UNITED STATES – ANTI-DUMPING MEASURES ON CERTAIN OIL COUNTRY TUBULAR GOODS FROM KOREA

(WT/DS488)

OPENING STATEMENT OF THE UNITED STATES OF AMERICA AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

July 20, 2016

Mr. Chairman, members of the Panel,

1. On behalf of the U.S. delegation, I would like to thank the Panel and the Secretariat for your service in this dispute.

2. In our opening statement today, the United States would like to highlight several important issues addressed in the Parties' written submissions. We will first address Korea's claims regarding the viability test set forth in Article 2.2 of the Anti-Dumping Agreement. We will then address a number of Korea's claims regarding the calculation of constructed value (CV) profit by the U.S. Department of Commerce ("Commerce").

3. We will then explain why Commerce's decision to disregard NEXTEEL's export price was not inconsistent with Article 2.3, followed by an explanation of why Commerce's use of calculated costs based on POSCO's records was not inconsistent with Article 2.2.1.1. We will then conclude this opening statement by addressing Korea's claims regarding the procedural obligations in Articles 6 and 12 of the Anti-Dumping Agreement.

4. With respect to each of these issues, Korea has raised claims based on untenable interpretations and applications of the Anti-Dumping Agreement. Rather than advance an argument based on the plain meaning of the applicable provisions, Korea asks this Panel to accept interpretations of WTO rules that have little connection with how they are properly understood in light of their ordinary meaning, read in context, and in light of the object and purpose of the agreements at issue. Our statement today will make plain Korea's legal errors in this respect and provide the Panel with interpretations based on a proper reading of the relevant provisions.

I. Korea's "As Such" and "As Applied" Claims Regarding the So-Called "Viability Test" are Without Merit

5. Korea's challenges of what it refers to as a "viability test" are based on a flawed interpretation of Article 2.2 and a misunderstanding of U.S. law.[1] Today, we briefly present the proper interpretation of the applicable obligations under Article 2.2 and explain how U.S. law does not – contrary to Korea's argument[2] – preclude consideration of low-volume third-country sales.

6. The U.S. First Written Submission presents an interpretive analysis of Article 2.2 that is in accordance with the customary rules of interpretation.[3] As set forth below, Article 2.2 does not require the use of third-country sales to calculate normal value. Where third-country sales are considered, however, Article 2.2 does not preclude consideration of volume in evaluating whether third-country sales are "appropriate" based on the facts of a proceeding. Accordingly, the United States' consideration of volume is consistent with a proper interpretation of Article 2.2.

7. If home-market sales cannot be used to calculate normal value, then Article 2.2 provides, in relevant part, the following:

> the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.[4]

[1] First Written Submission of Korea (Confidential), paras. 52-62 (Dec. 11, 2015) ("Korea FWS").

[2] Korea FWS, paras. 33, 41, 55, 56.

[3] First Written Submission of the United States (Confidential), paras. 40-52 (April 14, 2016) ("U.S. FWS").

[4] Article 2.2, AD Agreement.

8. As Korea itself acknowledges,[5] where the preferred home-market sales cannot be used, Article 2.2 sets no hierarchy as between the secondary sources for calculating normal value: third-country sales or constructed normal value. This interpretive admission is fatal to Korea's claim, for it recognizes that Article 2.2 does not require the use of third-country sales under any circumstances. Third-country sales are one of two equal alternative data sources for calculating normal value; a responding party is not entitled to a particular alternative.

9. Indeed, under Article 2.2, an authority is not required to consider an alternative it will not employ. Rather, because Article 2.2 permits an authority to choose between the alternative methodologies, an investigating authority could simply choose to use constructed normal value to calculate normal value in a given investigation. In such a case, the authority need not even collect third-country sales data.

10. Yet, under Korea's interpretation, an authority would be required to first solicit and receive all information to analyze both constructed normal value and third-country sales before resorting to the use of one of those methodologies.[6] The text does not support Korea's interpretation of Article 2.2, and the Panel should reject it.

11. Where an authority considers the use of third-country sales, Article 2.2 permits their use only where the sale is made "to an appropriate third country, provided that the price is representative." An authority would not breach Article 2.2 if it disregards sales to a third country found not to be "appropriate," and the text does not require an authority to consider any one

[5] Korea FWS, para. 54.

[6] Korea FWS, para. 54.

factor. As described in the U.S. First Written Submission,[7] contrary to Korea's arguments,[8] Article 2.2 likewise does not *preclude* an investigating authority from considering an exporter's volume of sales in determining what is an "appropriate" third country.

12. Footnote 2 of the AD Agreement provides relevant context to the phrase "appropriate third country." Footnote 2 states that sales of the like product in the domestic market "shall normally be considered a sufficient quantity for the determination of the normal value if such sales constitute 5 per cent or more of the sales of the product under consideration to the importing Member."[9] The general rule of footnote 2 is intended to ensure that sales prices used for normal value are representative, and not an aberration. Footnote 2 recognizes that sales made at a sufficient volume are normally necessary to provide for a proper comparison. The reference in footnote 2 to volume thus provides useful guidance to an authority if it is evaluating what constitutes an "appropriate third country."

13. The arguments raised in Korea's submission confuse the relevance of footnote 2 in interpreting Article 2.2.[10] Under Korea's logic, while the text recognizes that volume is a relevant factor when considering whether the volume of home-market sales (the preferred data source) is of sufficient magnitude to provide for a proper comparison, volume may not even be considered by an authority when evaluating a secondary data source.[11] That is, under the general rule of Article 2, an authority would be required *not* to use the preferred home-market sales if

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

[8] Korea FWS, para. 57.

[9] Footnote 2, AD Agreement.

[10] Korea FWS, para. 57.

[11] Korea FWS, para. 57.

those sales constitute less than 5 percent of total sales, but the authority would be *required* to use third-country market sales of less than 5 percent.

14. Korea's interpretation is supported by neither logic nor the AD Agreement. To accept Korea's interpretation would distort the hierarchy that *does* exist in Article 2 by requiring the use of low-volume third-country sales where a comparable percentage of *home-market* sales exist but may not be used. Such an interpretation is not supported by the text or context of Article 2.2. Just as the volume of sales may be considered pursuant to footnote 2 to determine whether to use the preferred data source of home-market sales, volume can be considered when evaluating whether third-country sales are "appropriate" within the meaning of Article 2.2.

15. Even aside from Korea's flawed interpretation of Article 2.2, its "as such" claim also fails because it is premised on a misinterpretation of U.S. law. Korea argues that the viability test "prohibits the consideration" of third-country sales that account for less than 5 percent of U.S. sales.[12] But Korea has not demonstrated that the challenged measure precludes the United States from taking WTO-consistent action. The meaning of a challenged measure must be determined according to the domestic legal principles of the Member maintaining the measure.[13] In the United States, the interpretation of a regulation must begin with the ordinary meaning of the text.[14] The applicable U.S. regulation requires that sales to a third country must be of a "sufficient quantity," and states:

> "sufficient quantity" normally means that the aggregate quantity (or, if quantity is not appropriate, value) of the foreign like product sold by an exporter or producer

[12] Korea FWS, para. 56.

[13] *US – Countervailing and Anti-Dumping Measures (China) (Panel)*, para. 7.163.

[14] *US – Countervailing and Anti-Dumping Measures (China) (Panel)*, para. 7.163.

> in a country is 5 percent or more of the aggregate quantity (or value) of its sales of the subject merchandise to the United States.[15]

16. Contrary to Korea's argument, through the use of the term "normally," the regulation does *not* require Commerce to disqualify third-country sales that constitute less than five percent of sales to the United States. That is, Commerce under its regulation is free to consider the complete factual record when determining whether a third country is appropriate for the calculation of normal value, even where third-country sales constitute less than 5 percent of sales to the United States. Accordingly, Korea has not established that U.S. law requires action that would, even under its theory, result in a breach of Article 2.2.

II. Korea's Claim Regarding the Calculation of CV Profit is Without Merit

17. The United States will now address a number of Korea's claims regarding the Commerce Department's calculation of CV profit.

A. Korea Has Failed to Establish that Commerce Acted Inconsistently with the Chapeau of Article 2.2.2

18. At the beginning of the Korea OCTG investigation, Korean respondents – HYSCO and NEXTEEL – informed the Commerce Department in writing that they would not be reporting sales of the like product in the ordinary course of trade in the domestic or third-country markets. Both respondents told Commerce that such sales do not permit for a proper comparison because of the low volume of OCTG sales in Korea and in third countries.[16] Commerce subsequently verified respondents' declarations[17] and constructed normal value based on the cost of

[15] 19 C.F.R. § 351.404(b)(2) (Exhibit KOR-57).

[16] HYSCO Notification of Non-Viable Comparison Market (Exhibit USA-04); NEXTEEL Notification of Non-Viable Comparison Market (Exhibit USA-05).

[17] *See* HYSCO Sales Verification Report, pp. 17-21 (Exhibit USA-08); NEXTEEL Sales Verification Report, pp. 19-21 (Exhibit USA-09).

production plus a reasonable amount for SG&A costs and for profit consistent with the obligations in Article 2.2.[18]

19. Article 2.2.2 lists four methods for the calculation of CV profit – a preferred method and three alternative methods. The preferred method is to calculate CV profit based on actual data pertaining to production and sales in the ordinary course of trade of the like product by a respondent. When CV profit cannot be calculated using the preferred method, an investigating authority may use one of three alternative methods.

20. In this investigation, Commerce found that, "absent a viable home or third-country market," it could not calculate CV profit based on the preferred method and had to determine CV profit based on an alternative method.[19]

21. Commerce's conclusion was consistent with the requirements of Article 2.2, including Article 2.2.2, because when sales data do not permit a proper comparison under Article 2.2 for purposes of calculating normal value, such data should not be considered under Article 2.2.2 for purposes of calculating profit for constructed normal value.

22. Specifically, the plain language of Article 2.2 does not permit the use of sales data where such data do not permit a proper comparison. Article 2.2.2 is a subparagraph of Article 2.2. The obligation in Article 2.2.2 relating to determining costs for purposes of Article 2.2 thus should be construed in a manner that respects and supports the obligations in Article 2.2. The obligation of Article 2.2.2 that "profit shall be based on actual data" should not be read then as a strict

[18] Final Decision Memorandum, p. 14 (Exhibit KOR-21).

[19] Final Decision Memorandum, p. 14 (Exhibit KOR-21).

requirement to *use* actual data in a circumstance in which that data has been deemed inappropriate for purposes of calculating normal value generally under Article 2.2.

23. So when an investigating authority finds pursuant to Article 2.2 that normal value should not be based on sales data – as is the case when there is no viable domestic or third-country market – so too amounts for CV profit, a component of constructed normal value, should not be calculated based on the profit associated with this data under the preferred method.

24. For this reason, the United States did not act inconsistently with the obligations of Articles 2.2 and 2.2.2 when Commerce determined that CV profit could not be calculated based on the preferred method given neither HYSCO nor NEXTEEL had a viable domestic or third-country market during the period of investigation.

B. Commerce's Definition of the "Same General Category of Products" Is Consistent with Article 2.2.2, subparagraphs (i) and (iii), of the AD Agreement

25. When an investigating authority cannot calculate CV profit based on the preferred method, the alternative method for CV profit provided for in Article 2.2.2, subparagraph (i), indicates that profit may be determined on the basis of the actual amounts incurred and realized by respondents in respect of production and sales in the domestic market of the "same general category of products."

26. Korea and the United States do not dispute that the phrase "general category of products" usually should be defined as a category of products broader than the category of like products in the domestic market.[20]

27. That said, it is indisputable that Commerce defined the "same general category of products" in the Korea OCTG investigation more broadly than the "like product" so as to include not only OCTG subject to the investigation, but also drill pipes and OCTG not subject to the investigation, such as stainless steel tubular products.[21]

28. Commerce in its final determination provided an extensive explanation of the reasons why it defined the "same general category of products" in this manner as well as a reasoned and adequate explanation as to why it decided to exclude line pipe and standard pipe,[22] the pipe that Korea believes should be included in this definition.

29. Korea has failed to show why Commerce was wrong.

30. For example, Commerce found that the chemical, physical, and mechanical characteristics for OCTG differ significantly from the physical characteristics for line pipe or standard pipe.[23] Even taking into account the arguments Korea made this morning, many of which were post hoc, Korea has failed to demonstrate that this finding is wrong.

[20] *See* Korea FWS, para. 83, and U.S. FWS, para. 95.

[21] Final Decision Memorandum, p. 19 (Exhibit KOR-21).

[22] *See* U.S. FWS, paras. 98-102.

[23] Final Decision Memorandum, pp.16-17 (Exhibit KOR-21).

31. Commerce also found that quality standards, testing, and certification processes for OCTG differ significantly from the use and testing processes for line pipe or standard pipe.[24] Korea has failed to demonstrate that that this finding is wrong.

32. Commerce found that the steel grade used to produce OCTG differs significantly from the steel grade used to produce line pipe or standard pipe.[25] Korea has failed to demonstrate that this finding is wrong.

33. In fact, none of the arguments advanced by Korea with respect to the definition of the "same general category of products" provides a plausible alternative explanation of the evidence Commerce examined and used to reach its final determination.[26]

34. Because Korea has failed to make out its claims, the Panel should find that the United States did not act inconsistently with Article 2.2.2, subparagraph (i),[27] with respect to Commerce's definition of the "general category of products" in the Korea OCTG investigation.

C. Commerce's Decision Not to Apply a Profit Cap Was Consistent with Article 2.2.2(iii) of the AD Agreement

35. Since the information in this investigation did not otherwise permit Commerce to calculate CV profit on the basis of the preferred method, or the alternative methods provided for in Article 2.2.2, subparagraphs (i) or (ii),[28] Commerce had just one option left: It had to

[24] Final Decision Memorandum, p. 18 (Exhibit KOR-21).

[25] Final Decision Memorandum, p. 17 (Exhibit KOR-21).

[26] *See* U.S. FWS, paras. 103-110.

[27] For the same reasons, the Panel should also find that the United States provided a reasoned and adequate explanation for its definition of "products of the same general category" for purposes of Article 2.2.2(iii). U.S. FWS, 110, n.157.

[28] *See* U.S. FWS, paras. 112-114.

calculate CV profit on the basis of an alternative method as provided for in Article 2.2.2, subparagraph (iii), or "any other reasonable method."

36. Korea argues that when an investigating authority opts to base CV profit on "any other reasonable method," it must calculate and apply a profit cap. But there did not exist in the record of this investigation information that would allow Commerce to calculate and apply such a cap.

37. Korea argues that the lack of necessary information does not matter; Commerce still has to cap any profit amounts it calculates pursuant to subparagraph (iii). But Korea does not explain *how* Commerce should calculate this cap other than to assert that Commerce should have used profit data for products *not* included in the "products of the same general category." As the United States has explained, Korea's position regarding the definition of "products of the same general category" is untenable.

38. In point of fact, the answer lies in the ordinary meaning of Article 2.2.2, subparagraph (iii), when read in context with the obligations in Article 2.2; namely, when an investigating authority constructs normal value, it shall include "a reasonable amount for . . . profits."

39. When an investigating authority cannot calculate a reasonable amount for profits on the basis of the preferred method, the authority "may" determine CV profit on the basis of one of the three alternative methods.

40. When there is sufficient information in the record to calculate CV profit on the basis of more than one of the three alternative methods, an investigating authority may select which method it considers most appropriate. There is no hierarchy among the three alternative methods.

41. But when the information is only sufficient to calculate CV profit on the basis of just one of the alternative methods, there is no choice: The investigating authority will have to calculate CV profit on the basis of the only alternative available.

42. When the only alternative method available is the "other reasonable method" provided for under subparagraph (iii), the inability to separately calculate a profit cap because of an absence of information does not, as a consequence, lead to the conclusion that a reasonable method cannot be used. Where data exists to calculate the cap, the amount determined by a reasonable method is limited. But where data does not exist to calculate the cap, the proviso is simply not operative; the investigating authority is still bound to use a reasonable method to calculate a reasonable amount for profits.

43. The language of subparagraph (iii) itself, by linking the cap to "the profit normally realized by other exporters or producers," foresees circumstances in which the data needed to calculate the cap may not exist, including, as is the case here, where there is no profit information regarding sales by other exporters or producers of products of the same general category in the domestic market.

44. In the underlying investigation, Commerce reviewed the information in the record and correctly concluded that it did not include data that would allow the calculation of a profit cap. On that basis, Commerce correctly calculated the amounts for profit based on the information before it.

D. Commerce's Calculation of CV Profit on the Basis of the Audited Profit of an OCTG Producer is Consistent with Article 2.2.2(iii)

45. In this investigation, the information available to calculate CV profit pursuant to the "other reasonable method" provided for in Article 2.2.2, subparagraph (iii), consisted of the following: (1) the financial statements for Tenaris, a multinational company that produces and sells OCTG worldwide; (2) profit data from six Korean pipe companies, all of which produced and sold line and standard pipes in addition to OCTG, which was sold primarily in the United States; and (3) profit data from three Indian pipe companies, all of which primarily produced line pipe and standard pipe, and a fourth Indian company that was a processor of OCTG.[29]

46. After an extensive analysis of this information, Commerce chose to calculate CV profit based on Tenaris's financial statement. Commerce provided a reasoned and adequate explanation why the use of the profit margin from Tenaris's financial statement constituted the most reasonable method for the calculation of CV profit, as well as the most appropriate of the three options available.

47. Specifically, with respect to the Tenaris data, Commerce found that:

- Tenaris "is an OCTG producer that sells OCTG in significant quantities, and in virtually every market in which OCTG is sold, . . . [so] its average profit experience is representative of sales of OCTG across a broad range of different geographic markets"; and

[29] Final Decision Memorandum, pp. 20-21 (Exhibit KOR-21).

- Tenaris's "financial statement[] is predominantly of OCTG, [so] it reflects more precisely the profit on products identical to the subject merchandise."[30]

In contrast, the other producers' data did not reflect profit amounts for OCTG or even for the "same general category of products," because the other producers mostly produced line pipe and standard pipe.

48. Korea in its First Written Submission fails to identify a single flaw, mistake, or inaccuracy in Tenaris's financial statement. Korea also fails to explain why profit from Tenaris's OCTG sales do not reasonably reflect CV profit for the same product.

49. Instead, Korea has put together a hodgepodge of arguments, two of which reiterate points about the profit cap, which we have already addressed in this statement, and two of which introduce implausible concepts.

50. The first implausible concept suggested by Korea is the existence of a central interpretative principle emanating from Article 2.1 that overshadows all obligations under the Anti-Dumping Agreement and indicates "that the normal value should be reflective of the respondent's comparable price for a product that is destined for consumption in the exporting country."[31]

51. The Appellate Body has made clear that Article 2.1 is a definitional provision that, "read in isolation, do[es] not impose independent obligations."[32] Although Article 2.1 provides when a

[30] Final Decision Memorandum, p. 20 (Exhibit KOR-21).

[31] Korea FWS, para. 131.

[32] *US – Zeroing (Japan) (AB)*, para. 140.

product is to be considered as being dumped, it does not specify how normal value is to be determined. The determination of normal value is governed by Article 2.2, and Article 2.2 clearly does not restrict normal value as Korea suggests.

52. The second implausible concept suggested by Korea is that a reasonable method to calculate CV profit is ipso facto unreasonable absent a profit cap. Nothing in the language of Article 2.2.2, subparagraph (iii), lends support for Korea's argument. And as the United States just explained, the profit cap proviso should be construed consistently with the structure of Articles 2.2 and 2.2.2, which require first and foremost the calculation of a "reasonable amount" for profits.

53. The arguments advanced by Korea simply do not provide plausible alternative explanations as to why the use of the Tenaris information does not constitute a reasonable method by which to calculate CV profit. Given Commerce provided a reasoned and adequate explanation for why the use of the Tenaris information constitutes a reasonable method to calculate CV profit, the Panel should find that Korea has failed to establish that the United States acted inconsistently with Article 2.2.2 in its determination of CV profit.

III. Commerce's Decision to Disregard NEXTEEL's Export Price Was Not Inconsistent with Article 2.3 of the AD Agreement

54. We turn next to Korea's claim with respect to Article 2.3, and Commerce's decision to disregard NEXTEEL's export price based on a finding of association between NEXTEEL and the U.S. consumer.[33] Korea's interpretive analysis of Article 2.3 relies not on the text of Article

[33] Korea FWS, para. 156-181.

2.3, but rather on a footnote to a different article.[34] But a proper interpretation of Article 2.3 must begin with the text of that provision.

55. Article 2.3 permits an authority to disregard a producer's export price "where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer."[35] In its First Written Submission, Korea seeks to read the term "related" into the text of Article 2.3, equating the interpretation of the term "association" with the term "related" in footnote 11 of the AD Agreement.[36]

56. However, the ordinary meaning of the term "association" when read in context does not support Korea's interpretation. The meaning of "association" is "the action of joining or uniting for a common purpose; the state of being so joined,"[37] a definition that could include a broad range of commercial relationships. Guidance on the types of relationships contemplated can be drawn from the parallel treatment in Article 2.3 of "association" and "compensatory arrangement," two concepts that are suggestive of relationships where a transaction price is not reflective of a transaction made at arms-length. Article 2.3 permits an authority to disregard prices from a transaction that involves two companies that have joined together for a common purpose.

[34] Korea FWS, para. 163.

[35] Article 2.3, AD Agreement.

[36] Korea FWS, para. 165.

[37] *New Shorter Oxford English Dictionary*, Volume 1, p. 132 (Exhibit US-16).

57. Further interpretive guidance is provided by the term "independent buyer." Under Article 2.3, where a price is unreliable "because of association," an authority may construct an export price based on the price to an "independent buyer." An associated buyer is thus informed by what it is not: an independent buyer. The dictionary definition of "independent" is "not subject to the authority or control of any person, country; free to act as one pleases, autonomous."[38] An independent buyer has an objective of maximizing profits, a fundamentally different objective than exists in a transaction between two associated entities working towards a "common purpose."

58. Korea's interpretive arguments are unavailing. First, Korea's interpretation of "association" relies heavily on the definition of the term "related" found in footnote 11.[39] Korea asserts that "Footnote 11 of the Anti-Dumping Agreement, when applied to interpret the term 'association' within the meaning of Article 2.3, makes it clear that having 'control' means being in a position to exercise 'restraint' or 'direction.'"[40] But the term "control" does not appear in Article 2.3, and footnote 11 defines a different term in a different article of the AD Agreement. Article 2.3 refers to an "association" between the exporter and importer, while footnote 11 defines the term "related," which does not appear in Article 2.3. Korea's reliance on footnote 11 is misplaced.

59. Second, Korea argues that "Article 2.3 requires investigating authorities to provide a reasoned and adequate explanation regarding the basis of its finding that an association involving

[38] *New Shorter Oxford English Dictionary*, Volume 1, p. 1346 (Exhibit USA-16).

[39] Korea FWS, paras. 163-167.

[40] Korea FWS, para. 165.

the exporter results in export prices being unreliable."[41] The text does not support Korea's interpretation, which would impose new obligations on an authority that are not based in the text. Where an authority makes a finding of association, Article 2.3 does not require an independent assessment or determination of price reliability. Rather, the article requires only that such prices appear to be unreliable on the basis of the nature of the relationship. The phrase "unreliable *because of* association" draws a direct link between the relationship of the entities and the reliability of the prices. The authority can understand the prices to be unreliable as a consequence of the relationship; under Article 2.3, it is the relationship that provides the appearance of the unreliable nature of the prices.

60. In the Korea OCTG investigation, Commerce made detailed factual findings with respect to the relationships between NEXTEEL, POSCO and Customer.[42] We refer the Panel to our discussion in the U.S. First Written Submission at paragraphs 160-174. As seen in Commerce's final determination on association, the record facts supported a finding that the relationship between NEXTEEL and the U.S. Customer called into question the reliability of the export prices,[43] and Commerce appropriately utilized the first sale to an independent buyer of OCTG in the United States to calculate export price.

[41] Korea FWS, para. 177.

[42] *See* Final Decision Memorandum (Exhibit KOR-21) and USDOC Affiliation Memorandum (Exhibit KOR-43) (BCI).

[43] *See* Final Decision Memorandum (Exhibit KOR-21) and USDOC Affiliation Memorandum (Exhibit KOR-43) (BCI).

IV. Commerce's Use of Calculated Costs Based on NEXTEEL's Supplier's Records Was Not Inconsistent with Article 2.2.1.1 of the AD Agreement

61. We turn next to Korea's claim that Commerce's use of calculated costs, rather than the actual costs paid by NEXTEEL to POSCO, was inconsistent with Article 2.2.1.1. Article 2.2.1.1 provides:

> For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration.

62. Article 2.2.1.1 contains a general rule that costs are to be calculated on the basis of the records kept by the producer, but the obligation is qualified by the use of "normally." The inclusion of "normally" allows an authority to depart from costs based on the producer's records where the authority provides a reasoned explanation. The Appellate Body has observed that "the use of the term 'normally' …indicates that the rule…admits of derogation under certain circumstances."[44] The panel in *China – Broiler Products* applied this interpretation to Article 2.2.1.1, properly recognizing that an authority may derogate from the general rule to use a respondent's books and records if the authority justifies its decision on the record of the investigation.[45] The question for the Panel is whether Commerce provided a reasoned explanation for its decision to depart from NEXTEEL's books and records for certain material inputs.

63. Commerce's final determination satisfied the requirements of Article 2.2.1.1. Commerce's final determination and accompanying memos explained in great detail the

[44] *US – Clove Cigarettes (AB)*, para. 273.

[45] *China- Broiler Products (Panel)*, para. 7.161.

interconnected relationship between NEXTEEL and its supplier POSCO.[46] Having made a determination of affiliation, Commerce then undertook a comparison between POSCO's transfer prices to NEXTEEL and both POSCO's cost of production and POSCO's prices sold to unaffiliated customers. Based on that comparative analysis, Commerce determined it was appropriate to utilize the weighted average market price of POSCO's sales to unaffiliated customers. The data used by Commerce came from the same input supplier – POSCO – and was for sales of the same inputs purchased by NEXTEEL. Korea has not demonstrated that Commerce's decision to depart from the general rule, which is permissible under the plain language of Article 2.2.1.1, was inconsistent with that provision.

V. Commerce in the Korea OCTG Investigation Met All Disclosure and Participatory Requirements under the AD Agreement

64. Our last argument addresses various claims by Korea about the procedural obligations in Articles 6 and 12 of the Anti-Dumping Agreement.

65. Korea argues that Commerce did not do enough to ensure that respondents had ample opportunity to defend their interests; that Commerce did not disclose all the essential facts forming the basis for its decision to apply definitive measures; or that Commerce's notice did not contain all relevant information on matters of fact and law and the reasons that lead to the imposition of final measures.

66. First, contrary to Korea's arguments, the respondents were on notice that Commerce might rely on Tenaris's profit margin *before* Commerce's preliminary determination in this

[46] *See* Final Decision Memorandum (Exhibit KOR-21) and USDOC Affiliation Memorandum (Exhibit KOR-43) (BCI).

investigation. Specifically, before Commerce published its preliminary determination, U.S. petitioners placed information concerning Tenaris's profit margin, and other company-specific information related to Tenaris, on the record,[47] and both HYSCO and NEXTEEL had the opportunity to, and did, argue against the use of this information.[48]

67. U.S. petitioners responded to HYSCO's and NEXTEEL's initial arguments,[49] and the Korean respondents then submitted additional comments – again before the preliminary determination – in which they advocated that Commerce should not use Tenaris's information to calculate CV profit.[50]

68. In the end, Commerce calculated CV profit for purposes of the preliminary determination on the basis of other information. But a preliminary determination is just that – a *preliminary* determination. In fact, Commerce highlighted in this determination "that after the preliminary determination, [it] intend[ed] to continue to explore other possible options for CV profit for both respondents."[51]

69. Less than a week later, Commerce asked NEXTEEL to provide additional information that could be used in the calculation of CV profit. Soon after NEXTEEL responded, U.S.

[47] U.S. Steel CV Profit Submission (January 16, 2014) at Exhibit J (Exhibit KOR-06).

[48] Pre-Preliminary Comments of NEXTEEL, pp. 17-26 (Exhibit USA-10) (**BCI**); Pre-Preliminary Comments of HYSCO, pp. 16-25 (Exhibit USA-11) (**BCI**).

[49] Petitioners' Pre-Preliminary Determination CV Profit Comments (Exhibit USA-12).

[50] Pre-Preliminary Rebuttal Comments of NEXTEEL, pp. 3-10 (Exhibit USA-13); Pre-Preliminary Rebuttal Comments of HYSCO, pp. 3-10 (Exhibit USA-14).

[51] Prelim. Decision Memorandum, p. 22 (Exhibit KOR-05).

petitioners placed additional, pertinent information on the record, including information about Tenaris's profit margin.

70. Now, before addressing Korea's arguments further, it is important to recognize how little difference there is between the information about Tenaris's profit margin placed on the record before Commerce's preliminary determination and the information about Tenaris's profit margin placed on the record afterwards. Before the preliminary determination, Tenaris's profit margin was reported to be 23 percent; after the preliminary determination, it was more accurately reported for the period of investigation to be 26.11 percent, a difference of a little over three percentage points.

71. None of the key record facts concerning Tenaris changed: it still was a multinational company that produced and sold OCTG worldwide in significant quantities and, of course, unlike other options before Commerce, its profits were still derived predominantly from sales of OCTG.

72. So every argument that the Korean respondents could have made about Tenaris after Commerce's preliminary determination, they could have made before that determination.

73. And they did: For example, both HYSCO's pre-preliminary comments and its post-preliminary case brief argued that Tenaris's profit rate did not represent the profit experience in Korea[52]; both sets of comments argued that Tenaris's operations differed from HYSCO's[53]; and

[52] *Compare* Exhibit USA-24, pp. 42-44, *with* Exhibit USA-14, pp. 4-6.

[53] *Compare* Exhibit USA-24, pp. 45-50, *with* Exhibit USA-14, pp. 6-9.

both sets of comments argued that Tenaris's profit rate exceeded that of other OCTG producers.[54]

74. If you add up the number of times HYSCO filed comments addressing the Tenaris financial information – four; the number of times NEXTEEL filed similar comments – four[55]; add to these figures the opportunity to address the information again during the hearing held by Commerce, which counsel for HYSCO and NEXTEEL did;[56] it is beyond dispute that the Korean respondents had seen all information concerning Tenaris in a timely manner, made multiple presentations regarding it, and understood that Commerce was considering this information in its investigation.

75. Further, an investigating authority's obligation under Article 6.9 is limited to disclosing the essential facts under consideration – *not* its reasoning or conclusions. Commerce thus was not required under Article 6.9 to inform the Korean respondents of whether it would choose or had chosen to accept the Tenaris financial statements submitted by petitioners, nor was Commerce required to inform respondents that it would choose or had chosen to rely upon the information in those statements.

76. The Korean respondents were informed of the Tenaris financial statements at the same time as Commerce: when the U.S. petitioners submitted the data to the record. They knew that

[54] *Compare* Exhibit USA-24, pp. 51-52, *with* Exhibit USA-14, pp. 9-10.

[55] HYSCO filed comments about the Tenaris information twice before the preliminary and twice after, in its case and rebuttal briefs. HYSCO Case Brief, pp. 41-55 (Exhibit USA-24); HYSCO Rebuttal Brief, pp. 34-41 (Exhibit US25). NEXTEEL filed comments about the information twice before Commerce's preliminary determination and twice after, in its case and rebuttal briefs. NEXTEEL Case Brief (Exhibit USA-22); NEXTEEL's Rebuttal Brief (Exhibit USA-23); *see* NEXTEEL's Request to Reject Information (March 27, 2014), pp. 1-2 (Exhibit KOR-20).

[56] OCTG Hearing Transcript (June 26, 2014), pp. 112-122 (Exhibit KOR-32).

Commerce was still evaluating CV profit sources and that U.S. petitioners had introduced the financial statements for that specific purpose. And respondents were able to address and respond to all of the Tenaris information in a timely manner.

77. Finally, as discussed in our arguments concerning CV profit, consistent with its obligation under Article 12.2.2, Commerce provided in its final determination a thorough explanation as to why the Tenaris information was the best available option for purposes of the CV profit calculation given Tenaris's OCTG production, volume of sales, and customer base.

78. Korea's claims under Articles 6.2, 6.4, 6.9, and 12.2.2 regarding the Tenaris information and Commerce's public notice, which included the reasons for its acceptance of this information and its rejection of the Korean respondents' arguments to the contrary, are without merit.

79. The Panel should also dismiss Korea's claims regarding certain communications received by Commerce during the investigation.

80. The communications at issue involve letters sent from politicians, labor unions, and members of the public to the Commerce Department and Office of the President of the United States. These letters expressed the opinions and concerns of the senders about the ongoing Korea OCTG investigation.

81. The United States does not dispute that Commerce added the letters it received from the senders to the record of the Korea OCTG investigation. Nor do we dispute that interested parties received some of these letters after a delay.

82. But to suggest, as Korea does, that this delay means that the United States failed to comply with Articles 6.4 and 6.9 does not reflect a proper interpretation of the requirements of

these provisions, especially since the Korean respondents had an opportunity to address these letters and did so by submitting new information and argument on June 18, 2014,[57] the due date for case briefs, and again on June 26, 2014, after case and rebuttal briefs were filed in this investigation.[58]

83. In sum, Korea fails to explain why the letters that it complains about in its First Written Submission constituted information that was "relevant" to the presentation of the respondents' cases, or how the information would have been "used" by Commerce in its investigation. Korea also fails to demonstrate that the letters it complains about were "essential facts" under consideration that formed the basis for Commerce's decision to apply definitive measures. Korea thus has failed to establish that the actions of the United States with respect to the identified letters were inconsistent with Articles 6.4 and 6.9.

VI. Conclusion

84. As the United States demonstrated in its First Written Submission and again today, Korea has advanced arguments that lack factual support and invited the Panel to invent new obligations that have no basis in the covered agreements. Consequently, for the reasons provided, the United States respectfully requests that the Panel reject Korea's claims that the United States has acted inconsistently with the covered agreements.

85. Mr. Chairman, members of the Panel, this concludes our opening statement. We thank you for your attention and would be pleased to respond to any questions you may have.

[57] Respondents New Factual Information Letter (Exhibit KOR-64).

[58] Respondents Rebuttal Letter (Exhibit KOR-63).