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

(WT/DS488)

EXECUTIVE SUMMARY OF THE OPENING AND CLOSING STATEMENTS OF THE UNITED STATES OF AMERICA AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

July 27, 2016

EXECUTIVE SUMMARY OF U.S. OPENING STATEMENT

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

1. 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. 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. 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.

2. 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 factor.

3. Footnote 2 of the AD Agreement provides relevant context to the phrase "appropriate third country." The general rule of footnote 2 is intended to ensure that sales prices used for normal value are representative, and not an aberration. The reference in footnote 2 to volume thus provides useful guidance to an authority if it is evaluating what constitutes an "appropriate third country." The arguments raised in Korea's submission confuse the relevance of footnote 2 in interpreting Article 2.2. Under Korea's logic, under the general rule of Article 2, an authority would be required *not* to use the preferred home-market sales if 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. Korea's interpretation is supported by neither logic nor the AD Agreement. 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.

4. 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. 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. 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. 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

5. Article 2.2.2 lists four methods for the calculation of constructed value ("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.

6. 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.

7. 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.

8. 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.

9. 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."

10. 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, the pipe that Korea believes should be included in this definition.

11. 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), with respect to Commerce's definition of the "general category of products" in the Korea OCTG investigation.

12. 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), Commerce had just one option left: It had to 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."

13. 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.

14. 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."

15. 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."

16. 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.

17. 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.

18. 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.

19. 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

20. We turn next to Korea's claim with respect to Article 2.3. The meaning of "association" is "the action of joining or uniting for a common purpose; the state of being so joined," a definition that could include a broad range of commercial relationships. Article 2.3 permits an authority to disregard prices from a transaction that involves two companies that have joined together for a common purpose.

21. 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. 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."

22. 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. 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. Second, 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.

IV. Commerce's Use of Calculated Costs Based on NEXTEEL's Supplier's Records

23. We turn next to Korea's claim that Commerce's use of calculated costs was inconsistent with Article 2.2.1.1. 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 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.

24. 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 interconnected relationship between NEXTEEL and its supplier POSCO. 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 analysis, Commerce determined it was appropriate to utilize the weighted average market price of POSCO's sales to unaffiliated customers. 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 Met All Disclosure and Participatory Requirements

25. 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.

26. Contrary to Korea's arguments, the respondents were on notice that Commerce might rely on Tenaris's profit margin *before* Commerce's preliminary determination. Specifically, before Commerce published its preliminary determination, U.S. petitioners placed information concerning Tenaris's profit margin on the record, and both HYSCO and NEXTEEL had the opportunity to, and did, argue against the use of this information.

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

28. 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.

29. 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.

30. The Panel should also dismiss Korea's claims regarding certain communications received by Commerce during the investigation. The United States does not dispute that Commerce added letters it received from politicians, labor unions, and members of the public to the record of the Korea OCTG investigation. Nor do we dispute that interested parties received some of these letters after a delay.

31. 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, and again on June 26, 2014.

32. 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.

EXECUTIVE SUMMARY OF U.S. CLOSING STATEMENT

33. While a panel is required to "'undertake an in-depth examination of whether the explanations given disclose how the investigating authority treated the facts and evidence in the record and whether there was positive evidence before it to support the inferences made and conclusions reached by it,'" the standard of review applicable to a panel reviewing an antidumping duty determination "precludes a panel from engaging in a *de novo* review of the facts of the case 'or substitut[ing] its judgement for that of the competent authorities.'"

34. The arguments advanced by Korea with respect to these issues do not support a finding that Commerce failed to base its determinations on positive evidence or to provide a reasoned and adequate explanation for those determinations. Korea asks the Panel to draw different conclusions from those of Commerce. For example, with respect to the identification of the "same general category of products," Korea asks the Panel to second-guess Commerce's findings with respect to the "performance requirements" and "use and testing requirements" as they relate to OCTG and non-OCTG products. It is not the task of a panel to second-guess the findings of an investigating authority, so this Panel should decline Korea's invitation to engage in such *de novo* review.