment:

62. As the United States has previously explained, Commerce found in its preliminary determination that record evidence indicated that the KNOC loans were tied to non-subject merchandise. By contrast, Commerce did not find that the KORES loans were tied to non-subject merchandise. In its response, and for the first time, Korea implies that before applying facts available, Commerce should have determined that the KORES loans were tied to subject merchandise.[67] However, it was POSCO that held any information that would have demonstrated the KORES loans were tied to non-subject merchandise and thus it was POSCO's responsibility to place that evidence on the record, as it did with the KNOC loans. POSCO did not do so, and thus there is no basis for Korea's argument.

Question 77 (Korea)

We note that the additional KORES loans reported by DWI concerned two projects, namely [[***]]. On what basis do you assert, in paragraph 69 of your second opening statement, that the fact that the KORES program was entirely unrelated to CRS production "is evident from the mere title of these loan programs"?

U.S. Comment:

63. To begin, in its response Korea fails to provide the "basis" for which it asserts that the purpose of the loans are "evident from the mere title of these loan programs," as the Panel requested. Rather, Korea states that POSCO "clearly" reported the purpose and it was "an undisputed fact" that the loans were not related to CRS.[68] To support this conclusory assertion, Korea cites to a table submitted in the hot-rolled investigation.[69]

64. Whether or not the title of the loans would have indicated that the loans were unrelated to CRS is irrelevant, as the loans were never verified by Commerce. While POSCO attempted to submit at verification in the cold-rolled investigation a table with minor corrections that included the [[***]] additional loans,[70] as the United States has previously discussed, Commerce did not verify these loans due to "the magnitude of change in the reported lending under the specified program."[71] Commerce explained that the loans were "significant additions to the reported

[67] Korea RPQ 76, paras. 83-84.

[68] Korea RPQ 77, para. 85.

[69] Korea RPQ 77, para. 85 and fn. 70.

[70] *See Certain Cold-Rolled Steel Flat Products from Korea*, Minor Corrections Presented at DWI's Verification (March 22, 2016), Attachment A (Exhibit KOR-86).

[71] U.S. SWS, paras. 123-128.

amount of funding received under the program as reported in DWI's questionnaire responses."[72] Commerce elaborated that "it will only accept information at verification as minor corrections that 'corroborates, supports, and clarifies' factual information already on the record."[73] As a result, Commerce was not in a position to verify the use of the loans.[74]

6.4 Selection of facts available

Question 78 (Korea)

Do you argue that the USDOC erred in drawing an adverse inference that POSCO received FEZ benefits or in selecting a rate from prior investigations?

U.S. Comment:

65. As the United States has previously addressed most of Korea's response, we refer the panel to our earlier submissions.[75] However, the United States has a few clarifications that are worth repeating here.

66. In its response Korea asserts that POSCO responded to Commerce's question regarding the FEZ that "none of its facilities *applied for, used, or benefitted* from any FEZ assistance" and that this was an "accurate" response and nothing on the record "suggested otherwise."[76] But this is not the response POSCO gave Commerce. Rather, POSCO reported that it had "no facilities located in a free economic zone ("FEZ")."[77] In other words, POSCO deprived Commerce of the opportunity to determine whether POSCO "*applied for, used, or benefitted* from any FEZ assistance." And the discovery at verification of a POSCO facility listed on an official government website as being located in an FEZ is what suggested that POSCO's response was not correct.[78] Thus, in resorting to facts available, contrary to an assertion by Korea, USDOC did not rely on "non-factual assumptions or speculation."[79]

67. Additionally, USDOC did attempt to verify the facility and did check the eligibility of POSCO under the FEZ benefit program. [80] However, rather than demonstrate the purpose of the

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[72] CRS I&D Memo (CVD), pp. 76-77 (Exhibit KOR-77).

[73] CRS I&D Memo (CVD), p. 76 (Exhibit KOR-77).

[74] CRS I&D Memo (CVD), pp. 76-77 (Exhibit KOR-77).

[75] See U.S. FWS, paras. 402-408; U.S. SWS, paras. 115-122.

[76] Korea RPQ 78, para. 88 (emphasis in original).

[77] *Cold-Rolled Steel Flat Products from Korea:* Initial Questionnaire Response (October 23, 2015), p. 52 (Exhibit KOR-70).

[78] CRS I&D Memo (CVD), p. 73 (Exhibit KOR-77).

[79] Korea RPQ 78, para. 88.

[80] Korea RPQ 78, para. 88.

facility, at verification POSCO officials instead provided a hand-drawn map and "stated that {its} facility was located outside of the hand-drawn FEZ."[81] In other words, rather than demonstrate that they did not benefit from having the facility in the FEZ, POSCO denied having the facility in an FEZ. Regarding Korea's argument that POSCO was not eligible to receive benefits under the program, while certain FEZ subsidies were reportedly limited to foreign-invested enterprises, as Commerce noted, information on the record demonstrated that certain shareholders of POSCO appeared to be foreign and thus, could have been eligible under the program.[82]

68. Regarding the selection of the facts, Korea asserts that USDOC acted inconsistent with the SCM Agreement in relying on the subsidy rates it relied on and should have relied on *de minimis* rates recently calculated in the preliminary phase of an administrative review because the rates involved steel products.[83] Korea has no legal basis for this argument. In particular, Korea points to nothing in the SCM Agreement requiring Commerce to use rates from the same industry. Indeed, it seems more likely that the level of subsidization by a particular subsidy program would be more on par across industries, than the level of subsidization by different programs, but in the same industry. Nonetheless, Korea has provided no basis to show that Commerce's approach is inconsistent with the SCM Agreement.

69. Additionally, Korea's suggestion that data from a preliminary determination is likely to be more accurate than the data from a final determination, again shows Korea's misunderstanding as to what a preliminary determination represents and the purpose of verification. Indeed, it would appear that the only reason Korea has suggested that Commerce should have used this preliminary data is that it would have been more favorable to POSCO. However, using data that is less favorable to the respondent than the respondent would have liked is not a breach of the SCM Agreement.

Question 79 (United States)

Please explain your argument that the USDOC examined the reliability and the relevance of the selected rate to the extent practicable (United States FWS para. 422), in light of the USDOC's statement that the corroboration exercise was inapplicable for purposes of this investigation (KOR-77, p. 15).

Question 80 (Korea)

Given the USDOC's statement that "there typically are no independent sources for data on company-specific benefits resulting from countervailable subsidy programs" (KOR-77, p.

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[81] *See* CRS I&D Memo (CVD), p. 73 (Exhibit KOR-77).

[82] CRS I&D Memo (CVD), p. 74 (Exhibit KOR-77).

[83] Korea RPQ 78, para. 92.

15), what could be "practicable" for the USDOC to do in order to check the selected subsidy rates pursuant to paragraph 7 of Annex II?

U.S. Comment:

70. Korea's response does not answer the Panel's question. It does not provide an alternative for what Commerce could have done to "check the selected subsidy rates," but provides an extensive response about how Commerce's evaluation was allegedly deficient and allegedly violated paragraph 7 of Annex II of the AD Agreement. The United States response to Question 79 addresses these arguments. Korea again suggests that Commerce rely on the preliminary rates from the Carbon Quality Steel CVD Investigation. The United States position with respect to Commerce's use of the preliminary rates suggested by Korea as an alternative source for information was addressed above in comments on Korea's response to Question 78.

7 COUNTERVAILING DUTIES ON CERTAIN HOT-ROLLED STEEL FLAT PRODUCTS FROM THE REPUBLIC OF KOREA (USDOC INVESTIGATION NUMBER C-580-884)

7.1 Cross-owned affiliate inputs

Question 81 (Both parties / Both parties)

In its questionnaire, the USDOC asked POSCO to report any cross-owned affiliates that "supplied" inputs to POSCO "for production of the downstream product produced by the respondent". To POSCO's clarification that there were such inputs supplied but it could not be determined whether they were actually used in HRS production the USDOC responded that the question was not whether inputs were actually used, but whether they could be used in the production of the downstream product (KOR-98, p. 64).

a. Both parties: As a matter of US law and in light of the questionnaire, was POSCO required to report inputs that could be used in the production of hot-rolled steel, or did the reporting obligation extend only to those inputs that were actually used in the production of hot-rolled steel? What, if any, are the implications of such a difference?

U.S. Comment:

71. The United States would refer the Panel to the U.S. response to the subpart of this question. Additionally, the arguments presented in Korea's response are addressed in previous submissions.[84]

b. Both parties: In light of your answer, please explain if you consider that the scope of the information requested was the same as the information that was considered to be "necessary" for the USDOC's determination. Did the USDOC fault POSCO for

[84] U.S. SWS, paras. 104-111.

not reporting inputs that "could be used", or for not reporting inputs which, in POSCO's view, were used but were not "primarily dedicated"?

U.S. Comment:

72. The United States would refer the Panel to the U.S. response to the subpart of this question. With respect to the argument in Korea's response regarding Commerce's basis to resort to facts available, the United States has addressed this argument in previous submissions.[85] With respect to Korea's argument that Commerce should not have disregarded the information POSCO submitted four months after the deadline, the United States has also addressed this argument in previous submissions.[86]

7.2 FEZ

Question 82 (United States)

At verification, the USDOC accepted as a "minor correction" the statement of POSCO that it did maintain a facility in Incheon FEZ (KOR-96 (BCI), p. 3), even though it had rejected the same information when offered earlier as part of POSCO's questionnaire responses (KOR-93). The USDOC however declined to verify the use or non-use of alleged FEZ programs by POSCO. Why did the USDOC reject the same information when offered earlier? On what basis did the USDOC decide to take into account only part of information provided? Was the nature of the information accepted different from the nature of the information not taken into account?

7.3 Selection of facts available

Question 83 (United States)

Please respond to Korea's argument that the selected rates were excessive and unrealistic (Korea FWS para. 650). Did the USDOC examine the relevance and the reliability of the subsidy rates selected as facts available? Please provide references to the record as part of your response.

8 ANTI-DUMPING DUTIES ON LARGE POWER TRANSFORMERS FROM THE REPUBLIC OF KOREA (USDOC INVESTIGATION NUMBER A-580-867)

8.1 POR2

Question 84 (United States)

Given that HHI had reported all revenues and expenses, albeit not separately but as part of the values concerning the subject merchandise, and given also that it had explained the reasons for not separately reporting them, what is the basis for your argument that HHI did

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[85] U.S. SWS, paras. 104-107 and U.S. RPQ, Question 20, paras. 90-97.

[86] U.S. SWS, paras. 129-139.

not submit any information at all, and as a result that the USDOC's obligations pursuant to paragraph 6 of Annex II never arose (United States FWS para. 218)?

Question 85 (Both parties)

In the POR2 redetermination results, the USDOC stated: "Hyundai is correct that Commerce, in the Draft Remand Redetermination, identified the purchase order as the document which contains information regarding service-related revenues and that this document does not always contain such information. However, the presence of the necessary information in inter-company documentation, rather than a purchase order or other communication with the unaffiliated U.S. customer, does not invalidate the information" (KOR-207 revised, p. 22).

a. Had the USDOC already examined the inter-company documentation for the [[***]] examined SEQUs when considering whether service-related revenues required capping in its original determination?

U.S. Comment:

73. The United States agrees that USDOC originally examined the documentation during the POR2 verification. For verification, USDOC conducted sales traces and found nothing out of the ordinary, although USDOC did not specifically verify service-related revenues and expenses.[87] As noted in the U.S. Response to Panel Questions at Panel Question 85a, Commerce also did not examine those documents for purposes of reviewing Hyundai's service-related revenues and expenses for the final determination. It was not until the remand proceedings that USDOC focused on the reporting discrepancy and examined the documents for purposes of service-related revenues and expenses.[88]

b. Please indicate whether the USDOC possessed documentation for sales other than SEQUs [[***]], that would have allowed the USDOC to apply its capping methodology.

U.S. Comment:

74. Korea and the United States agree that the only other documentation that USDOC possessed was for SEQU [[***]]. As the United States previously noted, USDOC used all of those documents for the sales they represented and used partial AFA for the sale for which Hyundai did not properly report the requested information.[89] Also as previously noted, USDOC

[87] See generally, Verification of the Sales and Cost Responses of Hyundai Heavy Industries Co., Ltd. In the 2013/2014 Administrative Review of the Antidumping Duty Order on Large Power Transformers from the Republic of Korea (August 31, 2015) (Exhibit USA-113 (BCI)).

[88] U.S. RPQ 85(a), para. 143.

[89] U.S. RPQ 85(b), para. 144, citing Department of Commerce Final Results of Redetermination Pursuant to Court Remand, Second Remand Redetermination (April 26, 2019), pp 16-18 (Exhibit USA-103 (BCI)).

found that [[***]] did not contain information indicating that service-related revenues were separately negotiated and, as a result, USDOC made no adjustment for those sales.[90]

8.2 POR3

Reporting of a part as non-subject merchandise

Question 86 (Korea)

You state that the alleged misreporting concerned one contract which was submitted as part of the sales documentation for SEQHs [[***]] and [[***]]. You also mention that the petitioner raised an inconsistency concerning SEQHs [[***]] (Korea FWS paras. 705-706). Which SEQHs exactly did the USDOC's finding of misreporting concern?

U.S. Comment:

75. Korea and the United States agree as to the facts stated in Korea's response to this question.

Question 87 (Both parties)

The petitioner observed in its comments on HHI's questionnaire response that HHI had understated its home-market gross-unit prices by characterising certain part as non-subject merchandise, and that "the submitted gross unit price does not reconcile with the sales documents" (KOR-130 (BCI), p. 21). In its final determination, the USDOC observed that "Hyundai submitted documentation which incorrectly identified a certain part required to assemble a complete LPT as non-foreign like product. Specifically, this documentation indicated that Hyundai reported the home market gross unit prices exclusive of such a part for the sales covered by that document" (KOR-121, p. 24). Please clarify what was the exact deficiency that the USDOC identified in HHI's initial reporting. Was this part incorrectly characterised as non-subject merchandise in HHI's sales documentation or simply misreported in HHI's gross-unit prices?

U.S. Comment:

76. The Panel specifically asked Korea to clarify what was the exact deficiency that the USDOC identified in HHI's initial reporting; and second whether the part in question was incorrectly characterized as non-subject merchandise in HHI's sales documentation or simply misreported in HHI's gross-unit prices. Korea fails to answer both questions. Instead, Korea seeks to focus on the timing of the petitioner's observation and that the deficiency was only identified after USDOC issued its preliminary results of review. To be clear, HHI's submission was deficient, as the United States pointed out in responding to this question from the Panel. Specifically, for the home market sales, the particular part was improperly classified as non-

[90] U.S. RPQ 85(b), para. 144, citing Department of Commerce Final Results of Redetermination Pursuant to Court Remand, Second Remand Redetermination (April 26, 2019), pp 16-18 (Exhibit USA-103 (BCI)).

foreign like product in the documents submitted to USDOC, and improperly excluded from HHI's gross unit home market price reported to USDOC.[91] Korea argues "because the factual record had closed, HHI could not further revise its database or submit additional documentation establishing whether the parts, by their nature, were or were not subject merchandise."[92] Korea's argument is unconvincing; it fails to recognize that Commerce provided HHI with multiple opportunities throughout the administrative review to provide the information. And when HHI failed to do so, USDOC specifically requested sales documentation to examine the issue further. As USDOC specifically stated in its final results of review:

> The scope clearly indicates that parts physically attached to, imported with or invoiced with active parts of subject merchandise are also subject merchandise. In addition, due to the Department's consistent instructions, Hyundai has known since the investigation that such parts should be included in the reported gross unit price when the parts are required to assemble an incomplete LPT.
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> In its February 5, 2016, Section D Questionnaire Response, Hyundai cites to the issues and decision memorandum from the investigation where we stated that "{t}the Department asked Hyundai to verify that for all sales, the gross unit price only reflects the actual LPT, and not any spare parts, unless such parts are needed to assemble an incomplete LPT" and states that "*{t}transformer parts physically attached to an LPT are within the definition of the scope of subject merchandise*" (emphasis added). In addition, in its November 10, 2016, Supplemental Questionnaire Response, Hyundai states that "{a}ssembled transformers are clearly within the scope of the antidumping duty order," that "{t}he Department has recognized that the gross unit price properly included those elements that are "needed to assemble an incomplete LPTs,"" and that "…the Department instructed respondents to report gross unit price to only reflect the price of the LPT and not any spare parts, unless such parts were needed to assemble an incomplete LPT.""
>
> Since the investigation, Hyundai has known that: (1) parts that are physically attached to, imported with, or invoiced with active parts of a LPT; or (2) parts that are required to assemble an incomplete LPT, are also subject merchandise/foreign like product, and that they should be included in its reported gross unit price. Despite Hyundai's knowledge and clear instructions by the Department, Hyundai did not correctly report its home market price in this review. Specifically, Hyundai excluded a particular part which, as explained above, is considered foreign like product. Even though Hyundai was given three opportunities, as

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[91] U.S. RPQ 87, para. 145, citing LPT I&D Memo (March 6, 2017), p. 25-26 (Exhibit KOR-121).

[92] Korea RPQ 87, para. 106.

described below, to correct its reporting concerning the home market sales, it failed to do so until the issue was identified by the Department.

As noted above, on December 3, 2015, we issued the initial AD Questionnaire to Hyundai, to which Hyundai responded to sections B and C on January 27, 2016. This was Hyundai's first opportunity to include properly a particular part in its reported home market gross unit prices. In our July 27, 2016, Supplemental Questionnaire, to which Hyundai responded on August 18, 2016, we requested full sales and expenses documentation for two home market sales. In its response, Hyundai submitted documentation which incorrectly identified a certain part required to assemble a complete LPT as non-foreign like product. Specifically, this documentation indicated that Hyundai reported the home market gross unit prices exclusive of such a part for the sales covered by that document. This was Hyundai's second opportunity to provide the Department with correct home market prices for these sales.

In our October 7, 2016, Supplemental Questionnaire, we asked Hyundai to provide any supporting documentation related to: (1) Hyundai's sales negotiation process; and (2) all reported expenses concerning/covering the same home market sales described above. In response, Hyundai continued to exclude the same particular part from its home market gross unit price for these sales and, in fact, continued to reference documentation which incorrectly identified the part as non-foreign like product; thereby incorrectly excluding the part from the reported gross unit prices. ***It was in the process of reviewing the submitted documents provided by Hyundai in its October 27, 2016, response that we identified this problem. This was Hyundai's third opportunity to correct its misreporting.*** Hyundai argues that: (1) this issue was raised at a very late stage of the review process, which does not permit Hyundai to submit rebuttal information; and (2) the record is ambiguous. However, Hyundai bears the burden to demonstrate what has been reported is correct and accurate in a timely manner; it cannot fault Petitioner or the Department for raising this issue when it had the obligation and multiple opportunities to correct its misreporting.

We find that record evidence demonstrates that the excluded part is required to assemble a complete LPT. As a result, this part should have been treated as foreign like product. In its case brief, Hyundai provided the revised gross unit prices for those sales identified by the Department in its review of Hyundai's October 27, 2016, Supplemental Questionnaire Response. These revisions show increased gross unit prices (*i.e.*, gross unit prices that are now inclusive of parts that Hyundai initially excluded). Further, other than arguing that: (1) the issue was raised at a very late stage of this review process, which does not permit

Hyundai to submit rebuttal information; and (2) the record is ambiguous, ***Hyundai does not dispute Petitioner's claim of such misreporting***.[93]

In sum, the record shows that prior to the closing of the record, Commerce gave HHI plenty of opportunities to provide the requested information.

77. With respect to Korea's argument that HHI provided "a revised worksheet including revenue for the part in the gross unit price, so that the USDOC could calculate the price either with or without the value of the part,"[94] Korea misses the point of USDOC's reliability check. The submitted documents for those few sales for which support documents were requested demonstrate that the information submitted for the vast majority of sales was inaccurate and unreliable. And Korea fails to come to terms with the fact that HHI did not correct the vast majority of home market sales, which suffer from the same misreporting USDOC identified in its reliability check.

Question 88 (Both parties)

Please explain on what basis you understand the USDOC to have found that HHI's reported home-market sales database was in its entirety unreliable, instead of merely rejecting the sales related to the [[***]] (KOR-121, p. 25)?

U.S. Comment:

78. It is astounding that Korea claims it is unclear as to USDOC's basis for reaching the conclusion that HHI's home-market database was unreliable, in its entirety. The record is extensive, detailed, and provides the reasoned basis for USDOC's finding that HHI's home-market database is unreliable.[95] In particular, as the United States previously noted, HHI's home market database failed the reliability check when sales documentation for 4 out of 5 home market sales for which USDOC requested specific documentary support demonstrated that HHI had improperly reported the particular part as non-foreign like product merchandise. As the USDOC concluded, and neither HHI during the review nor Korea in this dispute has denied, the vast majority of HHI's home market sales were misreported.

Question 89 (Korea)

You refer to Exhibit KOR-129 as containing the Petitioner's comments on HHI's reporting of home-market sales (Korea FWS para. 706). However, this exhibit appears to contain the

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[93] *Final Results of the Administrative Review of the Antidumping Duty Order on Large Power Transformers from the Republic of Korea, 2014-2015*, Issues and Decision Memorandum (March 6, 2017) ("LPT I&D Memo (March 6, 2017)"), pp. 23-24 (Exhibit KOR-121) (emphasis added).

[94] Korea RPQ 87, para. 106.

[95] LPT I&D Memo (March 6, 2017), p. 23-25 (KOR-121).

Petitioner's comments on HHI's US sales. Please submit the appropriate exhibit or indicate where in the record can the Panel find the Petitioner's comments on this issue.

U.S. Comment:

79. The United States agrees that the document can be found at Exhibit KOR-252 (BCI).

Accessories

Question 90 (United States)

Why did the USDOC focus on the use of the term "accessories" by HHI, given that the definition of "subject merchandise" was made clear by the USDOC and that HHI repeatedly argued that it had complied with the substance of this definition in its reporting?

Selective reporting

Question 91 (United States)

In its analysis regarding the deficiency of "selective reporting", the USDOC noted, as another deficiency, that "Hyundai did not correctly allocate the installation costs over the value of the transformer and spare parts in the home market" (KOR-121, p. 28). Does this statement refer to the first issue of service-related revenues or is it a separate issue?

Question 92 (Both parties)

When applying AFA, the USDOC stated that it corroborated the selected dumping margin that it derived from the petition. Is the USDOC's observation that the selected margin was lower than the highest transaction specific margin found for another respondent under this investigation sufficient to ensure the use of reasonable replacements?

U.S. Comment:

80. Korea's claim that USDOC's selection of facts available in POR3 was inconsistent with the applicable disciplines of the Anti-Dumping Agreement cannot be sustained. First, Korea argues that "applying information from secondary sources with special circumspection, and corroborating that information, as required by paragraph 7 of Annex II, means that an investigating authority cannot simply apply petition information as facts available."[96] Korea fails to come to terms with the steps USDOC took in its corroboration process. Commerce first went back over all the evidence in the original petition to check to see if there was any information on the record that would call into question any element used in the petition. In this case, no adjustment was necessary. USDOC then compared the margin from the petition with transaction-specific margins from a fully cooperating party. That information indicated that the non-cooperating party may have been able to engage in pricing practices that are reflected in the petition margin. Nothing on the record indicates that the non-cooperating party could not sell or

[96] Korea RPQ 92, para. 111.

otherwise engage in pricing practices that are reflected in the petition margin, and Korea makes no argument along these lines.

81. Next, Korea argues that "the fact that the petition had been examined from the perspective of its sufficiency to start an investigation or review is not sufficient for purpose of using the information when making a final determination."[97] Korea's argument is based on a faulty assumption. Korea incorrectly assumes that USDOC is using its pre-initiation examination of the adequacy and accuracy of the petition under Article 5.3 of the Anti-Dumping Agreement. This is incorrect. In corroborating the information that supports the petition rate, USDOC revisited the petition and if information on the record were to indicate that an element is not reliable or that an adjustment to the petition rate should be made, then USDOC would make an adjustment as part of its corroboration exercise. Simply because no adjustment was made in this case does not mean that the process is flawed. Corroboration, like the application of facts available, is based upon the information available to the administering authority.

82. Last, Korea previously argued that USDOC failed to make a comparison between the information to be used as facts available and other corroborating information. Now, in responding to the Panel's question, Korea acknowledges a comparison *was* made, but dislikes the comparison. In particular, Korea complains the transaction-specific margin is an outlier and is aberrational, but fails to acknowledge whether other transaction-specific margins would otherwise support the petition rate. Instead, Korea simply asserts, with no supporting information, that the transaction-specific margin is aberrational. Korea insists that "had USDOC wanted [sic] make an *accurate* determination it should have compared the petition margin of 60.81 percent with reference to all of Hyosung's sales in POR3."[98] This argument should be recognized for what it is: Korea is attempting to eliminate any use of an adverse inference in selecting from facts available, notwithstanding that the party has failed to cooperate.

Question 93 (Korea)

Please provide to the Panel the document pertaining to the Petitioner's comments on HHI's 10 November 2016 questionnaire response (Korea FWS para. 716).

U.S. Comment:

83. The United States agrees that the document can be found at Exhibit KOR-129 (BCI).

8.3 POR4

8.3.1 HHI

[97] Korea RPQ 92, para. 112.

[98] Korea RPQ 92, para. 113.

Accessories

Question 94 (Korea)

You argue that there was information available on the record that would have allowed the USDOC to make its determination, despite the alleged misreporting of accessories (Korea FWS para. 843). Please explain what information you are referring to exactly.

U.S. Comment:

84. Korea contends that "the cost and price information with respect to spare parts should have been evaluated and used as replacements for any missing information with respect to accessories."[99] However, Commerce indeed considered and took into account "the complementary chart" Hyundai submitted, but Hyundai refused to identify the products that constituted Hyundai's accessories and thus the chart could not be used by Commerce, as previously discussed in response to Panel Question 95.

85. With respect to Korea's argument that a U.S. domestic court ruled on this issue and that Commerce has now acknowledged that there was no basis to resort to total facts available because of the alleged "accessories" issue, some clarification is in order. However, the U.S. court applies U.S. domestic law, and has made no determination as to whether Commerce's determination on "accessories" was otherwise inconsistent with the Anti-Dumping Agreement. Thus, the ruling provides no basis for the Panel to rule on this matter with respect to whether Commerce's determination is otherwise inconsistent with its obligations.

Question 95 (United States)

Did the USDOC take into account the "complementary chart" (Attachment 2SD-9) submitted by HHI in its supplemental questionnaire, listing the "items" which had been reported as having separate revenue in the underlying sales document, and their corresponding costs? Could the USDOC use information from this document, once it had determined that certain of these items amounted to "accessories" which were not part of the subject merchandise?

Question 96 (Korea)

Could you provide to the Panel a copy of the Attachment 2SD-9 that HHI submitted in its supplemental questionnaire of 24 July 2017 (USA-41 (BCI))?

U.S. Comment:

86. The United States agrees that the document can be found at Exhibit KOR-253 (BCI).

Gross-unit price

[99] Korea RPQ 94, para. 116.

Question 97 (United States)

What was the scope of sales for which the USDOC determined a gross-unit price misreporting and what was the scope of information rejected due to this deficiency? On what basis did the USDOC reject this information?

Question 98 (Both parties)

In its Issues and Decision Memorandum, the USDOC stated with respect to this issue: "Additionally, due to Hyundai's failure to provide the requested information regarding accessories, as detailed in Comment 1 above, we are unable to determine whether this item would be an accessory" (KOR-211, p. 15). Was the issue of understatement of home market prices connected to the issue of misreported accessories? Would the difference between the initial and revised contracts be a non-issue if the USDOC had accepted HHI's reporting of accessories?

U.S. Comment:

87. The United States and Korea agree that the issue of understatement of home market prices is not connected to the issue of misreported accessories.

88. In its response Korea argues that "[i]rrespective of the 'accessories' issue, there remains no issue between the initial and revised contracts. This is because the revisions to the original contract related to a non-subject part and thus did not affect the reported gross unit price. Thus, HHI's reporting based on the original contracts was accurate." Korea is wrong. As the United States has demonstrated in its response to Panel Question 95, Hyundai understated its home market gross unit prices by inconsistently reporting an identical part in different sales as subject merchandise and non-foreign like product.

Question 99 (Korea)

Please submit a non-redacted version of the revised price calculation worksheet ("exhibit 2") referred to in KOR-130 (BCI).

U.S. Comment:

89. No comment necessary.

8.3.2 Hyosung

Service-related revenues

Question 100 (United States)

In its questionnaire, the USDOC asked Hyosung to explain whether service-related revenues were itemized in its "sales documentation". In addition, the USDOC asked Hyosung, when breaking out the gross unit prices, to explain how it calculated the net price for service-related revenues, based on the "invoice to the customer" or using other calculation methodologies (KOR-155, pp. 5-8). Based on these requests, why did the USDOC

find that the OAFs were documents necessary for the calculation of service-related revenues?

Question 101 (United States)

When did the USDOC first notify Hyosung that it required the reporting of service-related revenues on the basis of order acknowledgement forms (OAFs)?

Overlapping invoice

Question 102 (Korea)

The USDOC noted that according to Hyosung's questionnaire responses, "HICO America issues the invoice to the unaffiliated customer when the merchandise is delivered and/or site test is completed" (KOR-211, p. 30). If this was indeed the sales process followed by Hyosung, please explain why you take issue with the USDOC's finding that the record was unclear as to the number of sales covered by one invoice.

U.S. Comment:

90. Korea argues that the "[i]nvoices for LPTs often cover multiple shipments, and this information was on the record. Thus, the record was not unclear, as the record confirms that Hyosung provided timely and verifiable information with reasonable explanation."[100] Korea's assertion that the record evidence was clear is belied by Hyosung's own words in response to Commerce's draft redetermination on remand. In reviewing the evidence on the record, Hyosung stated there were clerical errors in the invoices in question.[101] Thus, while the information was on the record, it was not "clear" from the documents, as Hyosung admits. To the contrary, the information was affected by "clerical" errors.

91. With respect to Korea's argument that the Panel should find there was no basis for Commerce to apply facts available based on Commerce's finding on remand that the "overlapping invoices" was not grounds for the application of facts available, the fact that Commerce reevaluated the record evidence and accordingly changed its original finding does not mean that Commerce's initial finding was inconsistent with the Anti-Dumping Agreement. Specifically, simply because Commerce changed its initial finding does not indicate that a reasonable, unbiased person, looking at the same evidentiary record, could not have reached Commerce's initial finding. To the contrary, a reasonable and unbiased authority will make findings based on the evidentiary record before it.

[100] Korea RPQ 102, para. 122.

[101] Hyosung Comments Draft Remand Redetermination, (December 5, 2019), p. 8-9 (Exhibit USA-114 (BCI)).

Question 103 (Both parties)

Was the alleged inaccuracy of the data reported due to the overlapping invoice related to the non-submission of OAFs?

U.S. Comment:

92. Korea and the United States agree that these are separate issues.

93. Apart from the fact that these are separate issues, Korea claims that Commerce admitted error in the POR4 redetermination pursuant to court remand with respect to the OAFs in that "they represent internal documents used for management purposes and it is USDOC's long-standing practice not to rely on such internal documents for determinations."[102] Korea is wrong.

94. First, the OAFs are documents that expressly recognize the service-related revenue and expenses and thus represent what should have been reported to Commerce to ensure such revenue was capped by the expenses incurred.

95. Second, Korea does not deny the veracity of the information contained in the OAFs. That is, Korea does not deny that the OAFs reflect service-related revenues that should have been capped.

96. Last, the court's ruling is irrelevant to this dispute, as it has applies U.S. domestic law and has made no determination about whether Commerce's determination was otherwise inconsistent with the Anti-Dumping Agreement. The United States notes that Korea has selectively left out any mention of court rulings that were adverse to its position on issues before this Panel. We agree that those rulings, whether favorable or unfavorable, are not relevant to the Panel's findings in this dispute. With respect to the relevance of the OAFs and whether, as evidentiary support, such documents reliably reflect service-related revenues that should have been capped, the record supports that the OAFs reflect the critical nature of the company's expected revenue and the expenses incurred, and that to fail to take such documents into account would allow a distortion of the price used in the dumping calculation, and thus prevent a proper comparison between export price and normal value.

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

Question 104 (Korea)

Please respond to the United States' argument, in paragraph 90 of its second opening statement, that "because the additional elements are legal characterisations, they are not susceptible to objective yes/no coding. Thus, this statistical approach really just tracks

[102] Korea RPQ 103, para. 125.

whether adverse inferences are adopted and whether non-cooperation is present, which as discussed above, does not address the alleged measure at issue".

> "When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."
>
> "The question is," said Alice, "whether you can make words mean so many different things." "
>
> The question is," said Humpty Dumpty, "which is to be master—that's all."
>
> **— Lewis Carroll, Through the Looking Glass**

97. The Panel's question asked Korea to respond to the U.S. argument that the "additional elements" of the unwritten measure Korea alleges in its panel request are not susceptible to yes/no coding. Korea makes no mention of yes/no coding and offers no rebuttal to paragraph 90 of the U.S. second opening statement, as the question requested.

98. Instead, Korea attempts over the course of five pages to amend its panel request rather than attempt to prove the measure contained in its panel request, as identified by the Panel in its preliminary ruling. Of course, no such amendment is possible. Korea attempts to convince the Panel that the words in its panel request do not mean what they say, and in essence asks the Panel to ignore the Panel's own preliminary ruling. Korea goes so far as to argue that the word "and" does not mean that what follows is "additional."[103] We are truly "through the looking glass." However, words do have meanings; the Panel has already ruled on what is the alleged unwritten measure subject to Korea's as such claim; and Korea has all but conceded that it is unable to demonstrate the existence of the measure alleged in its panel request.

99. Many months ago, after an incoherent first written submission that failed to consistently address any single measure, the United States filed a preliminary ruling request. In opposing that request, Korea stated that, "{i}n Section I.C of the panel request, entitled 'Use of Adverse Facts Available As Ongoing Conduct, or a Rule or Norm of General and Prospective Application', Korea identified the measure at issue as follows:

> 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

[103] Korea RPQ 104, para. 139.

> 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."[104]

100. Korea also highlighted paragraph 32 of its panel request, which read:

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

Regarding the above, Korea asserted that "{t}his description of the measure in question is again an almost verbatim repetition of the measure as identified in Section I of the panel request."[105]

101. The Panel in July 2019 found that

> 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

[104] Korea Response to U.S. PRR, para. 18 (quoting Korea Panel Request, para. 9).

[105] Korea Response to U.S. PRR, para. 23 (emphasis added).

> received, and (ii) that such facts are the "best information available" in the particular circumstances.[106]

102. Accordingly, Korea's lengthy attempt to avoid answering the question by arguing that the challenged measure is limited to automaticity between a finding of non-compliance and the adoption of adverse inferences is in vain. The Panel has already found otherwise.

103. Moreover, Korea's arguments in its response to the U.S. preliminary ruling request, discussed above, further disprove Korea's attempted pivot. Korea has made many more statements throughout this proceeding that belie its new position. For example, Korea stated that "Korea's description of the measure at issue involves several interlinked aspects of the measure, which together form the single measure challenged."[107] Korea also asserted that "under this rule, USDOC selects from facts from the record that are deliberately adverse to the interests of the relevant 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."[108]

104. Korea also errs in attempting to distinguish the "precise content" of the measure from the measure itself, and from potential "elements" of the measure.[109] "Content" means the "thing that is held or included in something." Precise means "definitely or strictly stated, defined, or fixed." In other words, the precise content of a measure simply means that the alleging party must strictly define what the alleged measure contains or includes. It is not separate from the measure. It is the measure, strictly defined.

105. Moreover, "elements" are just a way of referring to the various different parts of an alleged measure. Again, Korea itself asserted that "the measure at issue involves several interlinked aspects of the measure, which together form the single measure challenged."[110] These "aspects" or "elements" too are part of the measure, not distinct from it. Together, like the "precise content," they are the measure. Moreover, in its misplaced reliance on *US – Antidumping Methodologies*, Korea confuses the "precise content" of a measure, with what demonstrates the existence of a measure with a particular precise content.[111]

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[106] Preliminary Ruling, para. 2.1 (quoting Korea Panel Request, para. 90) (footnote and citation omitted).

[107] Korea Response to U.S. PRR, para. 31.

[108] Korea FWS, para. 880 (emphasis added).

[109] *See* Korea RPQ 104, paras. 132-137.

[110] Korea Response to U.S. PRR, para. 31.

[111] *See* Korea RPQ 104, para. 135.

106. Korea also complains that it is being "penalized" for what it now refers to as "additional coloring" in its panel request.[112] There is no penalty. Korea alleged the existence of an unwritten measure in its panel request. It had an obligation to be very clear about what it intended to prove. The Panel ruled on what was the "alleged unwritten measure that is the object of Korea's 'as such' challenge."[113] Korea bears the burden of proving both the existence of this alleged unwritten measure, and if it could have done so, that such an unwritten measure is in breach of the Anti-Dumping Agreement or SCM Agreement. Korea's efforts to alter the "alleged unwritten measure that is the object of Korea's 'as such' challenge" are impermissible and serve only as an implicit concession that it is unable to prove the existence of the measure alleged in its panel request that is actually within the Panel's terms of reference.

Question 105 (Korea)

Which specific provisions of Annex II do you allege that the unwritten measure violates?

107. Korea first argues that paragraph 7 of Annex II is breached "when the selection of adverse facts available is not based on a process of reasoning and evaluation to find the best information that leads to an accurate determination."[114] There are several problems with this response.

108. First, Korea does not actually cite any particular provision in paragraph 7 or make reference to any particular language in that paragraph. Instead, it asserts that paragraph 7 is violated when the selection of facts is not based on reasoning and evaluation to find the best information. This is not treaty language and, therefore, is not a stand-alone obligation to which the Members have agreed.

109. Second, USDOC's reasoning differs in each case. Any assessment of what is "the best information" is also inherently case-specific. Therefore, these concepts are particularly inapt in the context of an as such claim like Korea's.

110. Korea then lays bare the completely atextual nature of its claim. It asserts that "it is difficult to isolate the different paragraphs of Annex II as they all reflect the same notion of using the 'best information available' when it becomes necessary to rely on facts available."[115] A complaining party may not prevail on a claim if it itself has not identified any particular obligations that it considers are breached. It certainly is not the Panel's task to make Korea's

[112] Korea RPQ 104, para. 141.

[113] Preliminary Ruling, para. 2.1.

[114] Korea RPQ 105, para. 144.

[115] Korea RPQ 105, para. 146.

case for it.[116] This serves as an astounding admission. In any event, it is clearly insufficient to make out even a *prima facie* case of WTO inconsistency.

111. Korea concludes by quoting a previous Appellate Body report.[117] The Appellate Body cannot add to or diminish the rights and obligations of the Members.[118] Where parties disagree over the proper application of a provision in the covered agreements, review of Appellate Body reasoning with respect to that same provision or by analogy may prove persuasive to a panel. But it certainly cannot be cited as if the passage itself is an obligation, divorced from any provision in the covered agreements. To succeed, Korea must show that a provision in the covered agreements is breached, and it cannot do so.

Question 106 (Korea)

In Silicomanganese from Australia (KOR-162), the USDOC used partial AFA to determine BMI's "highest headcount ratio". How does this fall within the scope of the measure identified in your panel request which appears to be limited to the determination of the "duty rate" (Panel Request, para. 9)? Moreover, the USDOC's analysis also appears to include a discussion of the "reasonableness" of headcount allocation methodology for calculating BMI's shared corporate-wide expenses. How is this consistent with your view that, in cases of non-cooperation, the USDOC simply draws and adverse inference and does not undertake an analysis of the selected facts?

112. Korea first refers the Panel to its response to Question 104 as part of its effort to revise the alleged unwritten measure it challenges in its panel request. The U.S. comments regarding Question 104 explain that this is improper, as the Panel has already found what is the alleged unwritten measure subject to Korea's as such challenge.

113. Of further note is a contradiction in Korea's positions. On the one hand, Korea states that "{t}he measure is thus not 'limited to the determination of the "duty rate"', but rather encompasses the drawing of adverse inferences *and*, when a duty rate is determined, the selection of facts from the record that are adverse to the interests of this producer."[119] On the other hand, in its response to Question 104, Korea argued, "{t}he term 'and' in the second sentence {of paragraph 9 of the Korea panel request} does not indicate an 'additional' element but rather completes the picture of what happens when the USDIC {sic} uses AFA."[120] The

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[116] *See US – Oil Country Tubular Goods Sunset Reviews (21.5) (Panel)*, para. 6.10 ("We also recall that the role of a panel is not to make the case for either party, but to clarify parties' claims through questioning, where necessary."); *US – Softwood Lumber V (21.5) (Panel)*, para. 5.8 ("The role of the Panel is not to make the case for either party …"); *EC – Countervailing Measures on DRAM Chips (Panel)*, para. 7.7 ("The role of the Panel is not to make the case for either party….").

[117] Korea RPQ 105, para. 146.

[118] DSU, Art. 19.2.

[119] Korea RPQ 106, para. 148.

[120] Korea RPQ 104, para. 139.

contradiction between these two positions further illustrates that Korea simply lacks any coherent legal argument.

114. Korea then devotes seven paragraphs to arguing in detail why the reasoning USDOC used to select from the facts available was insufficient in Korea's view. It is clear that, when Korea uses the phrase "no process of reasoning and evaluation," it actually means some level of reasoning and evaluation that Korea finds insufficient. Korea's discussion of the supposedly insufficient reasoning and evaluation is divorced from any text found in the covered agreements. Moreover, whether the reasoning of an investigating authority under the facts of a particular case was sufficient for the purpose of any WTO obligation would be an inherently case-specific inquiry. In other words, this is precisely the type of exercise that is not proper in the context of an ***as such*** challenge.[121]

Question 107 (Korea)

With respect to Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from Turkey (KOR-163), you allege that the USDOC's decision contains "no discussion of corroboration" (Korea FWS, pp. 228-234). It appears however that the USDOC in that investigation rejected the highest petition rate precisely because it was unable to corroborate it. Given this fact, how does this investigation support the existence of the measure alleged by you?

115. Korea again begins its response by referring to its response to Question 104, where it attempts to alter the alleged unwritten measure it is challenging as such. It is worth noting that, even if the Panel's preliminary ruling did not foreclose the path Korea now tries to take (and it does), it would be a clear deprivation of procedural fairness to find a U.S. measure in breach of the Anti-Dumping Agreement or the SCM Agreement, where as late as responses to Panel questions following the second meeting with the parties, both the Panel and the responding party did not understand what the complaining party was attempting to challenge.[122] Of course, the only measure within the Panel's terms of reference, as the Panel already found, is the measure alleged in Korea's panel request. Korea's last-minute attempt to abandon its original allegation, which Korea failed to substantiate, and instead allege a new unwritten measure (which Korea again fails to substantiate) should be rejected.

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[121] Furthermore, Korea's response validates a point that the United States has made previously – namely, that Korea has effectively collapsed its legal argument of breach with the elements of its alleged measure. The Panel's question asks about the existence of the alleged measure. Yet, Korea interprets it as "suggest{ing} that, because there was some discussion about the alleged 'reasonableness' of the selected headcount ratio that the USDOC undertook an analysis of the facts as required by Article 6.8 and Annex II of the Anti-Dumping Agreement." Korea RPQ 106, para. 151.

[122] *See Thailand – H-Beams (AB)*, para. 88 ("This requirement of due process is fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings."). *See also ibid*. ("A defending party is entitled to know what case it has to answer….").

116. Korea then engages in a lengthy discussion of *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from Turkey*.[123] Even the facts that Korea recounts shows a deliberate process of considering and rejecting multiple facts available before finally settling on the highest transaction-specific margin of a cooperating company. Among the reasons that USDOC thought that this was a reasonable replacement was that "{t}he transaction underlying this dumping margin is neither unusual in terms of transaction quantities nor otherwise atypical."[124] Of course, as the portions of the determination reproduced by Korea the margin chosen, 35.66 percent, was a fraction of the petition rates USDOC rejected, which ranged from 102.1-113.75 percent.[125]

117. Yet, Korea dismisses the reasoning and instead characterizes it as "mechanistic." It is unclear what more Korea considers that USDOC was required to do, as Korea cites no additional relevant facts from the record of that case, nor appeals to the text of any provisions in the covered agreements. What is clear is that Korea's allegation that USDOC ceases all reasoning and evaluation is disproven by this case, where USDOC quite clearly reasoned, among other things, that it should not select a petition rate because "the 113.75 rate is significantly higher than the range of Ozdemir's transaction-specific dumping margins," an evaluative step USDOC performed for each of the other petition margins in reaching the same conclusion with respect to those rates.[126] Additionally, USDOC evaluated the terms of the transaction, which was used to replace the missing information, comparing it with other information on the record, and found that neither the quantities nor other terms of the transaction were unusual or atypical. Accordingly, Korea fails to establish the existence of the unwritten measure it alleged in its panel request.

Question 108 (Korea)

In Certain Carbon and Alloy Steel Cut-to-Length Plate from Germany, the USDOC, in drawing an adverse inference, appears to have undertaken some analysis of the degree of cooperation received, e.g., by noting that the information in question "is the type of information that a respondent should have reasonably anticipated being required to provide to its customers for quality assurance and warranty claims". How does this support your position that, whenever it reaches a finding of non-cooperation, the USDOC simply draws adverse inferences and selects facts available without taken into account the "degree of cooperation received"?

118. Korea begins yet another response by indicating that, at this late stage, the Panel does not understand what unwritten measure Korea is challenging. The United States has already explained that the Panel has found what measure is the only measure subject to an as such

[123] Korea RPQ 107, paras. 161-165.

[124] Korea RPQ 107, para. 162 (quoting KOR-163).

[125] Korea RPQ 107, para. 162 (quoting KOR-163).

[126] Korea RPQ 107, para. 162 (quoting KOR-163).

challenge that is within its terms of reference, and it is not the measure that Korea now argues it is challenging.

119. Korea next distinguishes between USDOC's determination of non-cooperation, and USDOC's consideration of non-cooperation in selecting facts available.[127] But Korea does not engage in further argument on the basis of this distinction. Instead, Korea makes a series of assertions that characterize USDOC's determination, without providing a single citation to evidence that might support its assertions.[128] This would be insufficient to establish an as-applied claim. It certainly offers no support for a claim of WTO inconsistency as such.

Question 109 (Korea)

In Certain Carbon and Alloy Steel Cut-to-Length Plate from France, the USDOC corroborated the highest dumping margin contained in the petition "using transaction-specific margins from [another] mandatory respondent Dillinger France". The USDOC also noted that the margin for Dillinger France was not calculated using total AFA and the sales appear to have "normal terms". How does this analysis by the USDOC suggest that the USDOC, whenever it reaches a finding of non-cooperation, selects facts available without any process of reasoning or evaluation?

120. In Question 109, Korea is presented with another case in which USDOC clearly engaged in a process of reasoning and evaluation in selecting facts available. Korea argues that it "is not the kind of evaluation of the available facts on the record with a view to making an accurate determination that is required by Article 6.8 and Annex II of the Anti-Dumping Agreement."[129]

121. As an initial matter, USDOC's supposed failure to engage in ***any*** process of reasoning or evaluation was part of the unwritten measure Korea alleged to exist, based on Korea's explanations.[130] Therefore, the existence of reasoning and evaluation in this case disproves the existence of the alleged unwritten measure.

122. Moreover, Korea's argument, in essence, that the reasoning and evaluation in this specific case was insufficient for purposes of the Anti-Dumping Agreement would be an as-applied challenge, but Korea is pursuing an as such challenge.

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[127] Korea RPQ 108, para. 167.

[128] *See* Korea RPQ 108, para. 169.

[129] Korea RPQ 109, para. 175.

[130] Korea FWS, para. 923 ("In cases of alleged non-cooperation, the USDOC therefore ***does not engage in a comparative 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 a result that would certainly be not more favorable than that where the foreign producer or exporter in question had cooperated fully. ***This is the content of the AFA Norm or AFA Ongoing Conduct that Korea is challenging***." (emphasis added)). This formulation too differs from the description of the measure in Korea's panel request.

123. Furthermore, Korea would not even have a viable as applied challenge. Korea offers no textual basis in the Anti-Dumping Agreement for its allegation of breach. It offers no explanation, based on the particular facts of the case, of what other record facts USDOC unreasonably declined to rely upon. In essence, it is an unsupported assertion from Korea that USDOC erred in its discussion of potential facts available and selection of a particular fact, with no discussion of what other record fact should have been chosen instead and no basis in the covered agreements to impugn USDOC's reasoning. In any event, this is not an as-applied claim. And this case, and Korea's discussion of it, certainly offer no support for Korea's as such claim.

124. The most important aspect of this case is that it disproves Korea's allegation that the United States maintains a measure, pursuant to which USDOC abandons all reasoning and evaluation as soon as it encounters non-cooperation. This provides an independent basis to reject Korea's as such claim.

Question 110 (United States)

We note that, for the cases that you identify in paragraphs 152-179 of your Second Written Submission, you have placed on the record only some excerpts from the USDOC's determinations. Could you please provide the Panel with the complete text of the USDOC's determinations, in addition to the excerpts that you rely upon? These investigations are: Olives from Spain (USA-81); Aluminum Extrusions from China (USA-89); Welded Line Pipe from Korea (USA-90); Softwood Lumber from Canada (USA-92); Certain Cold-Rolled Steel Flat Products from the Russian Federation (USA-85); Certain Uncoated Paper from China (USA-93); Large Residential Washers from Korea (USA-94); Certain Uncoated Paper from Indonesia (USA-95))