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

(DS539)

OPENING ORAL STATEMENT OF THE UNITED STATES AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL WITH THE PARTIES

February 11, 2020

EXHIBIT LIST

Exhibit No.	Description	BCI
USA-97	Statement of Administrative Action accompanying the Uruguay Round Agreements Act (SAA), p. 869	
USA-98	*Yangzhou Bestpak Gifts & Crafts Co., v. United States*, 2012-1312, p. 15 (Fed. Cir. 2013)	

Mme. Chairperson, members of the Panel:

1. On behalf of the U.S. delegation, I would like to thank you again for agreeing to serve on this Panel, and for meeting once more with the parties. The United States appreciates the significant time and effort that necessarily is involved in the Panel's work.

2. We would like to begin by first addressing Korea's as applied claims and will then address Korea's as such claim.

I. KOREA'S AS APPLIED CLAIMS

3. Korea's as applied claims cover eight determinations by the U.S. Department of Commerce ("Commerce"). In this opening statement, we will respond to some of the points in Korea's second written submission regarding these eight determinations.

4. Korea continues to struggle to explain the basis for its claims that these determinations breach the Anti-Dumping Agreement or SCM Agreement. Like Korea's previous submissions, Korea's second written submission contains mischaracterizations and omissions of fact. Additionally, Korea ignores many of Commerce's evidentiary findings. Thus, rather than explain to this Panel why a reasonable, unbiased person, looking at the same evidentiary record as Commerce could not have made the same evidentiary finding, Korea attempts to either substitute the view of the Korean respondents for that of Commerce, or blame Commerce for the respondent's failure to provide the requested information.

5. Repeatedly, Korea asserts that Commerce's application of facts available is not "objective or fair, but effectively punitive."[1] Korea's assertions of unfairness are baseless as a factual matter. Moreover, as a legal matter, there is no general "unfairness" standard in the Anti-Dumping Agreement or SCM Agreement. Korea's allegations that determinations are "punitive" have no legal basis; rather, they merely reflect Korea's description of non-cooperating respondents' dissatisfaction with the outcome of the proceedings.

6. As we have noted before, all of this appears to be an attempt by Korea to ask this Panel for a *de novo* review of each of the eight determinations, in an attempt to have the Panel reweigh the record evidence in a manner favorable to the Korean respondents. That is not the Panel's role.

7. Rather, the Panel's task is to assess whether Commerce evaluated the record facts in an unbiased and objective way.[2] The Panel's task is not to determine whether it would have reached the same results as Commerce, but rather, whether a reasonable, unbiased person,

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[1] Korea SWS, paras. 192, 250, 264, and 277.

[2] *See, e.g., US – Countervailing Measures on Certain EC Products (21.5) (Panel)*, para. 7.82 (referring to the Appellate Body report in *US – Cotton Yarn*).

looking at the same evidentiary record as Commerce, could have—not would have—reached the same conclusions that Commerce reached.

A. Commerce Properly Resorted to Facts Available in the Anti-Dumping Determinations.

8. For each of the six antidumping determinations, Korea does not contest Commerce's finding that respondents failed to provide requested missing information. Rather, Korea's position is that for each of the determinations the information requested by Commerce was not necessary. Korea also attempts to blame Commerce for the Korean respondents' failure to provide the requested information. However, the records do not support Korea's claims.

Corrosion Resistant Steel

9. Turning first to the corrosion resistant steel investigation, Korea presents three arguments: (1) that no necessary information was missing because Hyundai provided Commerce with raw data to apply an "alternative methodology" to Hyundai's further manufactured sales;[3] (2) that Commerce did not provide an explanation for why the information Hyundai submitted was "unverifiable and deficient;"[4] and (3) that Commerce is somehow at fault for Hyundai's failure to provide the requested information because Commerce did not take into account Hyundai's difficulties in providing a Section E response and did not let Hyundai know as soon as possible after initiation that it would be required to submit a Section E response.

10. Korea argues that no necessary information was missing because Hyundai provided Commerce with raw data to apply an "alternative methodology." We can dispose quickly with this proposition, as Korea simply ignores that Commerce found that Hyundai did not qualify for any sort of special exemption that would have allowed Hyundai to use an alternative methodology for its further manufactured sales. Indeed, Commerce informed Hyundai that it failed to qualify for the alternative methodology because Hyundai's request to use an "alternative methodology" did not demonstrate, in accordance with Commerce's regulations, that the value added in the United States is equal to or greater than 65 percent of the imported coil.[5] Specifically, Commerce found that the calculations in Hyundai's request were "flawed" for overstating the amount of value added by affiliates.[6] Korea does not dispute Commerce's

[3] Korea SWS, para. 17.

[4] Korea SWS, para 11.

[5] *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Hyundai Steel Company's Exclusion Request (October 15, 2015) (Exhibit KOR-11).

[6] *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Issues and Decision Memorandum for the Final Determination (May 24, 2016), pp. 13, 27 ("CORE I&D Memo") (Exhibit KOR-5).

finding, and thus has no basis for any argument that necessary information regarding further manufactured sales was not missing.

11. Korea's second argument is that Commerce did not provide an explanation for why Hyundai's Section E was "unverifiable and deficient."[7] As an initial matter, Korea has provided no explanation for how this would support a claim of legal error. Article 12 contains obligations to explain a determination, but Korea has made no Article 12 claim.

12. In any event, Korea is simply wrong; Commerce fully explained the deficiencies in Hyundai's information. Specifically, in its Issues and Decision Memorandum, Commerce reviews the specific deficiencies in Hyundai's responses.[8] Based on those deficiencies, Commerce found the record to show that "Hyundai submitted a series of inaccurate value added calculations, made inaccurate claims of difficulty in gathering data, and then submitted three Section E responses and databases that were unusable and unreliable."[9]

13. Korea's third argument is to blame Commerce for deficiencies in Hyundai's Section E response, claiming that Hyundai experienced difficulties in responding to Commerce's Section E and that Commerce did not inform Hyundai as soon as possible of the need to Submit a Section E response. But nothing in Korea's submissions provides any basis for absolving Hyundai of its failure to respond.

14. To the contrary, the record in the determination fully explains why Commerce rejected Hyundai Steel's claims of difficulty. The determination explains that Hyundai Steel made "a series of inaccurate statements with respect to its ability to provide requested information for its further manufactured sales and costs."[10] As noted in our responses to the Panel's questions, Commerce recalled several instances where Hyundai Steel initially reported that providing Commerce with requested information would be too complicated, too burdensome, or not possible, but subsequently Hyundai Steel was able to provide the requested information.[11] Korea makes no attempt to show that these findings could not have been made by a reasonable, unbiased person. Accordingly, Korea has no legal basis for any challenge to Commerce's findings on this matter.

15. Korea attempts to blame Commerce for Hyundai's failure. According to Korea, Commerce failed to inform Hyundai as soon as possible of the need to submit a Section E

[7] Korea SWS, para 11.

[8] CORE I&D Memo, pp. 13-17 (Exhibit KOR-5).

[9] CORE I&D Memo, pp. 38 (Exhibit KOR-5).

[10] CORE I&D Memo, p. 41 (Exhibit KOR-5).

[11] *See* U.S. RPQ 2(b), paras. 16-21.

response.[12] While we have addressed this argument,[13] we would only reiterate the point that any delay was due to Commerce's review of Hyundai's request not to submit a Section E—a fact that Korea conveniently ignores. The fact that Commerce only insisted that Hyundai submit a Section E response once it had reviewed and denied Hyundai's request for exemption, does not establish that Commerce acted inconsistent with paragraph 1 of Annex II. In any case, Korea's argument concerning the time taken before Commerce required Hyundai to report its further manufactured sales in a Section E response has no merit. As the record demonstrates, Commerce provided Hyundai with sufficient time to provide its response to Section E.[14]

Cold-Rolled Steel and Hot-Rolled Steel investigations

16. With respect to Korea's claims regarding the Cold-Rolled Steel and Hot-Rolled Steel investigations, Korea continues to ignore the records and Commerce's evidentiary findings, asserting that no necessary information was missing.[15] Specifically, Korea asserts that Hyundai established the arm's length nature of the transactions between Hyundai and Hyundai **[[***]]** by submitting information that showed that the price Hyundai paid covered **[[***]]** costs and a reasonable profit.[16]

17. The records in the two investigations show otherwise. As discussed in the U.S. responses to panel questions, Commerce specifically found that the "net profit information provided for **[[***]]** does not show that **[[***]]** earned a profit from its freight service, or from non-operating income**]]**."[17] As the information Hyundai submitted failed to establish that **[[***]]** earned a profit, indicating that **[[***]]** provided services below market prices and thus not at arm's length, it was necessary for Commerce to request the contracts between **[[***]]** and **[[***]]** unaffiliated customers to establish market prices.[18] Contrary to Korea's claim, this request was not "simply a way" for Commerce to apply facts available.[19] Rather, the missing information was needed to find a market-based price for the related party service, and Hyundai's

[12] Korea SWS, para. 37.

[13] *See* U.S. SWS, paras. 32-34.

[14] Hyundai was first instructed to submit a Section E response on October 15, 2015 and Hyundai's third supplemental Section E response was due on February 10, 2016. *See Certain Corrosion-Resistant Steel Products (CORE) from the Republic of Korea,* Hyundai Steel Company's Exclusion Request (October 15, 2015) (Exhibit KOR-11); *Certain Corrosion-Resistant Steel Products from Korea*: Hyundai Steel Third Supplemental Section E Questionnaire Response (February 10, 2016) (Exhibit KOR-17 (BCI)).

[15] Korea SWS, paras. 89 and 185.

[16] Korea SWS, paras. 102 and 185.

[17] U.S. RPQ, para 48.

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

[19] Korea SWS, para. 102.

failure to provide this necessary information fully justified the use of facts available under the Anti-Dumping Agreement.

18. Korea misleadingly asserts that Commerce "originally confirmed the arm's-length nature of these transactions in the preliminary determination" by using the submitted data[20] and subsequently found no deficiencies with the data at verification.[21] To the contrary, Commerce's use of the certain data in a preliminary determination does ***not*** constitute confirmation of the accuracy of the data or whether the transactions were at arm's-length. Rather, data used in a preliminary determination represents an initial analysis of the unverified data. Such data continued to be subject to Commerce's verification to confirm the accuracy and completeness of the reported data. And with regard to the second point—regarding the verification of the reported data—the issue was not whether Commerce verified the related-party transfer price. Rather, the issue was whether the reported and verified expenses were arm's-length transactions.[22]

19. In addition, Korea makes a number of arguments with no apparent tie to any obligation under the Anti-Dumping-Agreement. For example, Korea takes issue with Commerce's finding that Hyundai Motor Group and **[[***]]** are affiliated parties. Korea has no basis, in either fact or in law, for challenging this. First, as a WTO legal matter, Korea points to no WTO obligation that would forbid Commerce from finding that these parties are affiliated. The matter should end here.

20. Nonetheless, the record fully supports Commerce's determination of affiliation.[23] "Affiliated persons" are defined by U.S. law and include members of a family, any officer or director of an organization and such organization, any person directly or indirectly owning, controlling, or holding voting stock in an organization, and two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.[24] Commerce's regulations provide that among the factors Commerce may consider when determining whether control over another person exists is corporate or family groupings.[25]

21. Furthermore, Hyundai itself reported in its Section A questionnaire, **[[***]]**.[26] Additionally, Hyundai reported that "Hyundai Motor Group and M.K. Chung (the chairman of

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[20] Korea SWS, para. 72.

[21] Korea SWS, para. 89.

[22] U.S. First Oral Statement para. 16.

[23] Korea SWS, paras. 84-86.

[24] 19 U.S.C. § 1677(33) (Exhibit USA-87).

[25] *See* 19 CFR 351.102(b)(3) (Exhibit USA-79).

[26] Hyundai Steel's Section A Response (October 16, 2015), p. A-12 (Exhibit KOR-28 (BCI)).

the group) commonly control Hyundai Steel."[27] Moreover, Hyundai Steel reported that it has an operational relationship with other members of the Hyundai Motor Group, as "there is common control of Hyundai Motor Group through its chairman, M.K. Chung."[28] In other words, in its questionnaire response, Hyundai reported that there was common control between Hyundai Motor Group and Hyundai Steel and between Hyundai Motor Group and other members of Hyundai Motor Group, including **[[***]]**. Additionally, at verification Commerce determined that there was direct ownership between **[[***]]** and Hyundai Steel.[29]

22. Hyundai's reasons for why **[[***]]** would not provide the requested contracts between **[[***]]** and **[[***]]** customers have evolved over time. Initially, Hyundai's explanation was that **[[***]]** declined due to "the proprietary and confidential nature of its transactions with other parties."[30] At verification, Hyundai stated that it could not obtain the information because there was no "direct ownership" of **[[***]]** by Hyundai Steel.[31] At the first meeting of the parties in this dispute, Korea introduced yet a third reason why Hyundai was not able to provide the contracts, asserting that **[[***]]** was not allowed to give Hyundai the contracts under Korean law.[32] This is an *ex-post* facto justification, never provided as an explanation to Commerce, and can play no role in any showing of an alleged WTO-consistency during the course of an investigation.

23. Furthermore, all three of the reasons Hyundai has provided are inconsistent with the facts. Specifically, **[[***]]** did have the ability and willingness to provide Hyundai with some information, such as the contract between **[[***]]** and a subcontractor. There is no reason on the record why **[[***]]** could not provide the additional documentation regarding the unaffiliated customers.[33] In other words, Hyundai Steel appeared to be selectively providing documents. In sum, based on Hyundai's inconsistent and shifting answers before Commerce and the fact **[[***]]** was willing to provide some information, but not the requested information, Commerce reasonably found that Hyundai should have been able to fully respond.[34] Korea has failed to

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[27] Hyundai Steel's Section A Response (October 16, 2015), p. A-12 (Exhibit KOR-28 (BCI)).

[28] Hyundai Steel's Section A Response (October 16, 2015), p. A-12 (Exhibit KOR-28 (BCI)).

[29] U.S. FWS, paras. 125-127.

[30] Hyundai Steel Section B-C Supplemental Response (December 15, 2015), p. 24 (Exhibit KOR-34 (BCI)).

[31] Department of Commerce, CEP Verification Report, Hyundai Steel (May 26, 2016), pp. 42-43 (Exhibit KOR-47 (BCI)).

[32] Korea RPQ 15(b).

[33] U.S. SWS, para. 56.

[34] U.S. FWS, paras. 156-157.

demonstrate that a reasonable, unbiased person, looking at the same evidentiary record as Commerce, could not have made the same evidentiary finding.

Large Power Transformers

24. Turning to the three administrative reviews of Large Power Transformers, Korea makes several assertions for why the missing information was not necessary for Commerce to complete its determinations. However, Korea's assertions are either misleading, or an attempt to seize the investigating authority's right to determine what is necessary information. Moreover, Korea ignores that, even if the information was not necessary (and it was), Hyundai significantly impeded the investigation, which provides an independent basis in Article 6.8 for Commerce's determinations.

25. Regarding Hyundai's reporting of service-related revenue in the second and third administrative reviews, Korea argues that no necessary information was missing because Hyundai reported the data consistent with how Commerce requested the data in previous segments.[35] Korea asserts that Commerce changed its treatment of service-related revenue between the original investigation and subsequent reviews.[36] However, as the United States demonstrated in its responses to Panel questions, this is not accurate.[37]

26. Rather, Commerce consistently applied the statue and regulations, treating service-related revenues in all segments in accordance with U.S. law. What changed was Commerce's understanding of Hyundai's transactions and accounting. Specifically, prior to Commerce's remand in POR2, Commerce accepted Hyundai's reporting of service revenues and expenses. Subsequently, Commerce determined that Hyundai should have been reporting service related revenues and expenses in data fields separate from Hyundai's gross unit price, as Commerce's questionnaire requested, and which would have allowed Commerce to cap Hyundai's service related revenue.[38] As Hyundai failed to provide the necessary information, as requested, necessary data was missing for Commerce to complete its determination.[39]

27. Regarding other missing data, Korea asserts that the missing data on certain parts was only a "small amount of data," and that the missing data on accessories was "not important or notable," as Commerce had been able to calculate dumping margins in previous segments

[35] Korea SWS, paras. 261 and 267.

[36] Korea SWS, para. 261.

[37] U.S. RPQ 35, paras. 131-139.

[38] Department of Commerce Draft Results of Redetermination Pursuant to Remand (January 9, 2018), p. 11 (Exhibit USA-27 (BCI)).

[39] Department of Commerce Draft Results of Redetermination Pursuant to Remand (January 9, 2018), p. 11 (Exhibit USA-27 (BCI)).

without the data.[40] However, under the Anti-Dumping Agreement, it is the investigating authority—not the respondent—that conducts the investigation, and thus has the role of deciding what information it needs to conduct the investigation. As the panel in *Egypt – Steel Rebar* stated, "{o}n the question of the 'necessary' information, reading Article 6.8 in conjunction with Annex II, paragraph 1, it is apparent that it is left to the discretion of an investigating authority, in the first instance, to determine what information it deems necessary for the conduct of its investigation (for calculations, analysis, etc.), as the authority is charged by paragraph 1 to 'specify … the information required from any interested party'."[41] The fact that Hyundai would have acted differently if it were the investigating authority hardly constitutes a breach of the covered agreements.

B. Commerce Properly Resorted to Facts Available in the Countervailing Duty Determinations.

28. With respect to the two CVD determinations, contrary to Korea's arguments, the records show that Commerce acted consistently with Article 12.7 of the SCM Agreement in resorting to facts available in the Hot-Rolled and Cold-Rolled investigations. In its second submission, Korea continues to mislead this Panel.

29. To recall, Commerce requested that POSCO "{s}pecify whether an affiliated company supplies inputs into your company's production process." POSCO responded that "{t}here were no affiliated companies located in Korea that provided inputs to POSCO's production of subject merchandise." This statement turned out to be materially false. Korea tries to excuse this false statement by arguing that, without regard to Commerce's actual request, POSCO felt that Commerce had a "practice" not to require disclosure of affiliates that provide materials that are not "primarily dedicated" to the production of the subject merchandise.[42] In other words, the respondent decided for itself that it was acceptable to withhold information because—without any notice to Commerce—POSCO read a limitation into Commerce's question, and then judged for itself that its related-party met the supposed criteria for not disclosing the information.

30. As discussed in the U.S. second written submission, POSCO's excuses for its own conduct hardly establishes a breach by the United States of the SCM Agreement. Commerce requested that respondents identify affiliated parties that provided inputs—without any limitation such that the question did not apply to inputs that were not "primarily dedicated" to the subject merchandise. Furthermore, Commerce certainly did not request that respondents perform a "primarily dedicated" analysis by itself, and withhold all information if the respondent decided the outcome in its favor. In deciding for itself that production by POSCO's affiliated input

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[40] Korea SWS, para. 267.

[41] *Egypt – Steel Rebar* (Panel), para 7.155.

[42] Korea SWS, para. 149.

suppliers was not "primarily dedicated" to the production of the downstream product, POSCO effectively tried to substitute itself as the investigating authority.

31. Moreover, contrary to what POSCO thought, Commerce has no established practice regarding whether an input is "primarily dedicated." Rather, the question of whether an input is "primarily dedicated" to a downstream product is decided on a case-by-case basis, with no bright line to define what is "primarily dedicated."[43]

32. Moreover, Korea's argument that POSCO did not disclose its affiliated input suppliers because they were not "primarily dedicated" to the production of the downstream product, and thus not required, is inconsistent with the rest of POSCO's response regarding affiliated input suppliers. As noted above, POSCO responded "{t}here were no affiliated companies located in Korea that provided inputs to POSCO's production of subject merchandise."[44] However, in the next sentence, POSCO reported that it "has affiliated companies located outside Korea that supplied a small volume of inputs of **[[*******]]** during the POI."[45]

33. Thus, while POSCO reported in the affirmative that it had affiliated parties in other countries producing a "small volume of inputs," which presumably POSCO would not consider primarily dedicated, for the same question, Korea argues that POSCO did not report the affiliated input suppliers in Korea because they were not primarily dedicated. Had POSCO simply responded in the affirmative, as it did regarding affiliated input suppliers outside of Korea, Commerce would have had the opportunity to follow up and verify any assertion that the affiliated companies only provided negligible amounts.[46] Instead, POSCO provided a false response, and in so doing deprived Commerce of the opportunity to investigate.

34. In its second written submission, Korea also takes issue with the U.S. assertion that Korea should have expected Commerce to request additional information regarding POSCO's FEZs.[47] Korea complains that Commerce's verification outline only indicated that Commerce

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[43] 19 U.S.C. § 1677(33) (Exhibit USA-87).

[44] Certain Cold-Rolled Steel Flat Products from Korea, Case No. C-580-882: Affiliated Companies Response (September 30, 2015), pp. 4-6 (Exhibit KOR-73 (BCI)); *Certain Cold-Rolled Steel Flat Products from the Republic of Korea,* Issues and Decision Memorandum (July 20, 2016), pp. 9 ("CRS I&D Memo (CVD)") (Exhibit KOR-77).

[45] Certain Cold-Rolled Steel Flat Products from Korea, Case No. C-580-882: Affiliated Companies Response (September 30, 2015), pp. 4-6 (Exhibit KOR-73 (BCI)); CRS I&D Memo (CVD), p. 9 (Exhibit KOR-77).

[46] *See* CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 64; *Certain Hot-Rolled Steel Flat Products from the Republic of Korea,* Issues and Decision Memorandum (August 4, 2016), p. 61 ("HRS I&D Memo (CVD)") (Exhibit KOR-98).

[47] Korea SWS, para. 160.

would seek documentary evidence.[48] However, it was the documents discovered at verification that first indicated that POSCO even had an FEZ facility.[49] Moreover, the additional documents POSCO provided failed to verify POSCO's use of FEZ subsidy programs, thus necessitating the need for Commerce to visit the facility. In any event, Commerce's request for additional information, including a visit to the FEZ facility, is consistent with paragraph 7 of Annex I of the Anti-Dumping Agreement, which addresses procedures for verifications. It makes clear that while verification agendas should include the general nature of the information to be verified, this does not "preclude requests to be made on the spot for further details to be provided in the light of information obtained."

35. Korea also argues that Commerce ignored evidence that demonstrated that POSCO did not benefit from the FEZ programs.[50] However, as discussed in the U.S. responses to Panel questions, the government of Korea's response as to whether POSCO benefited from FEZ subsidies was ambiguous.[51] Korea faults Commerce for not seeking clarification of the government's answer, but as both POSCO and Hyundai Steel affirmatively stated in their questionnaire responses that they had no facilities in FEZs, there was no reason—prior to verification—for Commerce to more closely examine the government of Korea's response.[52]

36. Additionally, contrary to Korea's assertion, the government of Korea never reported that POSCO was not a foreign-invested enterprise.[53] Nonetheless, Commerce did address POSCO's claim that it could not have benefited from the FEZ due to the program's designation to attract foreign investment.[54] Specifically, Commerce found that while certain FEZ subsidies were reportedly limited to foreign-invested enterprises, information on the record demonstrated that certain shareholders of POSCO appeared to be foreign and could have been eligible under the program.[55]

37. Regarding Korea's argument that there was no basis for Commerce to apply facts available with respect to the additional loans reported as minor corrections, contrary to Korea's assertion, the record shows that the additional loans were not simply a supplement to the record.[56] Rather, as Commerce found, the loans presented were "significant additions to the

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[48] Korea SWS, para. 160.

[49] U.S. FWS, para. 382.

[50] Koreas SWS, para. 161.

[51] U.S. RPQ 26, paras. 113-115.

[52] Korea SWS, para. 161.

[53] Korea SWS, para 161.

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

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

[56] Korea SWS, para. 139.

reported amount of funding."[57] As noted in the U.S. second written submission, the additional loans submitted as minor corrections increased the value of the U.S. dollar denominated loans alone from **[[***]]**.[58]

38. In sum, the record for each of the eight determinations demonstrates that necessary information was missing and thus the conditions for resorting to facts available were met. Korea's assertions otherwise are nothing more than an attempt to have this Panel substitute itself as the trier of fact and review Commerce's findings *de novo*.

C. Commerce Applied Facts Available Consistent with Paragraphs 3 and 5 of Annex II.

39. Similarly, Korea fails to establish a breach of paragraphs 3 and 5 of Annex II. The records of these determinations support Commerce's findings that the Korean respondents failed to cooperate to the best of their ability. As demonstrated in our submissions, in each proceeding, respondents failed to provide the requested information, despite multiple opportunities to do so. Korea's arguments otherwise are nothing more than mischaracterizations of the facts.

40. For example, with respect to the CORE investigation, Korea points to the raw data that Hyundai provided and asserts that "clearly" the raw data was verifiable.[59] However, the raw data Hyundai submitted does not represent the further manufactured sales data Commerce requested. With respect to the further manufactured sales data Commerce requested, and which would have been the subject of Commerce's verification, Commerce determined the data unverifiable.[60] Specifically, Commerce found the data to be unusable, with many deficiencies and inconsistencies, which made "it impossible for the Department to conduct its margin analysis of Hyundai's further manufactured sales."[61]

41. Korea also asserts that in finding that Hyundai failed to act to the best of its ability, Commerce ignored Hyundai's reported difficulties in providing the requested data.[62] However, as discussed above, Commerce did not ignore Hyundai's reported difficulties; it just rejected them after a full evaluation, finding that Hyundai's claims were "inaccurate" and "discredited."[63]

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

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

[59] Korea SWS, paras. 40-41.

[60] CORE I&D Memo, p. 14 (Exhibit KOR-5).

[61] CORE I&D Memo, p. 14 (Exhibit KOR-5).

[62] Korea SWS, para. 44.

[63] CORE I&D Memo, pp. 16 and 38.

42. With respect to the Cold-Rolled and Hot-Rolled investigations, Korea alleges that Commerce could have verified the affiliated service providers data that Hyundai submitted, but failed to do so.[64] However, Korea yet again ignores Commerce's finding that the data Hyundai submitted failed to demonstrate that the transactions were at arm's length.[65] Thus, even if Commerce had verified this data, the verification would not have demonstrated that the transactions were at arm's length. Indeed, Commerce's attempt to verify data showing the services were provided at arm's length was thwarted by Hyundai's failure to provide Commerce with the requested documents.

43. Regarding the large power transformers, Korea argues that in the second review there was no basis for Commerce to conclude that Hyundai "significantly impeded" the investigation when the exact same level of cooperation and reporting of data had previously been approved and upheld by Commerce.[66] What this argument ignores is that Commerce had accepted Hyundai's reporting in previous segments because there was "no indication that Hyundai improperly reported its sales data."[67] On remand it was discovered that Hyundai obtained revenues on sales-related services, which should have been capped, but were not due to Hyundai's failure to separately report the services as required.[68]

44. Finally, with respect to the Hot-Rolled steel CVD investigation, Korea asserts that POSCO submitted the data "within a reasonable period of time," as it submitted the information more than a month before verification.[69] However, the record shows that POSCO's initial attempt to submit the data was four months after the December 2015 deadline for new information.[70] This deadline was set according to Commerce's published regulations.[71] Article 12.12 clearly recognizes the legitimate interest investigating authorities have in proceeding expeditiously to reach a final determination. Moreover, Paragraph 1 of Annex II of the Anti-

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[64] Korea SWS, paras. 73 and 191.

[65] U.S. RPQ 12, paras. 47-48.

[66] Korea SWS, para. 294.

[67] Issues and Decision Memorandum for the Final Results of the Administrative Review of the Antidumping Duty Order on Large Power Transformers from the Republic of Korea, 2014-2015 (March 8, 2016), pp. 39-40 (Exhibit KOR-110).

[68] Department of Commerce Final Results of Redetermination Pursuant to Court Remand (February 8, 2018), p. 20 (Exhibit USA-29 (BCI)).

[69] Korea SWS, para. 223.

[70] *See* Letter from Department of Commerce Rejecting POSCO's Submission of New Factual Information (April 14, 2016) (Exhibit KOR-93); Letter from Department of Commerce Rejecting POSCO's Submission of New Factual Information (May 3, 2016) (Exhibit KOR-95).

[71] 19 C.F.R. § 351.301(c)(5) (Exhibit USA-76).

Dumping Agreement acknowledges that investigating authorities may, and therefore can, resort to facts available if information is not submitted in a timely manner.[72]

45. Korea's reliance on the Appellate Body's findings in *US - Hot-Rolled Steel* is misplaced. At issue in *US – Hot-Rolled Steel* was the investigating authority's rejection of data "*for the sole reason* that they were submitted after the deadline for submission of the questionnaire responses."[73] Nothing on the record in the investigation indicates any flaw in Commerce's decision to resort to facts available. Among the factors suggested by the Appellate Body are "the number of days by which the investigated exporter missed the applicable time-limit," the "nature and quantity of the information submitted," and the "verifiability of the information."[74] Putting aside whether the Appellate Body can validly adopt multi-factor tests of this kind not found in the WTO Agreement, it is clear that Commerce's determination here would have been proper under such an analysis. POSCO missed the deadline by more than four months.

46. Additionally, the missing data in *US - Hot-Rolled Steel*, were "weight conversion factors" for the reported data.[75] By contrast, here POSCO attempted to submit new information regarding the existence of certain cross-owned affiliates, a significant volume of additional loans, and the existence of a facility in an FEZ. As such, Commerce declined to verify the data "due to the untimely presentation of the data and the large amount of analysis required to verify the data."[76]

47. In sum, Commerce found that POSCO's information was untimely, an objective fact based on published deadlines according to published regulations. Korea's view—without regard to Commerce's need to run an orderly investigation that is fair to all parties—that Commerce was obligated to make a *sui generis* exception for POSCO is not enshrined in Article 12.7 (or any other provision) of the SCM Agreement.

D. Commerce Properly Selected a Replacement for Missing Information.

48. Korea also fails to establish that Commerce acted inconsistent with Article 6.8 and paragraph 7 of Annex II of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement when selecting replacements for missing necessary information. Indeed, Korea's claims have no legal basis under the WTO Agreement. Rather, Korea simply appears to be dissatisfied with the rates Commerce selected to replace missing necessary data. Without evidence, Korea claims that the rates Commerce used are punitive. However, Korea points to nothing on the record to demonstrate that the rates used to replace the missing data are

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[72] *See also* Anti-Dumping Agreement, Annex II, para. 3 (also reflecting the legitimate interest in timeliness of submissions).

[73] *US – Hot-Rolled Steel (AB),* para 87 (emphasis in original).

[74] *US – Hot-Rolled Steel (AB),* para 85.

[75] *US – Hot-Rolled Steel (AB),* para 64.

[76] HRS I&D Memo, p. 64 (Exhibit KOR-98).

unreasonable replacements. Moreover, Korea's arguments mischaracterize the records and are an attempt to add requirements that are simply not in the agreement.

49. Contrary to Korea's assertions, in using petition rates to replace missing necessary information, Commerce did not simply consider the petition rates sufficiently accurate merely because the data was considered sufficiently adequate and accurate at the time of initiation.[77] For example, with respect to the CORE investigation, and as discussed at length in Question 6a to the U.S. responses to Panel questions, in replacing the missing information, Commerce considered and found the petition rates to be reliable, probative, and relevant.[78]

50. Specifically, after "reviewing the adequacy and accuracy of the information in the petition" and the evidence supporting the calculations in the petition, Commerce found the rates to be reliable and probative.[79] The rates were also found to be relevant because they were derived from the CORE steel industry and based on information related to aggregate data involving the CORE steel industry.[80] Moreover, they were found to be relevant to Hyundai, as they were based on price quotes/offers for sales of CORE produced in and exported from Korea and had taken into account differences in the Korean industry.[81] Additionally, nothing on the record called into question the relevance of the petition rates.[82]

51. Furthermore, Hyundai's own data confirmed the probative value of the petition rates. Commerce noted that Hyundai's margin program output showed product-specific margins for coil at or above the petition rate.[83] In other words, the rate used to replace the missing information was lower than some of the product-specific (coil) transaction rates that comprise the respondent's own, actual sales and pricing behavior.

52. Annex II of the AD Agreement is very clear that investigating authorities may replace missing necessary information with "information supplied in the application for the initiation of

[77] Korea SWS, paras. 51 and 316.

[78] U.S RPQ6a, paras. 24-31.

[79] CORE I&D Memo, p. 18 (Exhibit KOR-5).

[80] CORE I&D Memo, p. 18 (Exhibit KOR-5).

[81] CORE I&D Memo, pp. 18-19 (Exhibit KOR-5).

[82] CORE I&D Memo, p. 18 (Exhibit KOR-5).

[83] CORE I&D Memo, p. 19 (Exhibit KOR-5); *see* Final Determination Margin Calculation for Hyundai Steel Company (Hyundai) (May 31, 2016) (Exhibit USA-11 (BCI)).

the investigation."[84] When doing so, the investigating authority must exercise special circumspection.[85] Commerce clearly fulfilled this obligation, and Korea fails to prove otherwise.

53. Nonetheless, Korea asserts that it was not sufficient for Commerce to compare the petition margin to Hyundai's product-specific margins, "irrespective of the aberrational nature or relevance" of the product-specific margins to the missing data.[86] However, Korea points to no evidence to demonstrate that the product-specific margins were aberrational or not relevant to the missing data. Korea's assertion that the preliminary margin calls into question the relevance of the petition rate is counterintuitive.[87] The preliminary margin is made up of product-specific margins that were above and below the petition rate. Korea's argument cannot be that the preliminary margin calls into question any petition margin that is above or below the preliminary margin.

54. With respect to Commerce's use of the respondent's own data, Korea makes similar, baseless, arguments. Regarding Commerce's use of Hyundai's own data in the Cold-Rolled and Hot-Rolled investigations, Korea asserts that Commerce failed to engage in the requisite analysis to ensure the selected information used to replace the missing information was the "best" information.[88] As an initial matter, "best information available" is just the title of Annex II, not a substantive provision that may be used to frame a legal inquiry. Rather, the information to be used to replace missing information is that obtained consistent with the substantive provisions of Annex II.

55. With respect to the Cold-Rolled investigation, Korea asserts that Commerce's use of Hyundai's own data to replace the missing information was inconsistent with paragraph 7 of Annex II, as the data was aberrational or unrepresentative.[89] Korea's attempt to demonstrate this by comparing the information used to replace the missing data to data rejected by Commerce fails.[90] Indeed, it was the rejection of this same data that resulted in there being missing information.

56. Korea also asserts that the margins for the sales used by Commerce were aberrational and for "phased out" products.[91] What Korea neglects to explain is that, regardless of the reasons

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[84] Annex II of the AD Agreement, para. 7.

[85] Annex II of the AD Agreement, para. 7.

[86] Korea SWS, para. 52.

[87] Korea SWS, paras. 52-53.

[88] Korea SWS, para. 105

[89] Korea SWS, para. 108.

[90] Korea SWS, para. 108.

[91] Korea SWS, paras. 120 and fn. 156.

behind Hyundai Steel's sale of this product, it made these sales to a U.S. customer during the period of review, and it made these sales at less than fair value.[92] These sales are precisely the type of sales the WTO disciplines were designed to address.

57. Korea has also failed to show that the rates used were "punitive." As an initial matter, "punitive" is not a term under the Anti-Dumping Agreement, and Korea does not explain what it means by "punitive." It appears that Korea uses punitive to mean a rate higher than the respondent would like. But the Anti-Dumping Agreement does not guarantee a respondent's satisfaction with a rate. Indeed, paragraph 7 provides that, "if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate." As the Appellate Body has recognized, "non-cooperation creates a situation in which a less favourable result becomes possible due to the selection of a replacement of an unknown fact." In short, that the outcome is less favorable than Korea would have liked does not mean Commerce's application of facts available was somehow inconsistent with Article 6.8.[93]

58. Turning to the Cold-Rolled CVD determination, Korea has no basis for asserting that Commerce's selection of facts available was not made with a view to making an accurate determination. Indeed, Korea points to nothing on the record to demonstrate that Commerce's determination is not accurate. With respect to the affiliated input providers, as the facts show, Commerce discovered these companies during verification.[94] As the record lacked the necessary information and as POSCO did not act to best of its ability, Commerce applied an adverse inference in selecting from the facts available with regard to the subsidies to POSCO's cross-owned input suppliers.[95] Contrary to Korea's assertion, in applying facts available with respect to the subsidies, Article 12.7 does not require Commerce to demonstrate, with facts, some level of benefits to the cross-owned input suppliers.[96] As POSCO failed to provide the necessary information, the extent to which POSCO and the cross-owned companies benefited from the subsidies is not known.

59. Nonetheless, like the margins used by Commerce in the anti-dumping determinations, Korea's claims regarding the CVD determinations appear to be based solely on its disappointment in Commerce's use of less favorable rates to replace the missing information.

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[92] CRS I&D Memo, p. 63 (Exhibit KOR-41), *citing* Commerce Final Calculation Memo for Hyundai Steel (July 20, 2016) (Exhibit KOR-49 (BCI)).

[93] *US – Carbon Steel (AB)*, para. 4.426.

[94] U.S. FWS, paras. 373-377.

[95] U.S. FWS, para. 377.

[96] Korea SWS, para. 156.

However, 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."[97]

60. As previously discussed, the starting point for Commerce's facts available analysis was the calculated subsidy rates of cooperating companies. These rates reflect the *actual subsidy practices* of the government in Korea as reflected in the actual experience of companies in Korea. Second, the logical inference applied in selecting from among the facts available in this situation is that where a company refuses to provide information, it is reasonable to conclude that the company has benefitted from the subsidy program at least as much as the cooperating company in the same industry who received the higher benefit amount. The refusing company may have benefitted to a greater extent than a company that provided the necessary information when requested. However, Commerce cannot know the true extent of the benefit without obtaining the actual data from the company or government. Thus, given the refusal of the company to provide the necessary information, Commerce applied the higher calculated rate for the particular subsidy program at issue.

61. Because these proceedings were investigations, where Commerce looked at new subsidies never examined before, and thus found there were no subsidy rates available for some identical or similar programs, Commerce examined the subsidy rates from other countervailing duty proceedings involving Korea.[98] Nothing in the text of Article 12.7 provides that rates initially determined in other investigations pertaining to the same government are somehow precluded from qualifying as an available fact. Rather, as the Appellate Body has observed, the very purpose of Article 12.7 is "to ensure that the failure of an interested party to provide necessary information does not hinder an agency's investigation."[99] Thus, Article 12.7 recognizes and reinforces the validity of Commerce's determinations in this respect.

62. In each case in which Commerce identified the particular subsidy rate to be applied as facts available, as a final step, Commerce examined the reliability and relevance of such rates to the extent practicable.[100] In this investigation, no evidence on the record contradicted or raised a

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[97] *US – Carbon Steel (India) (AB)*, para. 4.426 (discussing relevance of Annex II(7) of the Anti-Dumping Agreement in interpreting Article 12.7 of the SCM Agreement).

[98] *See* CRS I&D Memo (CVD), p. 12 (Exhibit KOR-77).

[99] *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 293.

[100] *See* CRS I&D Memo (CVD), p. 15 (Exhibit KOR-77); *see also*, Results of Redetermination Pursuant to Court Remand in *POSCO et al. v. United States*, pertaining to the cold-rolled steel investigation (in which Commerce explained, that in accordance with the statute, "when {Commerce} relies on secondary information rather than on information obtained in the course of an investigation or review,{Commerce}, shall, to the extent practicable corroborate that information from independent sources that are reasonably at their disposal." "Corroborate means that the Secretary will examine whether the secondary information to be used has probative value.") (June 6, 2018) (Exhibit USA-58) at 19. The court affirmed Commerce's redetermination of POSCO's subsidy rate in *POSCO et al. v. United States*, Slip Op. 18-115 (September 10, 2018) (Exhibit USA-59).

question about the subsidy rates that were applied as facts available. Thus, contrary to Korea's assertion,[101] as supported by the fact that the subsidy rate for each program was on par with the same or similar subsidy programs, each rate provided a reasonable estimate of the level of subsidization provided by the government.

II. AS SUCH CHALLENGE

63. Korea's as such claim is meritless. The United States will not attempt in this statement to repeat all of its written arguments or rebut each error in Korea's submissions.

64. Instead, ***first***, we will highlight how Korea's arguments in support of its as such claim are incoherent and internally inconsistent. In particular, Korea repeatedly argues as if the measure is just the adoption of adverse inferences in cases of non-cooperation, and nothing more. Yet, as the Panel found in its preliminary ruling and the United States will review in greater detail in this statement, Korea's panel request quite clearly included additional elements in the unwritten measure it alleges and challenges in its panel request. Korea's arguments that ignore these additional elements, therefore, are insufficient to prove the existence of the measure challenged in Korea's panel request.

65. ***Second***, and relatedly, the United States will address the unusual formulation of the alleged measure in Korea's panel request, which adopts as elements of the alleged measure what in essence are, as we will discuss in this statement, arguments about why the adoption of adverse inferences supposedly breaches the Anti-Dumping Agreement and SCM Agreement in fact-specific applications. The result is a mess that utterly fails to prove the existence of such a measure with these elements.

66. ***Third***, the United States will briefly address Korea's "statistical" argument, which it failed to validly defend in its second written submission.

67. And ***fourth***, the United States will close by summarizing why Korea's as such claim, apart from the incoherence and internal inconsistency, is contradicted as a substantive matter by the evidence on the Panel's record.

68. As these discussions confirm, Korea fails to prove the existence of the alleged measure in its panel request, and that Korea further fails to show that such a measure, if it existed, necessarily breaches the Anti-Dumping Agreement and the SCM Agreement.

A. Korea's Arguments Repeatedly Treat the Measure as the Mere Adoption of Adverse Inferences in Cases of Non-Cooperation.

69. To obtain a finding that a measure is WTO-inconsistent "as such," the Member bringing the dispute must establish that the measure ***necessarily*** breaches the covered agreements. If

[101] Korea FWS, paras. 449-450.

some applications of the measure are WTO-consistent, then the measure cannot be found to be as such WTO-inconsistent.

70. There is a particularly high threshold that must be met in order to successfully challenge an unwritten measure. Among the requirements is the need to identify and prove the ***precise*** content of the supposed unwritten measure. Yet, rather than clearly identify and seek to prove the existence of the alleged unwritten measure included in its panel request, Korea's formulation of the alleged unwritten measure and its arguments in support its as such claim are incoherent and inconsistent with its panel request. As a result, Korea has in no way established the existence of the measure alleged in its panel request, much less shown that such an existing measure necessarily breaches the Anti-Dumping Agreement and the SCM Agreement.

71. As the Panel found in its preliminary ruling,[102] Korea's as such claim alleges that the United States maintains the following unwritten measure:

> Under this ongoing conduct or norm, whenever the USDOC makes a finding that a producer or exporter has failed to cooperate by not acting to the best of its ability, it adopts adverse inferences ***and***, *in determining the duty rate for this producer or exporter, selects facts from the record that are adverse to the interests of this producer or exporter without establishing (i) that such inferences can reasonably be drawn in light of the degree of cooperation received, and (ii) that such facts are the "best information available" in the particular circumstances.*[103]

72. Despite the above-found content of the alleged unwritten measure that Korea has put forward in this dispute, Korea repeatedly agues as if the only element of the unwritten measure is that the adoption of adverse inferences by the investigating authority in cases of non-compliance. But, of course, as the Panel has found in the preliminary ruling, the alleged unwritten measure that Korea's must prove is ***not*** the mere adoption of adverse inferences, and nothing more, in cases of non-cooperation.[104] Rather, the alleged unwritten measure within the Panel's terms of reference involves, in cases of non-cooperation, both the adoption of adverse inferences ***and*** additional elements related to USDOC's determination of the duty rate—which as a shorthand we will refer to as "the additional elements" of the alleged unwritten measure.

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[102] Preliminary Ruling, para. 2.1.

[103] Korea Panel Request, para. 9 (emphasis added).

[104] Indeed, at other points, Korea writes that its "challenge focuses on ***the selection*** of the facts available in a situation" of non-cooperation. Korea RPQ 43 (emphasis added). *See also* Korea FWS, para. 924 ("The precise content of the AFA Norm, both in terms of what it involves (i.e. the selection of "adverse" facts available)…"); Korea SWS, para. 362 (same).

73. Korea's arguments are, therefore, manifestly insufficient to prove the existence of the measure challenged in its panel request to the extent they address the mere adoption of adverse inferences, and nothing more (*i.e.*, no additional elements), whenever an interested party fails to cooperate. For example, in its first written submission, Korea states:

> "Under this norm, or as part of this ongoing conduct, 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. This is what Korea refers to as being the 'AFA Norm' or the 'AFA Ongoing Conduct'."[105]

74. As another example, with respect to the alleged general and prospective application of the unwritten measure, Korea argues as if the measure were the mere adoption of adverse inferences. Korea states that "*the use of AFA by the USDOC* has such general and prospective application,"[106] and further contends that the general and prospective nature is "demonstrated by the unqualified nature of the statutory provision on which *the use of AFA* is based."[107] Korea further argues that the broad range of products in a list of 306 cases "in which AFA was used by USDOC" (with no mention of the additional elements) supports the measure's general and prospective application.[108] This showing is completely insufficient, and flatly inconsistent with Korea's panel request, as made clear by the Panel's preliminary ruling. Again, Korea must show that the alleged measure in its panel request—which includes the additional elements—has general and prospective application; showing that "the use of AFA" and nothing more has general and prospective application would be manifestly insufficient.

75. In noting the U.S. point that evidence relevant only to the use of adverse inferences and nothing more is insufficient because Korea's claim concerns a narrower alleged rule or norm, Korea protests that "{i}t is unclear what the United States has in mind."[109] What the United States has in mind is the alleged measure in Korea's panel request! This is the only alleged measure within this Panel's terms of reference. An alleged measure that includes the additional elements.

76. Korea's "statistical" evidence provides yet another example. In drawing its conclusion from a subset of 90 cases, Korea states that "{t}he automatic nature of the use of AFA becomes

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[105] Korea FWS, para. 878. *See also ibid*., para. 944 ("Korea already demonstrated that the precise content of the conduct is to draw adverse inferences whenever a finding is made of a failure to cooperate to the best of one's abilities.").

[106] Korea FWS, para. 929 (emphasis added).

[107] Korea FWS, para. 930 (emphasis added).

[108] Korea FWS, para. 931.

[109] Korea SWS, para. 379.

evident through these statistics."[110] Thus, Korea again here is addressing the adoption of adverse inferences and nothing more, but that is not the measure challenged in its panel request. (As we will discuss in a few minutes, this "statistical" analysis is also deeply flawed in several other respects.)

77. Just this morning, in paragraph 103 of its opening statement, Korea argued that "the U.S. continues to fail to present counterexamples that refute Korea's demonstration that ***the USDOC's use of AFA*** in situations of non-cooperation is a rule or norm of general and prospective application, or a form of ongoing conduct."[111] Thus, Korea again ignores the additional elements in its panel request. In addition to ignoring elements of the unwritten measure alleged in its own panel request, Korea also mischaracterizes measures challenged in other disputes as if they were solely related to the adoption of adverse inferences. For example, Korea states that the "AFA Norm" addressed in *US – Anti-Dumping Methodologies* and the alleged measure here share "identical content."[112] When the United States pointed out the absurdity of this statement, Korea responded that "{a}s the United States knows very well, the USDOC's use of AFA in NME situations is not meaningfully different from its use in non-NME situations."[113] In other words—and ignoring that this statement is untrue—Korea is suggesting that the measure there was really just about the adoption of adverse inferences. Korea treats the precise content of an alleged unwritten measure imprecisely. "The use of AFA" was not the measure challenged in that dispute, and it also is not the measure challenged in Korea's panel request.

78. These arguments that address just the adoption of adverse inferences are incapable of establishing the existence of the alleged unwritten measure challenged in Korea's panel request. To establish the existence of the unwritten measure alleged in Korea's panel request, its arguments would have needed to address a measure that includes the additional elements. As we will show in the next section, the additional elements are not actual alleged policies of the United States, but rather Korea's legal arguments about the application of adverse inferences in fact-specific circumstances.

B. The "Additional Elements" Are, in Essence, Legal Arguments.

79. To recall, Korea's panel request asserts that "{u}nder 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..., 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

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[110] Korea SWS, para. 413.

[111] Emphasis added.

[112] Korea FWS, para. 995.

[113] Korea SWS, para. 376.

received, and (ii) that such facts are the "best information available" in the particular circumstances."[114]

80. This means that, according to Korea's panel request, the United States maintains a measure that, if written, would state the following (or substantially similar):

> Any time a producer or exporter fails to cooperate to the best of its ability, Commerce:
>
> (1) shall adopt adverse inferences;
>
> (2) shall select facts from the record that are adverse to the interests of the relevant producer or exporter;
>
> (3) shall not establish that such inferences can reasonably be drawn in light of the degree of cooperation received; and
>
> (4) shall not establish that such facts are the best information available in the particular circumstances.

81. Korea apparently chose these additional elements because they match up with Korea's characterization of the relevant obligations under the covered agreements. That is, if they were established as elements of a measure, they would correspond with Korea's legal arguments as to what would constitute a WTO inconsistency. Korea's incorporation of those arguments as elements of the alleged unwritten measure creates significant confusion and collapses inquiries into the existence of the alleged measure, and whether such a measure would breach the covered agreements. Having alleged certain elements—matching up with its legal theories—are part of the unwritten measure, Korea has the burden of proving that such an unwritten measure actually exits.

82. And here, Korea does not come close to doing so. The additional elements are not actually aspects of an alleged policy of the United States. Indeed, in its argumentation regarding alleged existence of the measure, Korea does not even argue that the United States, without writing it down, has adopted a rule that USDOC shall not engage in reasoning or evaluation or consider accuracy in determining the facts available on which it relies. Indeed, the Statement of Administrative Action explains with respect to U.S. anti-dumping laws governing the use of facts available following the Uruguay Rounds Agreement:

> In such cases, Commerce {} must make {its} determination{} based on all evidence of record, weighing the record evidence to determine that which is most probative of the issue under consideration. The agenc{y} will be required,

[114] Korea Panel Request, para. 9.

> consistent with new section 782(e), to consider information requested from interested parties that: (1) is on the record; (2) was filed within the applicable deadlines; and (3) can be verified.[115]

In fact, under U.S. law, USDOC must determine margins "as accurately as possible."[116] Thus, Korea is not actually arguing that the United States has a rule that USDOC shall not engage in reasoning and evaluation of available facts in pursuit of an accurate margin.

83. Rather, what Korea has done is present theoretical arguments about why USDOC's application of adverse inferences might breach the Anti-Dumping Agreement and SCM Agreement in certain circumstances, without even trying to prove that any sort of alleged unwritten measure contains those elements. Korea's characterization of the obligations under the Anti-Dumping Agreement and the SCM Agreement is effectively the same as its characterization of the alleged unwritten measure it is challenging. The result is an alleged measure that incorporates Korea's legal "standards," which is obviously not the subject of some adopted U.S. policy.

84. Thus, Korea first argues that the Anti-Dumping Agreement and SCM Agreement are breached when an investigating authority deliberately selects information adverse to a producer's interests without having undertaken a comparative evaluation of the evidence on the record.[117] In describing the alleged measure, Korea argues that, when a party fails to cooperate USDOC finds facts that are sufficiently adverse to the interests of the interested party in question based solely on the party's non-cooperation, without any process of reasoning or evaluation to determine whether these facts reasonably replace the missing information or lead to an accurate determination, and without consideration of the specific reasons that led to the finding of non-cooperation.[118] Thus, Korea has set out an alleged standard for a WTO breach, and then attempts to incorporate a failure to meet that standard as actual elements of the alleged U.S. measure. As we have noted, however, in presenting its arguments on the existence of the measure, Korea does not even attempt to actually prove that these purported elements are part of some alleged unwritten measure. Nor could Korea do so, because it finds no support in the record of this dispute.

85. As an analogy, consider an obligation to provide due process in criminal proceedings. A normal case would identify a measure, perhaps a rule that no defendant in the jurisdiction shall

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[115] Statement of Administrative A Statement of Administrative Action accompanying the Uruguay Round Agreements Act (SAA), p. 869 (Exhibit USA-97).

[116] *Yangzhou Bestpak Gifts & Crafts Co., v. United States*, 2012-1312, p. 15 (Fed. Cir. 2013) (Exhibit USA-98).

[117] *See* Korea FWS, para. 1005.

[118] *See* Korea SWS, para. 368.

be permitted to testify in her own defense. The case would then argue that due process requires the right of criminal defendants to testify in their own defense, and in this way establish a breach.

86. But the proper analogy for Korea's claim would be if the litigant challenged an unwritten rule that courts shall not provide due process. Of course, there is no actual rule prohibiting the provision of due process. Nor can Korea point to a rule analogous to the prohibition of testimony or any other discrete rule. Rather, Korea's argument, applied to this hypothetical, would put a list of cases in front of the court and claim that the court's procedural decisions—although different from case to case and even within a single case—violated the defendant's due process in all of them.

87. Thus, Korea effectively states that the covered agreements require a reasoned evaluation and the United States maintains a measure that USDOC shall not engage in reasoned evaluations. Korea has not tried to show that the United States has actually adopted a rule that requires USDOC to refrain from reasoning. Rather, Korea argues that, by looking at USDOC's determinations, one should conclude that USDOC's selections of facts available in various specific cases are unreasonable. In other words, these are legal arguments masquerading as supposed elements of an alleged unwritten measure.

88. Because Korea has incorporated its legal arguments into its description of the alleged measure, the existence of the unwritten measure inquiry and the breach inquiry have effectively collapsed. As a result, Korea's arguments regarding breach focus entirely on what USDOC allegedly ***does***—that is, how USDOC allegedly acts, which would normally go to the existence of an alleged measure—rather than on why a measure supposedly already established as existing, breaches WTO obligations.[119]

89. There are additional problems with the legal arguments incorporated as the additional elements of the alleged unwritten measure. In particular, the additional elements are inherently fact-specific concepts not amenable to an as such challenge. Whether inferences can "reasonably be drawn"[120] and whether selected "facts are the best information available in the particular circumstances"[121] are inherently fact-dependent questions that must be answered on a case-by-case basis. USDOC's selection of facts available, including when based on adverse inferences, differs not just from one case to another, but from one issue in a case to another issue in that same case. Such choices are fact-specific.

90. This point is demonstrated by Korea's need to dive into the specific facts of specific cases. It tries to do a "statistical" analysis. But because the additional elements are legal characterizations, they are not susceptible to objective yes/no coding. Thus, this statistical

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[119] *See* Korea FWS, paras. 1009-1032.

[120] Korea FWS, para. 880. *See also, e.g.*, Korea Oral Statement at First Panel Meeting, para. 141.

[121] Korea FWS, para. 880. *See also, e.g.*, Korea Oral Statement at First Panel Meeting, para. 141.

approach really just tracks whether adverse inferences are adopted and whether non-cooperation is present, which as discussed above, does not address the alleged measure at issue. Korea asserts that USDOC applies adverse inferences "in a mechanistic manner solely based on the finding that the 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."[122] But the unsupported, conclusory nature of this assertion only underscores the point: its veracity cannot actually be assessed without a legal evaluation of every relevant issue in every one of the cases on an issue-by-issue basis. To put a fine point on it, this unsupported assertion is in no way a statistical analysis.

91. This point is driven home even further by Korea's "substantive" analysis, which selects 12 cases and discusses the facts of each, before arguing that each set of facts supports an alleged breach. Korea itself states that a review of the issues and decisions memoranda in these 12 cases is necessary to allow the Panel to assess its claim.[123] In truth, it would allow the Panel to assess 12 as applied claims that have not been brought and nothing more. Again, this reveals that the way Korea formulated the unwritten measure and its claim is inherently fact-specific and incompatible with an as such challenge.

92. To summarize, Korea has essentially taken as applied legal reasoning and attempted to re-cast it as elements of an unwritten U.S. measure subject to an as such claim. The result is incoherent and meritless.

C. Korea's "Statistical" Analysis

93. The United States recalls that Korea's "statistical" analysis is invalid because it is flawed in its very conception. Any demonstration of what automatically occurs whenever a party fails to cooperate would have to start with a universe of cases defined by the presence of non-cooperation. Only by analyzing that data set could one validly draw conclusions about what occurs whenever a party fails to cooperate.

94. Korea does not do this. Instead, Korea starts with cases in which USDOC adopted adverse inferences. At best, this allows one to draw conclusions about what occurs whenever USDOC draws adverse inferences. Korea alleges that each of these cases involves non-cooperation in substance. In its futile attempt to respond to the United States, Korea emphasizes that all of the cases on its list involved non-cooperation—which doubles down on the fatal error in logic.[124] At best, Korea's analysis could provide evidence that, whenever USDOC draws adverse inferences, there is always some sort of non-cooperation in substance. This would

[122] Korea FWS, para. 1017.

[123] Korea FWS, para. 1022.

[124] Korea SWS, para. 412.

hardly be surprising, as U.S. law only affords USDOC the discretion to adopt adverse inferences when it finds that an interested party has failed to cooperate to the best of its ability.

95. But the presence of non-cooperation in cases of adverse inferences, as a logical matter, allows no assumptions that the presence of non-cooperation automatically leads to adverse inferences. This is no different than claiming that, if one can show that all spiders are animals, then one can also assume that all animals are spiders. In other words, Korea's exercise is backwards and therefore invalid. (Of course, as discussed above, even if Korea could establish automaticity between non-cooperation and adoption of adverse inferences—and, to be clear, it has not—this still would be insufficient to establish the existence of the alleged unwritten measure because it ignores the additional elements of that alleged unwritten measure.)

D. USDOC Does Not Abandon All Reasoning and Evaluation, and Instead Select Facts Based Solely on the Adverse Inference, Whenever an Interested Party Fails to Cooperate.

96. Setting aside the incoherence and inconsistencies in the unwritten measure alleged by Korea and its arguments in support thereof, it is clear that, if USDOC ever engages in reasoning and evaluation, and relies on more than just the adverse inference, in selecting facts available on which to rely, Korea's claim fails. Korea's as such claim, therefore, fails because Korea is wrong that, whenever there is non-cooperation, USDOC abandons all reasoning and evaluation, and instead selects facts based solely on an adverse inference.

97. If that were true, then in selecting subsidization rates for various subsidy programs with respect to a particular non-cooperative respondent, USDOC would select the same subsidization rate for every program. According to Korea, once the respondent failed to cooperate the sole consideration was the adverse inference. However, the evidence proves this is not what occurs. Rather, because USDOC engages in reasoning and considers far more than just the adverse inference, the record shows that USDOC often adopts different subsidization rates for different programs.

98. For example, in *Certain Uncoated Paper from China*, USDOC made non-cooperation findings warranting adverse inferences regarding, *inter alia*, Provision of Calcium Carbonate for LTAR (less than adequate remuneration) and Provision of Caustic Soda for LTAR.[125] According to Korea, an unwritten measure required USDOC at that point to cease all reasoning and instead focus solely on selecting a "sufficiently adverse" rate. The rate for each program would be identical if the adverse inference were the sole basis for selection of the facts, as Korea contends. However, because Korea's case is incorrect, this is not what occurred. Instead, USDOC engaged

[125] *Certain Uncoated Paper from China*, Issues and Decision Memorandum (January 8, 2016), pp. 19-20, 24-30 (Exhibit USA-93).

in extensive reasoning, ultimately arriving at a subsidy rate of 0.74 percent for Provision of Calcium Carbonate for LTAR and 0.37 percent for Provision of Caustic Soda for LTAR.[126]

99. There are also numerous examples in which USDOC adopted adverse inferences with respect to some issues in a case, but not others, with respect to the same non-cooperative respondent. This too shows that USDOC engages in reasoning and evaluation when a party has failed to cooperate to the best of its ability.

100. For example, the United States previously raised *Stainless Steel Bar from Italy* in arguing that non-cooperation does not automatically mean the adoption of adverse inferences. Korea argues that the United States was "simply incorrect" because "USDOC actually *applied* AFA in that proceeding."[127] What Korea ignores is that, on the issue cited by the United States, USDOC did *not* rely on adverse inferences.[128] Korea points to a different issue in that case, involving the same non-cooperative respondent, to establish that USDOC did actually apply adverse inferences.[129] But if Korea's contentions were accurate, USDOC would have applied adverse inferences to every aspect of that respondent's calculation. The fact that it opted not to rely on adverse inferences for one issue, while doing so for another, is evidence that USDOC does not just blindly choose adverse inferences whenever it encounters non-cooperation. In other words, Korea's story about one door closing and another one opening is wrong.

101. As another example, consider the case in which USDOC is selecting from various potential replacement margins. In *Certain Uncoated Paper from Indonesia*,[130] USDOC resorted to adverse inferences for two respondents that failed to respond to USDOC's questionnaire. It considered adopting the highest petition margin of 66.82 percent, which the petitioners advocated.[131] However, it determined that this rate lacked probative value.[132] This was because, USDOC reasoned, the petition rate was much higher than the highest calculated transaction-

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[126] *Certain Uncoated Paper from China*, Issues and Decision Memorandum (January 8, 2016), pp. 19-20, 24-30 (Exhibit USA-93).

[127] Korea SWS, para. 389 (emphasis original).

[128] *See* U.S. Oral Statement, para. 70.

[129] *Compare* Korea SWS, para. 389 and note 512 (citing Exhibit USA-62, pp. 16-18) *with* U.S. Oral Statement.

[130] *Certain Uncoated Paper from Indonesia*, Issues and Decision Memorandum (January 8, 2016), pp. 4-5 (Exhibit USA-95).

[131] *Certain Uncoated Paper from Indonesia*, Issues and Decision Memorandum (January 8, 2016), pp. 4-8 (Exhibit USA-95).

[132] *Certain Uncoated Paper from Indonesia*, Issues and Decision Memorandum (January 8, 2016), pp. 4-8 (Exhibit USA-95).

specific rate calculated for the cooperating respondent.[133] Accordingly, USDOC instead adopted a significantly lower rate of 17.39 percent, which was the highest calculated transaction-specific rate of a cooperating respondent.[134]

102. These examples show that, separate from Korea's failure to credibly pursue any coherent as such claim against the lone alleged unwritten measure included in its panel request, an essential substantive aspect of its claim is clearly wrong. Accordingly, Korea's as such claim against an unwritten measure should be rejected.

CONCLUSION

103. This concludes our oral statement. We look forward to answering any questions the Panel may have. Thank you.

[133] *Certain Uncoated Paper from Indonesia*, Issues and Decision Memorandum (January 8, 2016), pp. 7-8 (Exhibit USA-95).

[134] *Certain Uncoated Paper from Indonesia*, Issues and Decision Memorandum (January 8, 2016), pp. 7-8 (Exhibit USA-95).