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

(DS539)

INTEGRATED EXECUTIVE SUMMARY OF THE UNITED STATES OF AMERICA

MARCH 19, 2020

EXECUTIVE SUMMARY OF U.S. FIRST WRITTEN SUBMISSION

I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

10. The record demonstrates that USDOC properly determined that Hyundai failed to cooperate to the best of its ability in the investigations. Additionally, USDOC selected reasonable replacements for the missing information by relying on data Hyundai itself provided.

Korea's assertion that USDOC acted inconsistently with Article 6.8 and paragraph 7 of Annex II when selecting the replacements for the missing necessary information on the record has no merit. Korea similarly argues that USDOC's selected facts resulted in a determination that was "punitive in nature." However, that the outcome is less favorable than Korea would have liked does not mean the application of facts available was punitive or otherwise inconsistent with Article 6.8 and Annex II.

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

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

1. Second Administrative Review on LPTs

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

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

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

2. Third Administrative Review on LPTs.

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

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

17. Additionally, as USDOC determined that HHI failed to act to the best of its ability, its rejection of HHI's reported information was not inconsistent with its obligations under Annex II or Article 6.8. In finding that HHI had not acted to the best of its ability, USDOC noted, "{i}n addition to the "selective reporting" issues identified above, these three issues demonstrate that {HHI} has engaged in a pattern of behavior that leaves {USDOC} with a response that, taken as whole, is unreliable." Moreover, because HHI's information did not meet the criteria of paragraph 3 of Annex II, HHI is not afforded the protections of paragraph 5 of Annex II. Finally, USDOC's selection of the petition rate as a reasonable replacement for the missing necessary information, was in accordance with paragraph 7 of Annex II. Korea's claim to the contrary is without merit.

3. Fourth Administrative Review on LPTs.

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

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

provide this information, "collectively, these issues demonstrate how Hyundai has impeded this review."

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

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

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

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

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

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

with Korea's substantive allegations, there would be no basis to decide Korea's consequential claims under Articles 1, 9.3, and 18.1 of the Anti-Dumping Agreement.

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

A. Cold-Rolled Steel and Hot-Rolled Steel

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

26. Korea alleges that USDOC acted inconsistently with Article 12.7 of the SCM Agreement in resorting to facts available with respect to POSCO's failure to provide necessary information. Korea's claims are completely unsupported by the records in the investigations, and are thus without merit. With respect to the cross-owned input suppliers, Korea argues that it was inappropriate to apply adverse facts, given the negligible amounts that it claims the input suppliers provided. However, nothing on the record indicates that the amounts were in fact negligible. POSCO also claims, that the inputs were not "primarily dedicated" to the production of cold rolled steel. However, as USDOC notes, whether an input product is primarily dedicated to the production of a downstream product is a decision that can only be made by USDOC. Because POSCO refused to provide the information when requested, the amounts provided by the affiliated companies were never reported and USDOC never had the opportunity to verify the data or decide whether the input product was primarily dedicated to CRS. Similarly, Commerce never had the opportunity to verify the information regarding POSCO's FEZ and DWI's additional loans because POSCO failed to provide the information when requested.

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

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

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

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

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

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

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

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

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

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

33. As Korea acknowledges, a Member attempting to challenge an unwritten measure "as such" must first establish the existence of the alleged unwritten measure, which requires showing (1) the precise content of the alleged rule or norm; (2) that this alleged measure is attributable to the responding Member; and (3) that this alleged measure has general and prospective application. Moreover, if a complaining Member can establish the existence of an unwritten measure, to substantiate a breach "as such," the Member must demonstrate that the measure "—

not only in a particular instance that has occurred, but in future situations as well—will ***necessarily*** be inconsistent with {the responding} Member's WTO obligations." As discussed in the U.S. preliminary ruling request and first written submission, Korea fails to provide a coherent argument regarding an as such claim against an alleged unwritten measure.

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

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

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

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

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

39. Korea's argument regarding ***prospective*** application suffers from the same flaws of addressing a written statute rather than the supposed unwritten measure and vacillating between different formulations of the supposed measure that do not match the panel request. The United States reiterates that Korea's submission simply fails to present a coherent as such claim and

deprives the United States of a fair opportunity to provide a clear legal rebuttal. Finally, Korea is obviously incorrect in stating that the measure at issue in *US – Antidumping Methodologies* and the one Korea purportedly challenges here share the "identical content."

40. Korea argues that "{i}n the alternative, should the Panel consider that the use of AFA does not meet the criteria for being a rule or norm of general and prospective application, Korea considers that it in any case constitutes a form of 'ongoing conduct'." Korea argues that the elements for establishing the existence of an unwritten measure in the form of ongoing conduct overlap completely with the elements for establishing the existence of an unwritten measure in the form of a rule or norm with general and prospective application. If the inquiry does not include even a single condition that is not already covered by the rule or norm inquiry, it is of no utility and is, therefore, moot. Moreover, Korea errs in asserting that the "reasoning" from other cases involving different measures applies in this case.

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

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

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

43. Korea next filters out cases until 90 remain, and then asserts that, in all cases USDOC applied AFA in a mechanistic manner solely based on the finding that party failed to cooperate to the best of its ability and without engaging in the required comparative process of reasoning and evaluation and an assessment of the available facts on the record to identify the facts that lead to an accurate determination. Korea cites to no evidence to support its assertion and provides no explanation of how it reached this conclusion. Korea provides no further analysis of these 90 cases or the available facts on the 90 separate records. Korea's conclusory statement has no probative value regarding any question that might be relevant to a panel's analysis.

44. Korea does, however, make multiple assertions that misunderstand the function of an as such challenge. Korea's statement that it "seeks to focus on the most egregious situation where

the {alleged unwritten measure} is in any case not consistent with the relevant WTO obligations of the United States," implies that there are less egregious situations in which the alleged unwritten measure (whatever it is) ***is*** consistent with the United States' WTO obligations. Korea implies that perhaps among these are "situations of a complete lack of response or a complete failure to participate." But this is the hallmark of a measure that is ***not*** WTO inconsistent "as such." Rather, Korea is describing a measure that arguably is WTO inconsistent "as applied" in "the most egregious situation."

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

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

47. Korea then puts forward four arguments it derives from this table. First, according to Korea, USDOC in those 12 determinations resorted to the use of adverse inferences without considering the specific facts that led to the finding of non-cooperation. Korea criticizes USDOC for failing to distinguish between, for example, "total lack of cooperation" and where requested information was not provided for reasons USDOC considered invalid. However, Korea never even attempts to argue that the Anti-Dumping Agreement or the SCM Agreement requires investigating authorities to make such a distinction. Moreover, none of the many formulations of the alleged unwritten measure have described a prohibition on USDOC considering the facts surrounding the finding of non-cooperation.

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

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

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

insufficient for an as such claim. An as such claim requires demonstrating that a measure ***necessarily*** breaches the covered the agreements.

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

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

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

I. KOREA'S ARTICLE 9.4 CLAIM

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

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

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

56. In the *US – Zeroing* report relied upon by Korea, the Appellate Body ultimately found that, as the participants failed to suggest an alternative methodology to calculate the maximum allowable all others rate (*i.e.*, cap), it did not need to resolve the issue in that appeal. Thus, its problematic reasoning is best understood as *obiter dictum*. In any event, as in that case, the parties here also have not proposed any alternative methodology for calculating the cap in Article

9.4 (likely because there is not one based in the text of the Agreement). Therefore, Korea has failed to make out a *prima facie* case, and the Panel need not resolve the issue to dispose of Korea's claim.

EXECUTIVE SUMMARY OF U.S. SECOND WRITTEN SUBMISSION

I. INTRODUCTION

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

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

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

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

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

A. Corrosion Resistant Steel Products

61. Korea has failed to establish that USDOC acted inconsistently with Article 6.8 and Annex II of the Anti-Dumping Agreement in applying facts available in the investigation on corrosion resistant steel products. Korea's additional arguments to the contrary ignore USDOC's findings, mischaracterize the record, or based on the untenable proposition that authorities are obligated to adopt methodologies favored by foreign producers or other interested parties. Specifically, Korea's response to panel questions focuses entirely on Hyundai Steel's purported efforts and difficulty in providing the requested information and faults Commerce for not adopting a methodology proposed by Hyundai Steel for reporting further manufactured sales. Thus, Korea's response does not advance Korea's position that necessary information was not missing. Additionally, contrary to the arguments in Korea's responses to panel questions, consistent with paragraphs 1 and 6 of Annex II of the Anti-Dumping Agreement, USDOC provided Hyundai Steel with guidance, a reasonable time to provide specified information, and meaningful opportunity to provide further explanation. Korea's arguments to the contrary mischaracterize the record and are an attempt to blame USDOC for Hyundai Steel's failures.

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

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

B. Cold-Rolled Steel and Hot-Rolled Steel

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

65. The record shows that USDOC reasonably found that information submitted by Hyundai Steel with respect to affiliated party transactions was insufficient to show that the transactions were at arm's length. Korea has failed to demonstrate that USDOC's resort to facts available

with respect to Hyundai Steel's affiliated service providers was inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement. Moreover, USDOC properly determined in both the CRS and HRS investigations that Hyundai Steel failed to cooperate by not acting to the best of its ability in its responses to USDOC's requests for necessary information regarding its affiliated service providers.

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

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

C. Large Power Transformers

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

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

70. Korea continues to insist that USDOC is to blame for Hyundai's refusal to provide the requested information pertaining to the "accessories" that Hyundai sold to its customers. This position is baseless. As we demonstrated in our first written submission and in our responses to

Panel questions, once Commerce made the request for information, Hyundai either had to report the requested information pertaining to accessories, or accept that its non-cooperation would result in the application of facts available.

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

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

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

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

A. Cold-Rolled Steel and Hot-Rolled Steel

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

75. Korea also fails to establish that USDOC's reliance on facts available with respect to POSCO's facility located in a Free Economic Zone is inconsistent with Article 12.7 of the SCM

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

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

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

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

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

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

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

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

inferences. Therefore, arguments that address a measure that consists only of resort to adverse inferences upon a finding of non-cooperation, and nothing more, are manifestly insufficient.

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

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

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

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

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

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

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

85. Additional elements of Korea's alleged unwritten measure are that Commerce "selects facts from the record that are adverse to the interests of this producer or exporter without

establishing (i) that such inferences can reasonably be drawn in light of the degree of cooperation received, and (ii) that such facts are the "best information available" in the particular circumstances." As with respect to the alleged resort to an adverse inference in all cases of non-cooperation, Korea has not and cannot establish the existence of these elements.

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

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

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

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

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

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

place the vast majority of these cases on the record of this dispute. Thus, Korea's "statistical analysis" lacks an evidentiary basis.

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

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

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

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