

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

(DS539)

**RESPONSES OF THE UNITED STATES
TO THE QUESTIONS FROM THE PANEL
FOLLOWING THE SECOND SUBSTANTIVE MEETING**

March 4, 2020

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USA-2	Respondent Selection for the Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products from the Republic of Korea (July 23, 2015)	BCI
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USA-6	Certain Corrosion-Resistant Steel Products from Korea: Hyundai Steel’s Response to Sections B and C of the Department’s Supplemental Questionnaire (December 2, 2015)	BCI
USA-7	<i>Certain Corrosion-Resistant Steel Products From the Republic of Korea: Affirmative Preliminary Determination of Sales at Less than Fair Value and Postponement of Final Determination</i> , 81 Fed. Reg. 78 (Dep’t of Commerce) (January 4, 2016)	

USA-8	Decision Memorandum for the Preliminary Determination in the Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products from the Republic of Korea (PDM) (December 21, 2015)	
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USA-15	Antidumping Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Supplemental Questionnaire for Sections B-C (January 19, 2016)	BCI

USA-16	Cold-Rolled Steel Flat Products from the Republic of Korea: Hyundai Steel Company Verification of Sales Agenda (April 15, 2016)	
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USA-21	Letter from ABB., Large Power Transformers from the Republic of Korea – Request for Administrative Review (August 29, 2014)	
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	Sections B and C of Hyundai Heavy Industries and Hyundai Corporation USA’s Responses (May 22, 2015)	
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USA-27	Department of Commerce Draft Results of Redetermination Pursuant Court Remand of the Antidumping Duty Administrative Review (January 9, 2018)	BCI
USA-28	Letter from Hyundai: Antidumping Administrative Review of Large Power Transformers from Korea – Response to First Sales Supplemental Questionnaire Section A (Narrative and Attachment SS-17) (May 13, 2015)	BCI
USA-29	Department of Commerce Final Results of Redetermination Pursuant to Court Remand (February 8, 2018)	BCI
USA-30	<i>Initiation of Antidumping and Countervailing Duty Administrative Reviews</i> , 80 Fed. Reg. 60,356 (Dep’t of Commerce) (October 6, 2015)	
USA-31	Antidumping Duty Administrative review of Large Power Transformers from the Republic of Korea: Respondent Selection Memorandum (December 2, 2015)	BCI
USA-32	Antidumping Duty Administrative review of Large Power Transformers from the Republic of Korea: Supplemental Questionnaire for Hyundai Heavy Industries Co., Ltd. and Hyundai Corporation USA’s Questionnaire Responses (October 7, 2016)	BCI
USA-33	Hyundai Heavy Industries Co., Ltd. Case Brief (January 5, 2017)	BCI

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USA-44	Administrative Review of the Antidumping Duty Order on Large Power Transformers from the Republic of Korea; 2015-2016: Hyosung First Sales Supplemental Questionnaire (April 12, 2017)	BCI
USA-45	Large Power Transformers from South Korea: Petitioner’s Comments on Hyosung’s Supplemental Section A Response (June 1, 2017)	BCI
USA-46	Department of Commerce Initial Anti-Dumping Questionnaire Hyosung (January 5, 2017)	
USA-47	Large Power Transformers from South Korea: Response to Petitioner’s Comments (August 11, 2017)	BCI
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USA-54	Countervailing Duty Investigation Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Countervailing Duty Questionnaire (September 24, 2015)	
USA-55	Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products from the Republic of Korea; Verification of POSCO and its Cross-Owned Affiliates' Questionnaire Responses (May 6, 2015)	BCI
USA-56	Decision Memorandum for the Preliminary Negative Determination: Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Republic of Korea (December 15, 2015)	
USA-57	Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Request to Take Action on Certain Barcodes (April 21, 2016)	BCI
USA-58	Results of Redetermination Pursuant to Court Remand in <i>POSCO et al. v. United States</i> (June 6, 2018)	
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USA-61	<i>Viet I-Mei Frozen Foods Co. v. United States</i> (U.S. Court of International Trade 2015)	
USA-62	<i>Final Affirmative Countervailing Duty Determination: Stainless Steel Bar From Italy</i> , 67 Fed. Reg. 3163, Jan. 23, 2002 (<i>Issues & Decision Memorandum</i> (Comment 1))	
USA-63	<i>Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Carbon-Quality Steel Plate from Indonesia</i> , 64 Fed. Reg. 73155, 73162, Dec. 29, 1999	

USA-64	<i>Final Results of Countervailing Duty Administrative Review; Certain In-Shell Pistachios from the Islamic Republic of Iran</i> , 70 Fed. Reg. 54027, Sep. 13, 2005	
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USA-66	<i>Certain Corrosion-Resistant Steel Products from the Republic of Korea</i> , Case Brief on Behalf of United States Steel Corporation (April 22, 2016)	BCI
USA-67	<i>Certain Corrosion-Resistant Steel Products from the Republic of Korea</i> , Rebuttal Brief on Behalf of United States Steel Corporation (April 28, 2016)	BCI
USA-68	<i>Certain Corrosion-Resistant Steel Products from the Republic of Korea</i> , Case Brief of Hyundai Steel Company (April 22, 2016)	BCI
USA-69	<i>Certain Corrosion-Resistant Steel Products from the Republic of Korea</i> , Rebuttal Brief of Hyundai Steel Company (April 28, 2016)	BCI
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USA-71	<i>INTENTIONALLY LEFT BLANK</i>	
USA-72	<i>Certain Cold-Rolled Steel Flat Products from the Republic of Korea</i> , Supplemental Questions for Sections B-C (November 23, 2015)	BCI
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USA-74	19 U.S.C. § 1677b	

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USA-77	19 C.F.R. § 351.302	
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USA-79	19 CFR § 351.102	
USA-80	<i>Large Power Transformers from the Republic of Korea</i> , Issues and Decision Memorandum (July 2, 2012)	
USA-81	<i>Ripe Olives from Spain</i> , Issues and Decision Memorandum (June 11, 2018)	
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USA-85	<i>Certain Cold-Rolled Flat Steel Products from the Russian Federation</i> , Issues and Decision Memorandum (July 20, 2016)	
USA-86	19 U.S.C. § 1677f(a)(3)	
USA-87	19 U.S.C. § 1677(33)	
USA-88	Antidumping Duties; Countervailing Duties; Final Rule, 62 Fed. Reg. 27296 (May 19, 1997)	
USA-89	<i>Aluminum Extrusions from China</i> , Issues and Decision Memorandum (November 21, 2016)	

USA-90	<i>Welded Line Pipe from the Republic of Korea</i> , Issues and Decision Memorandum (October 5, 2015)	
USA-91	<i>Non-Oriented Electrical Steel from Taiwan</i> , Issues and Decision Memorandum (October 6, 2014)	
USA-92	<i>Softwood Lumber from Canada</i> , Issues and Decision Memorandum (November 1, 2017)	
USA-93	<i>Certain Uncoated Paper from China</i> , Issues and Decision Memorandum (January 8, 2016)	
USA-94	<i>Large Residential Washers from Korea</i> , Issues and Decision Memorandum (September 8, 2015)	
USA-95	<i>Certain Uncoated Paper from Indonesia</i> , Issues and Decision Memorandum (January 8, 2016)	
USA-96	List of Duplicative Cases in Exhibit KOR-216	
USA-97	Statement of Administrative Action accompanying the Uruguay Round Agreements Act (SAA), p. 869	
USA-98	<i>Yangzhou Bestpak Gifts & Crafts Co., v. United States</i> , 2012-1312, p. 15 (Fed. Cir. 2013)	
*USA-99	<i>Certain Corrosion-Resistant Steel Products from the Republic of Korea</i> : Rebuttal Brief of Hyundai Steel Company (April 28, 2016)	BCI
USA-100	<i>Certain Hot-Rolled Products from the Netherlands</i> , 81 Fed. Reg. 15,225 (Dep’t of Commerce March 22, 2016) (preliminary LTFV determination)	
USA-101	<i>Certain Hot-Rolled Steel Flat Products From the Republic of Korea</i> , Hyundai Steel’s Rebuttal Brief (July 18, 2016)	BCI
USA-102	<i>Countervailing Duty Investigation, Certain Cold-Rolled Steel Flat Products from the Republic of Korea</i> , Response to Ministerial Error	

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USA-103	Department of Commerce Final Results of Redetermination Pursuant to Court Remand, Second Remand Redetermination (April. 26, 2019)	BCI
USA-104	<i>Administrative Review of the Antidumping Duty Order on Large Power Transformers from the Republic of Korea; 2015-2016: First Sales Supplemental Questionnaire</i> (April 12, 2017)	BCI
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USA-112	Full version of Certain Uncoated Paper from Indonesia (USA-95)	

*Exhibits that are new with this submission begin with Exhibit USA-99.

TABLE OF REPORTS

Short Title	Full Case Title and Citation
<i>US – Carbon Steel (AB)</i>	Appellate Body Report, <i>United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India</i> , WT/DS436/AB/R, adopted 19 December 2014

1 GENERAL QUESTION

Question 48 (Both parties)

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

1. Many of the “as applied” measures Korea has challenged have been replaced by remand redeterminations. It is unclear whether Korea considers that any dispute remains between the United States and Korea, such that it would continue to seek a ruling or recommendation from the Panel regarding these measures. Below the United States provides a summary and the status of the litigation for each of the “as applied” measures.

2. **Corrosion-Resistant Steel (CORE):** The CORE litigation has concluded. At the United States Court of International Trade (“USCIT”), Hyundai Steel challenged USDOC’s final determination and its decision not to apply the “special rule” to Hyundai Steel’s U.S. sales of auto parts and tailor welded blanks (TWBs), and its decision to apply partial facts available to Hyundai Steel’s U.S. sales of auto parts, TWBs, sheet, skelp, and blanks. On January 10, 2018, the USCIT sustained USDOC’s decision not to apply the “special rule” (i.e., not to exempt Hyundai Steel from reporting the section E data) for TWBs and auto parts, but remanded USDOC’s decision not to apply the “special rule” to skelp, sheet, and blanks (though held that as Hyundai failed to submit requested information, USDOC had properly found a gap in the record existed as to TWBs, auto parts, and skelp, sheet, and blanks). On May 11, 2018, USDOC filed its remand.¹ USDOC provided Hyundai Steel with an opportunity to remedy its data deficiencies with respect to sales of skelp, sheet, and blanks. This resolved the issue of USDOC’s reliance on facts available for Hyundai Steel’s sales of skelp, sheet, and blanks. On June 22, 2018, the USCIT sustained USDOC’s remand results. The case was not appealed.

3. **Cold-Rolled Steel – Anti-Dumping Investigation (CRS-AD):** The CRS-AD litigation has concluded. At the USCIT Hyundai Steel challenged USDOC’s determination to apply partial facts available to Hyundai Steel’s freight and warehousing expenses and to certain sales in Hyundai Steel’s control number (CONNUM) reporting, and USDOC’s determination not to grant Hyundai Steel a constructed export price (CEP) offset. On June 28, 2018, the USCIT sustained USDOC’s final determination in part. The USCIT affirmed the use of facts available with adverse inference on Hyundai Steel’s inland freight expenses, but remanded to USDOC for further explanation USDOC’s application of facts available to certain transactions for which Hyundai Steel did not incur the expense, and for those where Hyundai Steel used an unaffiliated freight provider. For Spec C sales, the USCIT remanded USDOC’s margin selection to replace the missing information. On October 17, 2018, USDOC filed its remand redetermination, finding that the use of adverse facts available for U.S. sales for which Hyundai did not incur domestic inland freight was not warranted, but that the use of adverse facts available with respect to transactions where an unaffiliated freight provider was used, was warranted. Additionally,

¹ See Final Results of Redetermination Pursuant to Remand: Antidumping Duty Investigation on *Certain Corrosion-Resistant Steel Products from the Republic of Korea* (May 11, 2018) (Exhibit KOR-26).

Commerce selected the second-highest calculated margin for the Spec C sales, continued to deny a CEP offset, and determined that the ministerial errors did not have any effect on the new calculated margin. On February 26, 2019, the USCIT sustained the USDOC's remand redetermination. The case was not appealed.

4. **Hot-Rolled Steel – Antidumping Investigation (HRS-AD):** The HRS-AD litigation has concluded. Hyundai Steel challenged USDOC's determination to apply adverse facts available regarding Hyundai's home market inland freight, home market warehousing expenses, international freight, marine insurance, and domestic inland freight for U.S. sales, and its determination to deny Hyundai a constructed export price offset. On December 27, 2017, the USCIT denied Hyundai's challenges and sustained USDOC's final determination. The case was not appealed.

5. **Cold-Rolled Steel – CVD (CRS-CVD):** The CRS-CVD litigation at the USCIT has concluded. On March 8, 2018, the USCIT sustained USDOC's application of adverse facts available to POSCO's four unreported cross-owned input suppliers, an unreported facility located in a FEZ, and unreported loans, but remanded to Commerce to reevaluate its selection of subsidy rates. Upon completion of USDOC's remand redetermination, the USCIT sustained USDOC's reconsideration of program specific subsidy rates. These issues were not appealed.

6. **Hot-Rolled Steel – CVD (HRS-CVD):** The HRS-CVD litigation at the USCIT has concluded. On September 11, 2018, the USCIT sustained USDOC's application of adverse facts available to POSCO for the four cross-owned affiliates' unreported inputs, a facility located in a FEZ, and unreported loans, but remanded to USDOC to reevaluate its selection of subsidy rates. Upon completion of USDOC's remand redetermination, the USCIT sustained USDOC's reconsideration of program specific subsidy rates. These issues were not appealed.

7. **Large Power Transformers (POR2):** Litigation on POR2 is currently before the USCIT. ABB (the petitioner) challenged USDOC's final determination, arguing that USDOC should not have determined not to cap Hyundai Heavy Industries (HHI)'s service-related revenues. On October 10, 2017, the USCIT remanded the final results to USDOC in a voluntary remand on the service-related revenues and revenue-capping issue. On February 7, 2018, USDOC filed its remand results finding that HHI failed to cooperate to the best of its ability because it withheld information relating to the service-related revenues and USDOC's revenue capping practice. This is the remand determination specifically challenged by Korea before this Panel. On November 13, 2018, the USCIT sustained in part and remanded in part the remand results, remanding back to USDOC its service-related revenues finding which was based on the use of documents internal to HHI. On April 26, 2019, USDOC filed its second remand results and continued to find that HHI failed to report any service-related revenue in its questionnaire responses, but using external communication documents to adjust the prices of certain SEQUs. On February 19, 2020, the USCIT sustained USDOC's findings as to the service-related revenues. This concludes the USCIT proceedings on the issues related to this dispute. On an unrelated matter, the USCIT remanded to USDOC the application of a circumstance of sale adjustment made on delayed delivery charges. USDOC's third remand is due May 19, 2020.

8. **Large Power Transformers (POR3):** Litigation on POR3 is currently before the United States Courts of Appeals for the Federal Circuit (“USCAFC”). Before the USCIT, HHI challenged USDOC’s application of total adverse facts available based on the four findings challenged before this Panel: (1) HHI’s failure to report service-related revenues separately from gross unit price; (2) HHI’s failure to include the price of a subject “part” in the price for certain home market sales; (3) HHI’s failure to report separately the prices and costs for accessories; and (4) HHI provided systematically selective reporting. On August 14, 2018, the USCIT sustained USDOC’s determinations to rely on the facts available with respect to the first two issues, but remanded the third and fourth issues. On December 13, 2018, USDOC filed its remand results with the USCIT, finding that HHI misreported costs and prices for accessories and its finding that HHI selectively reported information and thus, total adverse facts available was appropriate. On August 2, 2019, the USCIT sustained USDOC’s remand results. On October 3, 2019, HHI appealed the USCIT’s determination to the USCAFC, appealing three of the four issues. HHI did not appeal the USCIT’s determination to sustain USDOC’s remand redetermination as to the relevance of “accessories”. Briefing is not yet complete on this appeal.

9. **Large Power Transformers (POR 4):** Litigation on POR4 is currently before the USCIT. HHI, Hyosung, and ILJIN (a non-selected company subject to the administrative review) challenged USDOC’s final determination. HHI challenged each of the three bases underlying USDOC’s determination to use total facts available, as did Hyosung. ILJIN challenged USDOC’s method of determining the rate assigned to ILJIN (the all others rate). On December 18, 2018, USDOC requested a voluntary remand to address its determination to apply total adverse facts available with respect to both mandatory respondents and to reconsider or further explain assigning the non-selected companies the average rate of the two mandatory respondents. On August 5, 2019, the USCIT remanded multiple issues to USDOC, though it denied the United States’ motion for voluntary remand. The USCIT remanded, with respect to Hyosung, the issue of service-related revenues and USDOC’s reliance on order acknowledgement forms (“OAFs”) in applying its capping methodology; remanded the issue of the sales invoice containing multiple sales; and remanded Hyosung’s failure to report certain price adjustments; and further remanded the decision to apply total adverse facts available. With respect to HHI, the USCIT remanded the “accessories” issue; the adverse inference applied to USDOC’s sustained finding that HHI did not properly report home market prices; the affiliated sales agent issue; and further remanded the decision to apply total adverse facts available. The USCIT deferred the ILJIN issue pending USDOC’s redetermination on remand. On December 19, 2019, USDOC filed its remand results. The parties are awaiting judgment on the remand results.

2 INTERPRETATIVE ISSUES

Question 49 (Both parties)

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

10. Korea repeatedly invokes the title “best information available” as if it is a separate legal obligation or legal standard by which USDOC’s determinations should be assessed. This is erroneous.

11. The substantive obligations in Annex II are set out in the provisions contained in paragraphs 1 through 7. The title of Annex II does not contain a substantive obligation in addition to those contained in the provisions that follow. Further, Article 6.8 of the Anti-Dumping Agreement explicitly states, “{t}he *provisions* of Annex II shall be observed in the application of this paragraph.”² Therefore, Korea is incorrect in asserting that the title of Annex II imposes an obligation on an authority to select “the best information available,” distinct from the actual obligations set out in the text of Annex II.

Question 50 (Korea)

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

Question 51 (Both parties)

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

12. No. The first sentence addresses scenarios in which authorities have to base their findings on information from a secondary source. The second sentence further addresses “such cases.” And the third and final sentence does not contain any obligations regarding the selection of facts available. Therefore, nothing in paragraph 7 sets out an obligation disciplining the selection of facts available, or otherwise, in instances where an investigating authority uses information from a primary source.

Question 52 (Both parties)

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

² Emphasis added.

13. The first sentence of Paragraph 7 of Annex II provides, “{i}f the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they should do so with special circumspection.”³ The AD Agreement does not define “secondary information,” and the issues in this dispute do not require a comprehensive definition. With respect to the issues arising in this dispute, it is sufficient to recognize that secondary information includes information gathered outside the course of the subject investigation or review, including information supplied in the application for the initiation of the investigation.

14. As the Panel notes, in this dispute, Korea is challenging six proceedings. However, Korea is challenging multiple segments of the LPT proceedings. In total, Korea is challenging ten of Commerce’s determinations.

15. Commerce used secondary information to replace missing information in CORE, LPT (3rd review), and LPT (4th review). Specifically, for these three determinations USDOC used rates provided in the petition. USDOC did not use secondary information to replace missing information in CRS (AD), HRS (AD), and LPT (2nd review). Rather, Commerce replaced the missing data with the respondent’s own data.

16. With respect to the missing information in the CRS (CVD) and HRS (CVD) investigations, Commerce used both primary and secondary information to replace missing information. Specifically, where possible, Commerce replaced missing data with subsidy rates calculated for the respondent in the investigation. When this was not possible, Commerce used rates calculated for programs in other proceedings involving subsidies from the government of Korea.

Question 53 (Both parties)

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

17. As an initial matter, the United States notes that this provision in paragraph 7 has important qualifying language; namely, it provides that an investigating authority *should* do so “where practicable.”

18. There is no basis in this language for a “reasonableness” standard. Rather, in providing, where practicable, for checking information from other independent sources, this provision is calling for the use of this other information in assessing the accuracy of the secondary information relied on as facts available. The provision recognizes that there may not be such

³ Paragraph 7 of Annex II of the Antidumping Agreement.

other independent information readily available; as noted, the checking is only called for if practicable.

Question 54 (Both parties)

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

19. There is no exhaustive list of scenarios that would constitute impracticability for purpose of the second sentence of paragraph 7. Such scenarios may include where no independent source at the authority's disposal could possibly reveal the accuracy of the secondary information. Another scenario may be, if it were theoretically possible to use available independent sources to assess the accuracy of secondary information, but such sources are not readily available to the investigating authority or other reasons prevent it from checking such sources. For example, perhaps extensive information from public securities filings could be researched, compiled and analyzed, but doing so would be complicated, time consuming, and not feasible as a practical matter. For the purposes of paragraph 7, this type of extensive exercise would likely be considered not practicable.

Question 55 (United States)

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

20. The last sentence of paragraph 7 states:

It is clear, however, 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.

21. As an initial matter, the United States observes that paragraph 7 does not speak directly to the "purpose" of selecting facts available. Rather it speaks directly to a potential outcome—"a result which is less favourable to the party than if the party did cooperate." In addition, it is clear that nothing in the last sentence of paragraph 7 precludes an investigating authority from considering a party's non-cooperation in selecting replacement facts to reach a determination.

22. With regard to the creation of incentives, one consequence of the last sentence of paragraph 7 is that an investigating authority is not required to select replacement facts in a manner that allows a party to game the system to ensure that the rate determined based on the replacement facts is more favorable than the rate that would have resulted had the party cooperated. If the investigating authority were prevented from taking account of non-cooperation, a party could game the system through selective cooperation, which would mean that, contrary to paragraph 7, it would not be "clear" that non-cooperation could result in an

outcome less favorable than if the party had cooperated.⁴ This means that this sentence recognizes that investigating authorities may draw adverse inferences based on a party's non-cooperation, which will necessarily have the effect, *inter alia*, of incentivizing cooperation. Therefore, if a purpose of selecting facts available were an incentive for cooperation, this certainly would not be inconsistent with paragraph 7 or any other provision of the covered agreements.

Question 56 (Korea)

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

Question 57 (Both parties)

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

23. As an initial matter, the United States notes that paragraph 1 of Annex II does not contain a substantive obligation for an investigating authority to provide a party "reasonable time" to supply information. Rather, it contains a notice provision. Specifically, it states, in relevant part:

The authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry.

Thus, it focuses on the investigating authority making a party aware of the potential consequence of not supplying information within a reasonable time. Accordingly, there is no basis to further elaborate what time period might be considered "reasonable" for purposes of paragraph 1 of Annex II.

24. In any event, "reasonable" is a relative term that depends on the particular factual circumstances of each case. The reasonableness of a particular time period would certainly include the importance of the time limit fixed for questionnaire responses, and the need to ensure the conduct of the investigation in an orderly fashion. Moreover, a WTO Panel's role would not be to conduct its own *de novo* evaluation of the specific facts and circumstances of the conduct of a particular investigation to determine whether a particular response period was reasonable.⁵

⁴ Anti-Dumping Agreement, Annex II, para. 7.

⁵ See Anti-Dumping Agreement, Art. 17.6 ("If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned.").

25. Article 6.1.1 is of only limited use in terms of providing context. As a prior panel found, Article 6.1.1 applies to the initial questionnaire at the outset of an investigation,⁶ and does not apply to other requests for information.⁷

26. Furthermore, Article 6.1.1 provides the period required for replying to the entire initial questionnaire. Where the initial questionnaire is split into multiple parts issued at separate times, response periods to the various parts may need to be aggregated to determine whether at least 30 days were provided. This would further complicate any effort to use the 30-day period in Article 6.1.1 as context for evaluating the reasonableness of a different period for a purpose other than an initial questionnaire. Therefore, while arguably providing some context, the value of Article 6.1.1 to a request that differs from a single, initial questionnaire may be limited.

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

Question 58 (United States)

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

27. As the Panel's question suggests, Korea's "strong rejection" of the suggestion that USDOC provided guidance to Hyundai in the meetings of October 27 and November 24 relies solely on the absence of that guidance in meeting memoranda.⁸ Specifically, Korea mistakenly asserts that if Commerce had provided guidance, that guidance would have been discussed in the memoranda.⁹ Korea's reliance is misplaced. As discussed in the U.S. second written submission, a meeting memorandum is just a record of a meeting, not a summary of everything said at that meeting. This is clear from the relevant U.S. laws and regulations.

28. Under U.S. law, a meeting memorandum need only include "the identity of the persons present at the meeting, the date, time, and place of the meeting, and a summary of the matters discussed or submitted."¹⁰ The Commerce regulations cited by Korea merely state what Commerce's official record as a whole must include, not what a meeting memorandum must

⁶ See *Egypt – Steel Rebar (Panel)*, paras. 7.275-7.279.

⁷ See *Egypt – Steel Rebar (Panel)*, paras. 7.275-7.279, 7.285-7.295.

⁸ Korea SWS, para. 35 and Korea RPQ2.

⁹ Korea SWS, para. 35 and Korea RPQ2.

¹⁰ 19 U.S.C. § 1677f(a)(3) (Exhibit USA-86).

contain.¹¹ Consistent with U.S. law, the meeting memoranda for the meetings on October 27 and November 24 contain the required data.¹² Korea’s inference from the absence of specific guidance in the memoranda rests on a misunderstanding of U.S. law and is therefore, misplaced.

29. With regard to the statement in Korea’s November 2 questionnaire response, it clearly could not have reflected the content of the meeting subsequently held on November 24.

30. Regarding Hyundai’s November 2 characterization of the October 27 meeting, the context of the statement shows that it was self-serving, as it was part of a larger argument by Hyundai to have Commerce reconsider its decision to reject Hyundai’s request to be exempt from providing a Section E response.¹³ Specifically, in responding to Commerce’s request in the Section E that Hyundai revise its reporting of after-service parts, Hyundai responded “{a}lthough the Department has requested sales data for after service auto parts Hyundai Steel continues to believe these sales qualify for the ‘special rule’ under 19 C.F.R § 351.402(c)(2)” and “it remains unclear to Hyundai Steel how the Department reached the conclusions that ‘Hyundai failed to demonstrate, in accordance with 19 C.F.R § 351.402(c)(2), that the value added in the United States is equal to or greater than 65 percent of the imported coil.’”¹⁴ Before requesting “that the Department reconsider its request for these sales data and exclude the data from its analysis,” Hyundai alleges difficulties in reporting service auto parts, and complains about the lack of guidance, which is where the cited text appears.¹⁵ Thus, rather than indicate what guidance Commerce provided in the October 27 meeting, Hyundai’s November 2 statement appears to be just support for an argument Hyundai Steel made for Commerce to reconsider its rejection of Hyundai’s request for exemption.

31. Additionally, the context provided by all of the developments that followed Hyundai’s November 2 statement indicate that Hyundai Steel’s November 2 statement is not an accurate reflection of the totality of the guidance that Commerce provided Hyundai Steel.

32. Following Hyundai Steel’s statement on November 2, Commerce issued three supplemental questionnaires. As the United States has previously noted, the three supplemental

¹¹ See 19 C.F.R. §351.104 (a), Exhibit KOR-233 (stating that an official record of proceedings must contain “government ... memoranda of *ex parte* meetings”).

¹² *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Meeting with Counsel to Hyundai Steel Company (Hyundai) (October 27, 2015) (Exhibit KOR-14); *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Meeting with Counsel to Hyundai Steel Company (November 27, 2015) (Exhibit KOR-16).

¹³ *Certain Corrosion-Resistant Steel Products From Korea: Hyundai Steel’s Response to the Department’s Request for Section E and Additional Sales Data* (2 November 2015), p. 6 (Exhibit KOR-15).

¹⁴ *Certain Corrosion-Resistant Steel Products From Korea: Hyundai Steel’s Response to the Department’s Request for Section E and Additional Sales Data* (2 November 2015), pp. 4-5 (Exhibit KOR-15).

¹⁵ *Certain Corrosion-Resistant Steel Products From Korea: Hyundai Steel’s Response to the Department’s Request for Section E and Additional Sales Data* (2 November 2015), pp. 6-8 (Exhibit KOR-15).

questionnaires provided specific guidance to Hyundai Steel by identifying deficiencies with Hyundai Steel’s responses and providing questions to help Hyundai Steel correct or clarify its responses.

33. USDOC’s Issues and Decision Memorandum provides additional context about events after November 2. With respect to the back forth between Commerce and Hyundai Steel, Commerce explained:

We note that Hyundai is the only party to the proceeding that has access to its records and knowledge how those records are organized. In ex parte meetings, a teleconference and multiple submissions, Hyundai claimed that it was impossible for it to trace those further manufactured sales back to the subject coil. Hyundai first stated that the necessary data would not be available from its affiliates, or if so, difficult to report. When the Department instructed Hyundai to report all of its sales of TWBs and auto parts to unaffiliated processors Hyundai consistently asked the Department how it should collect and present its further manufactured data. Hyundai also pointed to the fact that it was participating in other Department proceedings, which occupy a lot of time. Hyundai then demonstrated that it could report some information in its first supplemental response to section E, and then more in its second response. As noted above, each of these responses was severely deficient. In its third response, Hyundai provided more information that was riddled with inconsistencies and effectively made unsolicited changes to its reporting in its further manufactured cost and in its sales databases.

In light of the Department clearly outlining which sales to report, and the Department’s initial questionnaire containing detailed instructions on what the Department expects with respect to the data, in order to perform its margin calculations in its standard programs, Hyundai was and remains the entity best suited to discern, how best to follow the Department’s reporting requirements. And as a matter of fact, it demonstrated with its submissions, that it in fact was able to access information it previously insisted would not be able to, such as tying TWBs to specific coils. Further, it is not within the purview of the Department to tell Hyundai how its accounting system and overall management system works, and it lies clearly with Hyundai how best to report its further manufactured sales within the Department’s required format.¹⁶

34. Additionally, as the United States has previously discussed, Commerce ultimately rejected Hyundai Steel’s claims of difficulty, finding that Hyundai Steel’s claims were ultimately “discredited” or “inaccurate.”¹⁷ Commerce noted that Hyundai Steel made “a series of

¹⁶ CORE I&D Memo, pp. 15-16 (Exhibit KOR-5).

¹⁷ CORE I&D Memo, pp. 16, 30, and 41 (Exhibit KOR-5).

inaccurate statements with respect to its ability to provide requested information for its further manufactured sales and costs.”¹⁸ The U.S. responses to the Panel’s questions following the first panel meeting of the parties review instances cited by Commerce where Hyundai Steel initially reported to Commerce that providing requested information would be too complicated, too burdensome, or not possible, but subsequently Hyundai Steel was able to provide the requested information.¹⁹

35. At the second Panel meeting, Korea’s counsel took issue with Commerce’s rejection of Hyundai’s claims of difficulty, noting that it was a game of “gotcha,” penalizing Hyundai for its efforts to eventually respond. However, the examples cited by Commerce were not Commerce playing “gotcha.” Rather, they explain that Hyundai’s credibility with respect to reporting difficulties was significantly undermined.

36. Finally, regarding Hyundai’s Section E responses, Commerce concluded, “{t}he record demonstrates that Hyundai has: submitted a series of inaccurate value added calculations with respect to the sales at issue; made claims of difficulty in gathering data which were inaccurate; and submitted Section E responses that were unusable, unreliable, and unverifiable.”²⁰ Korea’s assertions that Commerce failed to provide Hyundai with sufficient guidance do not undermine these findings. Moreover, Korea fails to show how a reasonable unbiased and objective authority could not have made the same findings.

Question 59 (United States)

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

37. Above in the U.S. response to Question 58 the United States addresses the guidance Commerce provided Hyundai in completing a Section E response and Korea’s argument that Hyundai received no guidance in submitting a response. The United States understands this question to be about the guidance that USDOC provided Hyundai regarding the completion of a Section E response prior to Commerce’s request that Hyundai complete a Section E. As the United States explained at the second Panel meeting, while Commerce was considering Hyundai’s request to be exempt from reporting a Section E response, the focus of Commerce’s

¹⁸ CORE I&D Memo, p. 41 (Exhibit KOR-5).

¹⁹ See U.S. RPQ 2(b), paras. 16-21.

²⁰ CORE I&D Memo, p. 41 (Exhibit KOR-5).

work was on helping Hyundai provide a complete and accurate request for exemption and not on providing guidance to Hyundai on how to complete a Section E response.

38. Moreover, Hyundai’s claimed difficulties were not known. Hyundai’s letter from August 17th provides little detail on alleged difficulties, as the focus of the letter is Hyundai’s request for exemption.²¹ Accordingly, Commerce’s efforts were to help Hyundai to provide a complete and accurate request for exemption. Nonetheless, despite Commerce’s efforts, Hyundai failed to provide a complete and accurate request for exemption.

39. As reviewed in Commerce’s Issues and Decision Memorandum, Hyundai’s initial request “did not clearly outline the exact quantities of CORE coil shipped to each of its affiliated and unaffiliated customers, nor did it detail any quantities it sought to exclude at each of the different stages of the further manufacturing process” and “failed to state upfront, what quantities of the intermediate further processed product which incorporates subject CORE (such as skelp or TWBs) were sold at what stage to the first unaffiliated customer/processor, before being re-sold to ultimately be consumed in the manufacture of an automobile.”²²

40. Indeed, the “lack of information made it impossible for the Department to discern how much of its total quantity of subject CORE Hyundai sought to have excluded from reporting, and how much of Hyundai’s shipments of CORE to the United States during the POI Hyundai ultimately intended to report for the Department’s analysis.”²³ Furthermore, “as support for its claim that its sales of further manufactured products met the 65% threshold stipulated in 19 CFR 351.402(c)(2), Hyundai submitted **one** calculation of the value added by its U.S. affiliates using the difference between the average sales price for an automobile (i.e., the merchandise as sold to an affiliated party in the United States) and the average price paid for imported corrosion-resistant steel” by Hyundai.²⁴

41. Despite an “initial request {that} was unclear with respect to which further manufactured sales it wanted excluded,”²⁵ Commerce engaged with Hyundai Steel for nearly two months to clarify Hyundai Steel’s request and to provide Hyundai Steel guidance on the information Commerce required to substantiate Hyundai’s request.²⁶ Specifically, USDOC had an in-person

²¹ *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Notice of Difficulty in Responding to Questionnaire and Request for Alternative Calculation Method by Hyundai Steel (August 17, 2015) (Exhibit KOR-7 (BCI)).

²² CORE I&D Memo, p. 8 (Exhibit KOR-5).

²³ CORE I&D Memo, p. 9 (Exhibit KOR-5).

²⁴ CORE I&D Memo, p. 39 (emphasis added) (Exhibit KOR-5).

²⁵ CORE I&D Memo, p. 8 (Exhibit KOR-5).

²⁶ U.S. FWS, paras. 41-46; U.S. RPQ 2(b), paras. 12-13.

meeting with Hyundai to discuss Hyundai's request;²⁷ issued a request for additional information to Hyundai;²⁸ held a telephone call with Hyundai to provide additional guidance;²⁹ and issued additional written guidance and instructions to Hyundai.³⁰ Moreover, USDOC excused Hyundai from reporting further manufactured sales when the first sale of corrosion-resistant steel to an unaffiliated party was a completed automobile.³¹

42. Despite Commerce's efforts, Hyundai's calculations for TWBs and after-service auto parts remained flawed and Hyundai failed to demonstrate that the products met the 65 percent threshold set forth in 19 CFR 351.402(c)(2). As a result, Commerce instructed Hyundai to report its sales of these two products to unaffiliated parties along with the appropriate databases and instructed Hyundai to provide revised sales reporting and U.S. sales databases to include sales of TWBs and after-service auto parts.³² It was at this point that USDOC's efforts and guidance turned to helping Hyundai complete a Section E response.

Question 60 (Both parties)

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

43. The difference between "each component" and a "product sold" for purposes of this proceeding is that a "product sold" may correspond to an individual sale, but a "product sold" may encompass several "components" with different CONNUMs. We remind the Panel that, as explained in our FWS, the proper reporting of the CONNUMs assigned to each product is crucially important to the dumping calculation, and thus properly reporting the CONNUM

²⁷ *Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Ex Parte Meeting with Hyundai Steel Company (August 21, 2015), p.1 (Exhibit KOR-8).

²⁸ *Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products (CORE) from the Republic of Korea*, Extension to Respond to Sections B through D of the Initial Questionnaire (September 11, 2015), p. 2 (Exhibit USA-3).

²⁹ *Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Teleconference with Hyundai Steel Company (September 14, 2015) (Exhibit KOR-9).

³⁰ *Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products (CORE) from the Republic of Korea*, Additional Guidance on Information Required to Substantiate Hyundai Steel Corporation's Request for Alternative Calculation Method (September 16, 2015), Attachment 1 (Exhibit USA-4).

³¹ *Antidumping Duty Investigation of Corrosion-Resistant Steel Products (CORE) from the Republic of Korea*, Extension to Respond to Sections B through D of the Initial Questionnaire (11 September 2015), p. 2 (Exhibit USA-3).

³² CORE I&D Memo, pp. 38-39 (Exhibit KOR-5).

associated with “each component” that eventually becomes part of the “product sold” is essential.³³

44. USDOC instructed Hyundai Steel to report “all sales of automotive parts, tailor welded blanks (TWBs), and further processed TWB (i.e. after-service parts)” in the original Section E and Further Manufactured Sales questionnaire issued October 15, 2015.³⁴ In its response to USDOC’s original Section E questionnaire, Hyundai Steel explained that certain “products,” contain multiple “components” (i.e., in producing TWBs, Hyundai Steel first slits, shears and/or blanks imported coil into pieces and then welds “two components” together to produce “a single finished TWB.”)³⁵ Hyundai notes that it determined that up to four CONNUMs could be associated with a finished “product.”³⁶

45. In its Section E and Further Manufactured Sales supplemental questionnaire, USDOC instructed Hyundai Steel to “report each component as a separate sale” such that USDOC would be able to “calculate a dumping margin for each further manufactured component of CORE.”³⁷ Further, USDOC instructed Hyundai Steel that “{i}n all data bases you provide, identify each transaction included in each data base by the CONNUM of the imported subject merchandise.”³⁸

46. Hyundai Steel appears to have understood these directions. In response, Hyundai Steel reported that it “understands that for sales of products incorporating multiple CONNUMs (e.g., further manufactured tailor welded blanks and after service auto parts), the Department is requesting that Hyundai Steel segregate each finished good sale into multiple line item transactions for each constituent CONNUM. Hyundai Steel has applied this methodology in the

³³ U.S. FWS, para. 133.

³⁴ *Antidumping Duty Investigation of Corrosion-Resistant Steel Products (CORE) from the Republic of Korea*: Hyundai Steel’s Response to the Department’s Request for Section E and Additional Sales Data (November 2, 2015), p. 1 (Exhibit KOR-15 (BCI)).

³⁵ *Antidumping Duty Investigation of Corrosion-Resistant Steel Products (CORE) from the Republic of Korea*: Hyundai Steel’s Response to the Department’s Request for Section E and Additional Sales Data (November 2, 2015), p. 2 (Exhibit KOR-15 (BCI)).

³⁶ *Antidumping Duty Investigation of Corrosion-Resistant Steel Products (CORE) from the Republic of Korea*: Hyundai Steel’s Response to the Department’s Request for Section E and Additional Sales Data (November 2, 2015), p. 2 (Exhibit KOR-15 (BCI)).

³⁷ *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Second Supplemental Questionnaire to Sections B&C, and First Supplemental to Further Manufacturing (November 19, 2015), p. 2 (Exhibit USA-5 (BCI)).

³⁸ *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Second Supplemental Questionnaire to Sections B&C, and First Supplemental to Further Manufacturing (November 19, 2015), p. 1 (Exhibit USA-5 (BCI)).

accompanying ‘C2’ further manufactured products sales database.”³⁹ Hyundai Steel further explained in its response to the Section E and Further Manufactured Sales supplemental questionnaire that it was unable “to identify the weight of all products (or the weight of the input CORE component) in all instances,” further indicating that it understood that there was a difference between a “product” and a “component” for reporting purposes.⁴⁰

Question 61 (United States)

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

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

47. As the Panel notes, USDOC requested an explanation for the “previously unexplained differences in the cost of manufacturing of TWBs” between Hyundai Steel’s November 30, 2015 database and its narrative explanations and worksheets.⁴¹ Specifically, USDOC requested Hyundai Steel: (1) “explain the change” between the “fully processed TWB cost” in its response to the original Section E response and the same cost reported in its response to the supplemental Section E response; and (2) to “update your further manufacturing cost file, if necessary.”⁴² USDOC was seeking an explanation for the costs associated with further manufacturing of TWBs, not the further manufacturing costs for *sheet, blanks, and skelp*.

³⁹ *Certain Corrosion-Resistant Steel Products from the Republic of Korea: Hyundai Steel’s Response to the Department’s Section E and Further Manufactured Sales Supplemental Questionnaire (November 30, 2015), p. S-7 (Exhibit KOR-18 (BCI)).*

⁴⁰ *Certain Corrosion-Resistant Steel Products from the Republic of Korea: Hyundai Steel’s Response to the Department’s Section E and Further Manufactured Sales Supplemental Questionnaire (November 30, 2015), p. S-9 (Exhibit KOR-18 (BCI)).*

⁴¹ *Certain Corrosion-Resistant Steel Products from the Republic of Korea, Cancellation of Hyundai Steel Company’s Constructed Export Price (CEP) Verification of Further Manufactured Sales (March 8, 2016), pp. 1-2 (Exhibit KOR-20).*

⁴² *Certain Corrosion-Resistant Steel Products from the Republic of Korea, Supplemental Questionnaire to Section E (2nd) (December 15, 2015), p. 3 (Exhibit USA-10 (BCI)).*

48. At no point in its second supplemental Section E questionnaire did USDOC request updated further manufacturing costs for sheet, blanks, and skelp.⁴³ Nonetheless, Hyundai submitted a revised cost database for those other components. Hyundai Steel explained that in the course of preparing its response to the question about the difference in the reported costs for TWBs, it “further examined the production routing and has therefore adjusted its calculations,” resulting in the revised costs for sheet, skelp, blanks, and TWBs.⁴⁴ Again, USDOC did not request Hyundai Steel to take *any* steps to “further examine the production routing” or revise its further manufacturing costs for sheet, blanks, and skelp. Indeed, only the cost difference for TWBs was at issue.

49. Regarding the revised calculations for sheet, skelp, and blanks, USDOC explained, “{t}he unexplained changes were not related to the questions asked in {the} Department’s December 15, 2015 supplemental questionnaire.”⁴⁵ USDOC therefore determined that Hyundai Steel’s revised further manufacturing cost file for sheet, blanks, and skelp was unsolicited. We note that in its response to USDOC’s December 15, 2015 supplemental questionnaire, “Hyundai submitted four new databases, three of which were unsolicited, containing unsolicited changes: home market sales, U.S. sales, further manufactured U.S. sales, and the FURCOM database.”⁴⁶

Question 62 (United States)

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

50. As discussed in greater detail above in the U.S. response to Question 59, the record shows that Commerce *did* take into account Hyundai’s claims of reporting difficulties. However, Commerce ultimately had to reject Hyundai Steel’s claims of difficulty, because it found that Hyundai Steel’s claims were “discredited” or “inaccurate.”⁴⁷ Commerce noted that Hyundai Steel made “a series of inaccurate statements with respect to its ability to provide

⁴³ See *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Supplemental Questionnaire to Section E (2nd) (December 15, 2015) (Exhibit USA-10 (BCI)).

⁴⁴ *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Hyundai Steel’s Response to the Department’s Second Supplemental Section E Questionnaire (December 29, 2015), p. 5 (Exhibit Kor-19).

⁴⁵ *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Cancellation of Hyundai Steel Company’s Constructed Export Price (CEP) Verification of Further Manufactured Sales (March 8, 2016), p. 2 (Exhibit KOR-20).

⁴⁶ CORE I&D Memo, p. 14 (Exhibit KOR-5).

⁴⁷ CORE I&D Memo, pp. 16, 30, and 41 (Exhibit KOR-5).

requested information for its further manufactured sales and costs.”⁴⁸ Additionally, as provided above, Commerce provided specific instances in its Issues and Decision Memorandum where Hyundai Steel initially reported to Commerce that providing requested information would be too complicated, too burdensome, or not possible, but subsequently Hyundai Steel was able to provide the requested information.⁴⁹

51. With respect to Korea’s claims that Commerce did not provide meaningful guidance to Hyundai, as also discussed above, the record shows that Commerce did provide Hyundai with meaningful guidance. Indeed, the record shows that Commerce provided Hyundai with meaningful guidance to help Hyundai provide a complete and accurate request for exemption and provided Hyundai with guidance for completing a Section E response. Furthermore, as Commerce explained on the record, however, is that Hyundai was “the entity best suited to discern, how best to follow the Department’s reporting requirements...Further, it is not within the purview of the Department to tell Hyundai how its accounting system and overall management system works, and it lies clearly with Hyundai how best to report its further manufactured sales within the Department’s required format.”⁵⁰

52. In short, Korea has failed to demonstrate that a reasonable, unbiased person looking at the same evidentiary evidence as Commerce could not have reached Commerce’s conclusion that Hyundai’s claims of difficulty were not supported by the record and Hyundai failed to act to the best of its abilities. Accordingly, Korea’s claim in this respect fails.

Question 63 (Both parties)

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

53. The first administrative review and Commerce’s selection of facts available in that review has no relevance on Commerce’s selection of facts available in the original investigation. These are distinct and separate segments, with findings based on different records.

54. In the first administrative review, while Commerce rejected Hyundai’s request to be exempt from reporting after-service auto parts and found that Hyundai’s after-service auto parts data was unusable, it found no basis to find that Hyundai failed to cooperate to the best of its

⁴⁸ CORE I&D Memo, p. 41 (Exhibit KOR-5).

⁴⁹ See U.S. RPQ 2(b), paras. 16-21.

⁵⁰ CORE I&D Memo, p. 16 (Exhibit KOR-5).

ability.⁵¹ Commerce noted that Hyundai responded to Commerce’s request for information and Commerce had not requested Hyundai to remedy any deficiency in its reporting methodology.⁵²

55. Thus, as Commerce found no basis to find that Hyundai failed to cooperate to the best of its ability in the first review, there was no basis to apply an adverse inference in choosing from the facts available.⁵³ In these circumstances, Commerce applied a weighted-average margin calculated for Hyundai.⁵⁴

56. By contrast, in the original investigation Commerce found that Hyundai failed to act to the best of its ability, and thus, in selecting from the facts available, Commerce found that an adverse inference was warranted.⁵⁵ Thus, in applying an adverse inference in selecting from the facts available, Commerce assigned Hyundai’s further manufactured sales to the United States a rate from the petition.⁵⁶

57. Korea’s argument that it was not necessary for Commerce to apply the petition rate in the original investigation, as it could have used the average margin, does not support any sort of WTO claim. The United States has no obligation to use replacement facts that Korea prefers.

58. In the original investigation, Commerce found that Hyundai had failed to act to the best of its ability. If Korea is suggesting that an investigating authority must apply a rate most advantageous to the respondent, regardless of whether the investigating authority found that an interested party acted to the best of its ability, nothing in the Agreement supports such an argument. Indeed, Annex II specifically contemplates the investigating authority using a petition rate to replace missing information and does not limit the use of petition rates only to instances where no less favorable rates are available. In short, there is no basis to conclude that Commerce’s application of facts available in the investigation was inconsistent with Article 6.8.⁵⁷

59. Finally, to the extent Korea is attempting to argue that Hyundai’s average margin for coils calls into question the relevance of the petition rate, this argument is counterintuitive. As

⁵¹ *Certain Corrosion-Resistant Steel Products from Korea*: I&D Memo for the Final Results of Antidumping Duty Administrative Review; 2016-2017 (March 18, 2019), p. 37 (Exhibit KOR-221).

⁵² *Certain Corrosion-Resistant Steel Products from Korea*: I&D Memo for the Final Results of Antidumping Duty Administrative Review; 2016-2017 (March 18, 2019), p. 37 (Exhibit KOR-221).

⁵³ *Certain Corrosion-Resistant Steel Products from Korea*: I&D Memo for the Final Results of Antidumping Duty Administrative Review; 2016-2017 (March 18, 2019), p. 37 (Exhibit KOR-221).

⁵⁴ *Certain Corrosion-Resistant Steel Products from Korea*: I&D Memo for the Final Results of Antidumping Duty Administrative Review; 2016-2017 (March 18, 2019), p. 37 (Exhibit KOR-221).

⁵⁵ CORE I&D Memo, pp. 16-17 (Exhibit KOR-5).

⁵⁶ CORE I&D Memo, p. 17 (Exhibit KOR-5).

⁵⁷ *US – Carbon Steel (AB)*, para. 4.426.

previously discussed, Commerce found the petition rate to be relevant as it found product-specific margins for coils at or above the petition rate in Hyundai's margin calculation.⁵⁸ As Hyundai's average margin is made up of Hyundai's product-specific margins, it cannot be the case that Hyundai's average margin calls into question the relevance of the product specific margins or that Hyundai's average margin calls into question a petition rate that falls between those same product specific margins.

Question 64 (United States)

In its response to Panel question No. 6(b), Korea argues that the USDOC erred in selecting, from the different rates provided in the petition, a rate that was based on constructed normal value instead of a rate based on the normal value derived from the domestic prices. Korea further notes that the constructed normal value rate was submitted by the petitioner based on the premise that home market sales were significantly below cost of production, while the USDOC confirmed that nearly []% of the sales were at prices significantly above the cost of production. Did the USDOC take into account this information when selecting the facts available?***

60. First, we would note that Hyundai Steel did not make this argument before USDOC during the course of the investigation.⁵⁹ By contrast, petitioners did argue for Commerce's use of specific rates. Specifically, petitioners argued that USDOC should use the highest transaction-specific margin calculated for Hyundai Steel's non-further manufactured merchandise as the replacement for the missing information.⁶⁰ Again, Hyundai Steel did not present any alternatives as potential replacements for the missing information.⁶¹ However, while Commerce could have used the highest transaction-specific rate, Commerce opted not to use the rate for Hyundai Steel's non-further manufactured merchandise. Instead, Commerce opted to use a petition rate, which was more favorable to the Korean company. Thus, undoubtedly, Commerce considered the facts available on the record and provided support for its reasoned result.

61. Moreover, 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

⁵⁸ CORE I&D Memo, p. 19 (Exhibit KOR-5).

⁵⁹ *Corrosion-Resistant Steel Products from the Republic of Korea*, Case Brief of Hyundai Steel Company (April 22, 2016), pp. 18-25 (Exhibit USA-68 (BCI)); *Corrosion-Resistant Steel Products from the Republic of Korea*, Rebuttal Brief of Hyundai Steel Company (April 28, 2016), pp. 3-37 (Exhibit USA-69 (BCI)).

⁶⁰ *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Case Brief on Behalf of United States Steel Corporation (April 22, 2019), pp. 25-26 (Exhibit USA-66 (BCI)); *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Rebuttal Brief on Behalf of United States Steel Corporation (April 28, 2019), pp. 17-18 (Exhibit USA-67 (BCI)).

⁶¹ *Corrosion-Resistant Steel Products from the Republic of Korea*, Case Brief of Hyundai Steel Company (April 22, 2016), pp. 18-25 (Exhibit USA-68 (BCI)); *Corrosion-Resistant Steel Products from the Republic of Korea*, Rebuttal Brief of Hyundai Steel Company (April 28, 2016), pp. 3-37 (Exhibit USA-69 (BCI)).

initiation of the investigation.”⁶² When doing so, the investigating authority must exercise special circumspection.⁶³ USDOC clearly fulfilled this obligation in the relevant determination, and Korea fails to prove otherwise.

62. Specifically, USDOC found the petition rates to be both relevant and probative. USDOC found the petition rates 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.⁶⁴ Additionally, USDOC found the rates 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.⁶⁵ And no information on the record called into question the relevance of the petition rates.⁶⁶

63. Moreover, USDOC “review {ed} the adequacy and accuracy of the information in the petition” and concluded that the petition rates had probative value.⁶⁷ Furthermore, USDOC noted that Hyundai’s margin program output showed product-specific margins for coil at or above the petition rate.⁶⁸ 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; it was not aberrational contrary to one premise of Korea’s argument.⁶⁹

64. Thus, USDOC undoubtedly considered the facts available on the record and provided support for its reasoned result. While Korea would have preferred for Commerce to use a different petition rate, the fact that Commerce used a rate that Korea does not like, does not establish a breach of the Agreement.

⁶² AD Agreement, Annex II, para. 7.

⁶³ AD Agreement, Annex II, para. 7.

⁶⁴ CORE I&D Memo, p. 18 (Exhibit KOR-5).

⁶⁵ CORE I&D Memo, pp. 18-19 (Exhibit KOR-5).

⁶⁶ CORE I&D Memo, p. 18 (Exhibit KOR-5).

⁶⁷ CORE I&D Memo, p. 18 (Exhibit KOR-5).

⁶⁸ 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)).

⁶⁹ CORE I&D Memo, pp. 17-19 (Exhibit KOR-5).

Question 65 (United States)

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

65. In response to Commerce’s March 8, 2016 letter⁷⁰ cancelling the verification of Hyundai’s further manufactured sales, Hyundai Steel submitted a request to Commerce to reconsider its decision.⁷¹ Hyundai’s request for reconsideration was based on four assertions: (1) Hyundai Steel fully cooperated; (2) Commerce did not provide Hyundai an opportunity to remedy the issues the Department identified in its preliminary determination; (3) any errors are minor and; (4) Hyundai’s calculations associated with sheet, skelp, and blanks (i.e., minor further processed products reported in the “C1” U.S. sales file) fully comply with Commerce’s standard further manufacturing reporting.⁷²

66. Commerce fully considered these arguments. In fact, the interested parties had further opportunities to present written and oral arguments on these issues, and Commerce addressed these arguments in its Issues and Decision Memorandum.

67. In particular, on April 22, 2016, petitioners and other interested parties, including Hyundai, submitted case briefs.⁷³ On April 28, 2016, petitioners and other interested parties, including Hyundai, submitted rebuttal briefs.⁷⁴ Finally, on May 3, 2016, Commerce held a public hearing.⁷⁵

68. The four assertions included in Hyundai’s request that Commerce reconsider its decision to cancel verification are on pages: 21-23; 29-32; 33-34; and 36-41 of Hyundai’s Case Brief⁷⁶

⁷⁰ *Certain Corrosion-Resistant Steel Products from the Republic of Korea: Cancellation of Hyundai Steel Company’s Constructed Export Price (CEP) Verification of Further Manufactured Sales (March 8, 2016) (KOR-20).*

⁷¹ *Corrosion Resistant Steel from Korea: Request to Reconsider Decision Not to Verify Further Manufactured Sales (March 11, 2016), pp. 1-2 (Exhibit KOR-21)*

⁷² *Corrosion Resistant Steel from Korea: Request to Reconsider Decision Not to Verify Further Manufactured Sales (March 11, 2016), pp. 1-2 (Exhibit KOR-21)*

⁷³ *Certain Corrosion-Resistant Steel Products from the Republic of Korea: Case Brief of Hyundai Steel Company (April 22, 2016) (Exhibit-23).*

⁷⁴ *Certain Corrosion-Resistant Steel Products from the Republic of Korea: Rebuttal Brief of Hyundai Steel Company (April 28, 2016) (Exhibit USA-99 (BCI)).*

⁷⁵ CORE I&D Memo, p. 2 (Exhibit KOR-5).

⁷⁶ *Certain Corrosion-Resistant Steel Products from the Republic of Korea: Case Brief of Hyundai Steel Company (April 22, 2016) (Exhibit-23).*

and pages: 4-8; 15-20; and 35 of Hyundai's Rebuttal Brief.⁷⁷ Commerce addresses these issues on pages 28-33 (Comment 4) and 33-41 (Comment 5) of its Issues and Decision Memorandum.⁷⁸

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

4.1 Affiliated party transactions

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

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

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

69. No, that is incorrect. The question is referring to the fact that USDOC's Section D questionnaire provided Hyundai Steel with three alternatives for providing necessary information relating to Hyundai Steel's purchases of "major inputs." The issue of whether transfer prices for other inputs (that is, inputs that do not qualify as major inputs) that Hyundai Steel received from its affiliates reflected market value is a separate and distinct matter. In U.S. antidumping proceedings, the transfer price of a transaction (including the provision of a good or service) directly or indirectly between affiliated persons is not used in an antidumping calculation if the transaction price does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration.⁷⁹ This principle, which is generally applied in many areas of economics and trade, applies to the related-party provisions of services at issue in this dispute.

70. As discussed in the U.S. response to Panel questions following the first meeting of the parties, Hyundai Steel initially reported in its Section A questionnaire response that it received

⁷⁷ *Certain Corrosion-Resistant Steel Products from the Republic of Korea*: Rebuttal Brief of Hyundai Steel Company (April 28, 2016) (Exhibit USA-99 (BCI)).

⁷⁸ CORE I&D Memo (Exhibit KOR-5).

⁷⁹ 19 U.S.C. § 1677b(f)(2) (Exhibit USA-74).

[[***]] from an affiliated party, [[***]] and noted that the company would “demonstrate in its forthcoming Sections B and C responses that transactions with affiliated service providers are at arm’s length.”⁸⁰ To demonstrate that Hyundai Steel’s transactions with [[***]] were at arm’s length, in its Section B response, Hyundai Steel provided calculations from [[***]] financial statements, noting that, “Hyundai Steel negotiates and transacts with this company on arm’s length basis and because this company earned a profit during the POI, Hyundai Steel believes these transactions reflect arm’s length prices.”⁸¹ Additionally, Hyundai Steel provided contracts between Hyundai Steel and [[***]] and between [[***]] and one of [[***]] subcontractors, which Hyundai Steel claimed “show that these transactions are at arm’s length,” but provided no additional explanation.⁸²

71. After reviewing Hyundai Steel’s Sections B and C responses, USDOC found that the information Hyundai Steel submitted failed to establish that the transactions between [[***]] and Hyundai Steel were at arm’s length. Specifically, in its supplemental Sections B-C questionnaire, USDOC noted: “The net profit information provided for [[***]] does not show that [[***]]⁸³ Additionally, “you claim that Hyundai Steel ‘believes the rates paid to [[***]] represent arms’ length prices. However, you never explained why the transactions between Hyundai Steel and [[***]] are at arm’s-length.”⁸⁴ Hyundai Steel was then asked to “demonstrate how these transactions should be consider{ed} at arm’s length when its between two [[***]] companies.”⁸⁵

72. As the information Hyundai Steel provided failed to demonstrate that the transactions were at arm’s length, to determine whether the transactions between affiliated parties were at arm’s length, USDOC sought to compare the prices between the affiliated parties to prices for the same service charged by the affiliated service provider to unaffiliated parties, or to prices for the same service paid by the respondent to unaffiliated parties.⁸⁶ Hyundai Steel reported that it does not use unaffiliated freight companies for similar services and thus, was unable to provide

⁸⁰ See Hyundai Steel’s Section A Response (October, 16, 2015), p. A-13 (Exhibit KOR-28 (BCI)).

⁸¹ Hyundai Steel Section B Response (December 6, 2016), p. 31 (Exhibit KOR-36 (BCI)).

⁸² Hyundai Steel Section B Response (December 6, 2016), p. 31 (Exhibit KOR-36 (BCI)).

⁸³ *Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Supplemental Questions for Sections B-C (November 24, 2015), p. 3 (Exhibit USA-72 (BCI)).

⁸⁴ *Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Supplemental Questions for Sections B-C (November 24, 2015), p. 3 (Exhibit USA-72 (BCI)).

⁸⁵ *Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Supplemental Questions for Sections B-C (November 24, 2015), p. 3 (Exhibit USA-72 (BCI)).

⁸⁶ *Certain Oil Country Tubular Goods from the Republic of Korea*, Issues and Decision Memorandum (July 10, 2014), pp. 36-37 (Exhibit USA-73).

comparable prices from unaffiliated vendors for comparison.⁸⁷ Therefore, it was not possible to consider any such contracts in evaluating whether the transactions between Hyundai Steel and [***] were at arm's length. Thus, to determine whether the transactions between Hyundai Steel and [***] were at arm's length, for purposes of USDOC's determination it was necessary to have [***] contracts with unaffiliated customers. However, Hyundai Steel was unable to provide the requested contracts and was thus unable to demonstrate that the transactions between Hyundai Steel and [***] were at arm's length.

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

73. As the United States explains in subpart (a) above, the three-part methodology for major inputs was not applicable to the inputs at issue such as freight and warehousing services (which are not major inputs). Rather, for these transactions, the inquiry involved a comparison between the transfer price between the purchaser (respondent) and its affiliates supplier with a market price for the input. In this case, the respondent did not provide the data needed to test whether the transactions were made at arm's length, namely: market prices for the purchases of services from its affiliate or the affiliates' cost of freight and warehousing (i.e., acquisition cost plus an amount for selling, general, and administrative expenses).⁸⁸ As noted just above, USDOC found that "the net profit information provided for [***] does not show that [***]"⁸⁹ Accordingly, the necessary information for conducting the analysis is not on the record.

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

74. In responding to such a question, a respondent typically will indicate why it was unable to obtain a market value for a given input and will then explain how it came up with the product specific per-unit cost in accordance with the requirements of the questionnaire. For example, in accordance with the questions asked at D-4-5 of the initial questionnaire, KOR-33, Hyundai Steel had to provide the total volume purchased, total value purchased, average price, affiliated supplier's COP, percentage of the supplier-specific purchases to total purchases, and the percentage of the input to COM (consumption value of input to total cost of manufacturing). In

⁸⁷ *Certain Cold-Rolled Steel Flat Products From the Republic of Korea*, Hyundai Steel's Section B Response (November 6, 2015), p. B-30 (Exhibit KOR-36 (BCI)).

⁸⁸ *Certain Hot-Rolled Products from the Netherlands*, 81 Fed. Reg. 15,225 (Dep't of Commerce March 22, 2016) (preliminary LTFV determination) (Exhibit USA-100).

⁸⁹ *Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Supplemental Questions for Sections B-C (November 24, 2015), p. 3 (Exhibit USA-72 (BCI)).

any event, as we explained earlier, the methodology for major inputs does not apply to freight and warehousing expenses.

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

75. As discussed above in subpart (a), after reviewing Hyundai Steel's Sections B and C responses, USDOC found that the information Hyundai Steel submitted failed to establish that the transactions between [[***]] and Hyundai Steel were at arm's length. Specifically, in its supplemental Sections B-C questionnaire, USDOC noted: "The net profit information provided for [[***]] does not show that [[***]]"⁹⁰

76. As the documents Hyundai Steel submitted failed to establish that the transactions between [[***]] and Hyundai Steel were at arm's length and Hyundai Steel reported that it did not use unaffiliated freight companies for similar services, it was not possible to consider any such contracts in evaluating whether the transactions between Hyundai Steel and [[***]] were at arm's length. Thus, to determine whether the transactions between Hyundai Steel and [[***]] were at arm's length, for purposes of USDOC's determination it was necessary to have [[***]] contracts with unaffiliated customers. As explained in Commerce's Issues and Decision Memorandum, as Hyundai failed to provide the requested contracts, Hyundai failed to establish the arm's length nature of the transactions with [[***]] and thus Commerce relied on facts available.⁹¹

Question 67 (United States)

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

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

77. The record shows that Hyundai Steel never presented the contract between Hyundai Steel and [[***]] to Commerce for the purpose of demonstrating that [[***]] warehousing services

⁹⁰ *Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Supplemental Questions for Sections B-C (November 24, 2015), p. 3 (Exhibit USA-72 (BCI)).

⁹¹ *Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Issues and Decision Memorandum (July 20, 2016), pp. 73-74 ("CRS I&D Memo") (Exhibit KOR-41).

were provided at arm’s length. In its initial questionnaire, Hyundai Steel merely reports that, “{w}ith respect to one warehousing location, [***], this facility is managed by an unaffiliated provider and Hyundai Steel transacts directly with the unaffiliated company.”⁹²

78. Rather, in response to USDOC’s request that Hyundai Steel “demonstrate that the warehouse expense provided by affiliate [***] are at arm’s length prices for each warehouse,” Hyundai Steel responded:

Hyundai Steel has compared the contract between [***], and the contract [***] (provided at Exhibit S-7. This comparison demonstrates that [***] has charged higher fees than it pays to the subcontractor. For example, at the last page of Exhibit S-6, Hyundai Steel pays to [***] KRW for the transportation from factory to warehouse in [***] KRW for the warehousing expense. In contrast, at the fifteenth page of Exhibit S-7 [***] KRW for the transportation from the factory to the warehouse and [***] KRW for the warehousing expenses. Thus, [***] earned a profit from its freight services which demonstrates that these services were negotiated at an arm's length basis. Accordingly, Hyundai Steel has not added the additional freight fields to report the lowest possible freight amount for any sale.⁹³

79. Thus, rather, than use the contract between Hyundai Steel and [***] to compare to the contracts between [***] and [***], Hyundai Steel attempted to show that the costs associated with the [***] contracts demonstrated that [***] made a profit.⁹⁴ Similarly, in the rebuttal brief cited by the panel, Hyundai Steel notes that to “demonstrate that the transactions with [***] were at arm's length... {it} provided in its initial questionnaire response contracts [***] maintained with its sub-contractors demonstrating that [***] passed on its full costs plus an amount to cover [***] expenses and profit.”⁹⁵ Indeed, in its rebuttal brief, Hyundai Steel’s only reference to the unaffiliated provider is in a footnote and the reference appears to be only a clarification that Hyundai Steel did not rely “exclusively” on [***] for freight and warehouse services.⁹⁶ Hyundai Steel was certainly not asking Commerce to use the contract between

⁹² Hyundai Steel Section B Response (December 6, 2016), p. 28 (Exhibit KOR-36 (BCI)).

⁹³ *Certain Cold-Rolled Steel Flat Products From the Republic of Korea*, Hyundai Steel Supplemental Sections B-C Questionnaire Response (December 15, 2015), p. 10 (Exhibit KOR-34).

⁹⁴ Hyundai’s questionnaires refer to [***] and [***]. See, Hyundai Steel Section B Response (December 6, 2016) p. B-29 and Exhibit B-15 (Exhibit KOR-36 (BCI)).

⁹⁵ *Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Hyundai Steel’s Rebuttal Brief* (June 13, 2016), pp. 24-25 (Exhibit KOR-29).

⁹⁶ *Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Hyundai Steel’s Rebuttal Brief* (June 13, 2016), pp. 24-25 (Exhibit KOR-29).

Hyundai Steel and [***] to demonstrate that the warehouse services provided by [***] were at arm's length.

80. Finally, in Exhibit B-13, Hyundai Steel lists [***] warehouses.⁹⁷ As noted, Hyundai Steel reports that for all but one of the warehouses, [***], the warehousing services are provided by [***].⁹⁸ The United States can only speculate as to why Hyundai did not ask USDOC to use the contract between Hyundai Steel and [***] to demonstrate that the warehouse services provided by [***] were at arm's length. However, based on what Hyundai reports, the costs associated with the [***] contract appear not to be comparable with the costs associated with the warehouses serviced by [***]. Specifically, Hyundai reports that for the warehouse serviced by [***], Hyundai Steel pays [***] [***] for warehousing, and [***] pays [***].⁹⁹ By comparison, the contract between Hyundai and [***] for the [***] warehouse indicates that Hyundai pays [***] just [***].¹⁰⁰ Similarly based on Hyundai Steel's reported average costs for warehousing, the average cost for warehousing at [***] during the period of investigation was [***], while Hyundai Steel's average cost for all warehouses was [***].¹⁰¹

Question 68 (United States)

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

81. This question mixes two different issues: whether Hyundai's margin should have been based on the information submitted or on (i) total facts available or (ii) partial facts available.

82. The cited text does not relate to the application of partial facts available. Rather, it is pulled from Comment 11 (Whether or Not to Apply Total Adverse Facts Available to Hyundai Steel) of the I&D Memo. As the title of the Comment suggests, this Comment considers

⁹⁷ Hyundai Steel Section B Response (December 6, 2016), Exhibit B-13 (Exhibit KOR-36 (BCI)).

⁹⁸ Hyundai Steel Section B Response (December 6, 2016), p. 29 (Exhibit KOR-36 (BCI)).

⁹⁹ *Certain Cold-Rolled Steel Flat Products From the Republic of Korea*, Hyundai Steel Supplemental Sections B-C Questionnaire Response (December 15, 2015), p. 8 (Exhibit KOR-34).

¹⁰⁰ *Certain Cold-Rolled Steel Flat Products From the Republic of Korea*, Hyundai Steel Supplemental Sections B-C Questionnaire Response (December 15, 2015), Exhibit S-14 (Exhibit KOR-34).

¹⁰¹ *Certain Cold-Rolled Steel Flat Products From the Republic of Korea*, Hyundai Steel Supplemental Sections B-C Questionnaire Response (December 15, 2015), Exhibit S-10 (Exhibit KOR-34).

whether, as the petitioner argued, Commerce should resort to total facts available with respect to Hyundai Steel.¹⁰² As some of the cited language indicates, Commerce found no basis to apply total facts available.¹⁰³

83. While Commerce decided that total facts available was not warranted, Commerce also found that there were certain deficiencies in Hyundai’s submitted information, and that the application of partial facts available was warranted.¹⁰⁴ Commerce’s findings on the application of partial facts available are contained in Comment 12¹⁰⁵ (Control Number and Prime/Non-Prime Designations), Comment 15¹⁰⁶ (Reporting of Inland Freight, Warehousing Service, International Freight, and Other Services Provided by an Affiliated Party), and Comment 19¹⁰⁷ (Other Cost Issues). As the Comments show, Commerce found it appropriate to apply facts available for some, but not all, of the issues discussed. Specifically, with respect to the CONNUM issues in Comment 12, Commerce decided to accept Hyundai’s reporting of certain product specifications and not apply facts available. However,

For those remaining issues for which the respondent was unable to substantiate its product reporting, which include instances in which information was misreported and/or based on inconsistent internal information, recalculations are possible without resort to total AFA, though involving some application of partial AFA where data do not exist on the record to fully correct the problems in question and the Department found Hyundai to be uncooperative.¹⁰⁸

84. Regarding affiliated service providers discussed in Comment 15, as Hyundai failed to demonstrate the arm’s-length nature of the services, Commerce was unable to determine the arm’s-length nature of transactions, and thus it was necessary to rely on facts available.¹⁰⁹

85. Finally, with respect to the “Other Cost Issues” in Comment 20, Commerce determined that it was not necessary to apply facts available with respect to marine insurance expenses, but

¹⁰² CRS I&D Memo, pp. 40-46 (Exhibit KOR-41).

¹⁰³ CRS I&D Memo, pp. 40-46 (Exhibit KOR-41).

¹⁰⁴ CRS I&D Memo, pp. 40-46 (Exhibit KOR-41).

¹⁰⁵ CRS I&D Memo, pp. 47-63 (Exhibit KOR-41).

¹⁰⁶ CRS I&D Memo, pp. 69-74 (Exhibit KOR-41).

¹⁰⁷ CRS I&D Memo, pp. 89-93 (Exhibit KOR-41).

¹⁰⁸ CRS I&D Memo, p. 59 (Exhibit KOR-41).

¹⁰⁹ CRS I&D Memo, p. 74 (Exhibit KOR-41).

that it was necessary to apply facts available with respect to Hyundai’s home market warehousing expenses.¹¹⁰

86. In sum, while Commerce found that it was not appropriate to apply total facts available to Hyundai, to address certain gaps in the record, Commerce applied partial facts available to fill those gaps.

Question 69 (United States)

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

87. Yes, in addition to finding that “Hyundai {} failed to provide the requested information or fully cooperate with {USDOC}’s request for this information,” Commerce found that Hyundai failed to cooperate by not acting to the best of its ability in responding to USDOC’s multiple requests for the information.¹¹¹ Furthermore, Commerce explained that it was applying an adverse inference in selecting the information to be used to replace the missing information. As the question notes, Commerce decided that it could rely on Hyundai’s submitted database as a source for replacing the missing data on freight costs. And the reason why an authority using adverse inferences in selecting from available values would chose those adverse to the non-cooperating respondent is self-evident.

88. Korea has provided no explanation for *why* the USDOC’s process for selecting these values is inconsistent with any specific provision of the Anti-Dumping Agreement. Rather, Korea’s claim rests on its argument that the AD Agreement requires the selection of the “best” available information to replace the missing information.¹¹²

89. As we have explained, this argument fails on several grounds. First, Korea’s argument is wrong as a matter of law – the AD Agreement contains no such requirement. Second, this argument fails when applied to the facts of this dispute. Indeed, this issue involving Hyundai’s freight costs illustrates that a requirement to use “best” information would either be meaningless, or if it had meaning, would support Commerce’s findings. In this case, Hyundai – one of the world’s largest and most sophisticated corporations – chose not to cooperate in providing the requested information on freight expenses. No entity – other than Hyundai – knows its actual freight expenses. There is simply no way for an authority, or for the panel, to know what the missing information might be. Thus, if by “best”, Korea means the data values closest to actual values, no one but Hyundai knows this information. On the other hand, if “best” means most

¹¹⁰ CRS I&D Memo, p. 93 (Exhibit KOR-41).

¹¹¹ CRS I&D Memo, p. 74 (Exhibit KOR-41).

¹¹² Korea First Written Submission, paras. 310, 311, 313, 510-512.

appropriate in the circumstances, then the “best” values are the values chosen by Commerce. As we have explained, adverse inferences support using data values on the record that are less favorable for Hyundai.

4.2 CONNUMs

Question 70 (Both parties)

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

90. Hyundai’s argument that certain sales were “aberrational” was not presented by Hyundai during the substantive phase of the investigation. Nor does the record support such an assertion.

91. Hyundai first presented this argument **after** Commerce’s final determination, in the stage of the investigation where party’s may point out ministerial errors in the dumping calculation. Clearly, an argument that certain sales are “aberrational” does not involve a ministerial error in a dumping calculation. Accordingly, there was no basis for Commerce to inquire about what Hyundai meant by this conclusory assertion.¹¹³ Furthermore, the tables Korea submitted to this Panel in its attempt to demonstrate the “aberrational nature” of the sales is ex post facto argumentation, never submitted to Commerce.¹¹⁴

92. Nor is their any basis in the record to support that the sales in question were “aberrational.” Korea’s asserted basis for this proposition is only that Hyundai reported, in response to one of Commerce’s supplemental questionnaires, that certain sales to one customer were sales of “phased-out” products.¹¹⁵ This statement has no special legal or factual significance. As an initial matter, clearly the products were not in fact “phased out” – they were sold in the U.S. market. Presumably, what Hyundai meant is that the products were near the end of the product life cycle. But the location of a product within the product life cycle has no special significance in antidumping calculations. Certainly, nothing in the AD Agreement indicates some sort of special treatment, nor is special treatment provided for in U.S. law. Indeed, companies are constantly changing their product mixes. Whether a product is near the beginning of its life cycle, in the middle, or the end has no special significance, nor does it make any particular sale “aberrational.” To the contrary, products should not be sold at less than fair value, regardless of whether they are at the beginning or end of the product life cycle.

¹¹³ *Certain Cold-Rolled Steel Flat Products From the Republic of Korea: Hyundai Steel Ministerial Error Comments* (August 1, 2016), pp. 13-14 (Exhibit KOR-50).

¹¹⁴ Korea RPQ 16(f), n.58 and Korea SWS, paras. 128 and 130.

¹¹⁵ *Certain Cold-Rolled Steel Flat Product from the Republic of Korea: Hyundai Steel’s Section B-C Supplemental Response* (December 15, 2015), pp. 18-19 (Exhibit KOR-34).

93. In short, Hyundai made these sales to a U.S. customer during the period of investigation, and it made these sales at less than fair value.¹¹⁶ The use of this margin as replacement information is supported by the record because it represents actual sales made by the respondent. And Korea can point to no basis in the AD Agreement why this selection of available facts is somehow consistent with any WTO obligation.

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

Question 71 (United States)

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

94. To clarify, Commerce used the contract between Hyundai and [[***]] for certain transactions. Hyundai reported that it “uses different warehousing services for PO products versus all other HR products. Hyundai Steel warehouses PO products at several warehouses, including a warehouse located in [[***]], which is managed by an unaffiliated provider, [[***]].”¹¹⁷ For products that are not pickled and oiled, Hyundai uses warehouses serviced by [[***]].¹¹⁸ Thus, in its calculation memo, Commerce noted, “For WARESHS involving pickled and oiled hot-rolled, the Department is not applying adverse facts because Hyundai Steel dealt directly with the unaffiliated service provider (instead of through [[***]]) for this merchandise in the home market.”¹¹⁹

95. As with the cold-rolled investigation, the record shows that Hyundai never presented the contract between Hyundai and [[***]] to Commerce for the purpose of demonstrating that [[***]] warehousing services were provided at arm’s length. In its initial questionnaire, Hyundai

¹¹⁶ CRS I&D Memo, p. 63 (Exhibit KOR-41), *citing* USDOC Final Calculation Memo for Hyundai Steel (July 20, 2016) (Exhibit KOR-49 (BCI)).

¹¹⁷ *Certain Hot-Rolled Steel Flat Products From the Republic of Korea*, Hyundai Steel’s Section B-C Questionnaire Response (November 23, 2015), B-30 (Exhibit KOR-56 (BCI)) or (Exhibit KOR-60 (BCI)).

¹¹⁸ *Certain Hot-Rolled Steel Flat Products From the Republic of Korea*, Hyundai Steel’s Section B-C Questionnaire Response (November 23, 2015), B-30 (Exhibit KOR-56 (BCI)) or (Exhibit KOR-60 (BCI)).

¹¹⁹ *Certain Hot-Rolled Steel Flat Products from the Republic of Korea: USDOC Final Analysis Memo* (August 4, 2016), p. 2 (Exhibit KOR-68).

simply reports that the [***] warehouse is managed by an unaffiliated provider, [***].¹²⁰ Additionally, in response to USDOC’s request that Hyundai “demonstrate that the warehouse expense provided by affiliate [***] are at arm’s length prices for each warehouse,” rather than use the contract between Hyundai and [***] to compare to the contracts between [***] and [***], Hyundai again reviewed the [***] contracts with [***] and attempted to show that [***] made a profit.¹²¹ Hyundai makes a similar argument in its rebuttal brief, with no reference to the [***] warehouse or Hyundai’s contract with [***].¹²²

96. Regarding the contract for marine insurance with [***] that was presented by Hyundai for the first time at verification, in its Issues and Decision Memorandum, USDOC explained that “Hyundai Steel failed the completeness portion at verification with regard to this issue, *i.e.*, failed to demonstrate the arm’s length nature of these services provided by the affiliated companies.”¹²³ Attached as Exhibit-36 of Hyundai’s verification exhibits are the marine insurance expenses from [***] and [***] that Hyundai suggested that Commerce examine at verification.¹²⁴ A comparison of the insurance services provided by [***] and [***] shows important differences that would undermine the usefulness of the [***] transactions for checking the arm’s length nature of the [***] transactions. These differences include, (1) type of product shipped ([***]) and (2) the U.S. destination port ([***]).¹²⁵

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

6.1 Cross owned affiliate inputs

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

Korea argues that the USDOC could have determined that the inputs provided by cross-owned affiliates were not primarily dedicated to the CRS production as the value of POSCO’s transactions in relation to the cross owned affiliates’ sales were part of POSCO’s consolidated financial statements, which were submitted early on in the investigation.

¹²⁰ *Certain Hot-Rolled Steel Flat Products From the Republic of Korea*, Hyundai Steel’s Section B-C Questionnaire Response (November 23, 2015), B-30 (Exhibit KOR-56 (BCI)) or (Exhibit KOR-60 (BCI)).

¹²¹ *Certain Hot-Rolled Steel Flat Products From the Republic of Korea*, Hyundai Steel’s Supplemental Sections A-C Questionnaire Response (January 19, 2016), p .33 (Exhibit KOR-59 (BCI)).

¹²² *Certain Hot-Rolled Steel Flat Products From the Republic of Korea*, Hyundai Steel’s Rebuttal Brief (July 18, 2016), pp. 5-7 (Exhibit USA-101 BCI))

¹²³ *Certain Hot-Rolled Steel Flat Products from the Republic of Korea*, Issues and Decision Memorandum (August 4, 2016), pp. 19 (Exhibit KOR-67).

¹²⁴ *Certain Hot-Rolled Steel Flat Products from the Republic of Korea*, Sales Verification Exhibits, Exhibit 36 (pages 1793-1794 of (Exhibit KOR-61)) (April 29, 2016) (Exhibit KOR-61).

¹²⁵ *Certain Hot-Rolled Steel Flat Products from the Republic of Korea*, Sales Verification Exhibits, Exhibit 36 (pages 1793-1794 of (Exhibit KOR-61)) (April 29, 2016) (Exhibit KOR-61).

POSCO also appears to have raised this argument in its case brief before the USDOC (KOR-83 (BCI), pp. 2-3).

- a. Korea: Please explain how you derived the percentage of the inputs provided to POSCO as a percentage of the affiliates' total sales (ranging from [***] to [***]%), by reference to the information contained in the consolidated financial statements (Korea FWS paras. 347-350).**
- b. Korea: Please also explain how you derived the percentage of the inputs provided when measured against POSCO's total cost of production of CR products (ranging from [***] to [***])% (Korea FWS paras. 347-350)? Are these figures derived from the consolidated financial statements?**
- c. Korea: Could the USDOC determine, on the basis of the consolidated financial statements alone, that certain inputs were provided by cross-owned affiliates, and whether these inputs were "primarily dedicated"?**
- d. United States: What specific information did the USDOC need in order to determine that the inputs at issue were not primarily dedicated to the production of the downstream product? Is the focus of the USDOC's inquiry on inputs as a percentage of the affiliates' total sales, or on inputs as a percentage of POSCO's total cost of production? Please explain by reference to US law and the USDOC's practice for determining the "primarily dedicated" standard.**

97. In determining whether inputs provided by an affiliated producer are primarily dedicated to the downstream product, the first thing USDOC needed was an accurate response from the respondent as to whether any affiliated companies supply “inputs into your company’s production process.”¹²⁶ As Commerce’s affiliated companies questionnaire explained, where cross-ownership exists and “the cross-owned company supplies an input product” for the production of the downstream products produced by the respondent, respondents are required to “provide a complete questionnaire response” for the affiliate.¹²⁷

98. Thus, if POSCO had responded in the affirmative regarding the four affiliated input providers, this would have necessitated complete responses from the four affiliated input providers and may have required Commerce to follow up with additional supplemental questionnaires. This would have allowed Commerce to analyze whether the inputs produced by the four affiliated input providers were primarily dedicated to the production of POSCO’s downstream product.

99. However, as the four input suppliers were discovered at such a late stage in the process, and Commerce did not have questionnaire responses from the affiliated input providers,

¹²⁶ United States Response to Panel Questions Following the First Substantive Meeting at paras. 90-91; *Countervailing Duty Investigation, Certain Cold-Rolled Steel Flat Products from Korea*, Affiliated Companies Response, POSCO/Daewoo (September 30, 2015), pp. 4-5 (Exhibit KOR-73(BCI)).

¹²⁷ *Countervailing Duty Investigation, Certain Cold-Rolled Steel Flat Products from Korea*, Affiliated Companies Response, POSCO/Daewoo (September 30, 2015), pp. 4-5 (Exhibit KOR-73(BCI)).

Commerce could not properly determine whether the identified inputs were in fact primarily dedicated to the production of downstream products and whether the identified affiliates received subsidies. In other words, Korea should have reported the four undisclosed affiliated input providers in its affiliated companies response and doing so would have given Commerce sufficient time to identify whether the inputs were primarily dedicated. In sum, due to Korea's inaccurate response, Commerce did not have the opportunity to seek questionnaire responses from the four affiliated input providers and was prevented from employing its expertise and determining whether the inputs were primarily dedicated to the production of downstream products.

100. If POSCO believed that it was not required to report affiliated input suppliers because the inputs that they provided to POSCO were negligible, it should have sought clarification from Commerce. Commerce's application of facts available could have been easily avoided if POSCO sought clarification regarding its affiliated input suppliers and not undertaken Commerce's "primarily dedicated" analysis for itself. As USDOC noted, had POSCO not responded in the negative, USDOC would have had the opportunity to follow-up and verify POSCO's further responses.¹²⁸ Instead, POSCO conducted its own analysis and deprived Commerce of the ability to implement its expertise regarding the production of inputs "primarily dedicated" to downstream products.

101. Additionally, as the United States has noted, Korea's claim that it did not disclose POSCO's 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. While POSCO responded "[t]here were no affiliated companies located in Korea that provided inputs to POSCO's production of subject merchandise,"¹²⁹ POSCO reported that it "has affiliated companies located outside Korea that supplied a small volume of inputs of [***] during the POI."¹³⁰ 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. Korea never addresses this inconsistency.

102. In response to the second part of the Panel's question, the determinations at issue, as well as relevant regulations, explain how Commerce addressed these issues. Commerce did not determine whether an input is primarily dedicated to the production of downstream products based on the input's relation to a percentage of an affiliates' total sales or a respondents' total

¹²⁸ See *Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Issues and Decision Memorandum (July 20, 2016), p. 64 ("CRS I&D Memo (CVD)") (Exhibit KOR-77).

¹²⁹ *Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Affiliated Companies Response* (September 30, 2015), pp. 4-6 (Exhibit KOR-73 (BCI)); CRS I&D Memo (CVD), p.9 (Exhibit KOR-77).

¹³⁰ *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).

cost of production. Rather, Commerce’s inquiry into whether an input is primarily dedicated to the production of downstream products involved a fact intensive assessment of the extent that production of the input is dedicated to intermediate inputs and subject merchandise.

103. Specifically, in determining whether an input is primarily dedicated to the production of downstream products, Commerce’s first consideration was whether the input could be used to produce downstream products such that subsidies received by an affiliated input supplier should be attributed to the respondent.¹³¹ This was a threshold consideration and determined whether Commerce would attribute subsidies received by an affiliated input supplier to an individually examined respondent.¹³² The response to Commerce’s initial question also informed Commerce whether to issue questionnaires to reported input suppliers.

104. Commerce’s regulation provide that Commerce will find an input primarily dedicated to downstream products “where a subsidy is provided to an input producer whose production is dedicated almost exclusively to the production of a higher value added product—the type of input product that is merely a link in the overall production chain.”¹³³ This clarification also explains, by way of an example, that “it would not be appropriate to attribute subsidies to a plastics company to the production of cross-owned corporations producing appliances and automobiles.”¹³⁴ In other words, it would not be appropriate to attribute subsidies to the downstream products where the downstream products are as disparate as automobiles and appliances. The regulatory notice states, “{w}hen we are investigating products such as appliances and automobiles, we will rely on the upstream subsidy provision of the statute to capture any plastic benefits which are passed to the downstream producer.”¹³⁵

105. Thus, Commerce’s analysis of whether an input is primarily dedicated to downstream products is a complex and fact intensive inquiry pertaining to the extent that an input is dedicated to producing subject merchandise and intermediate inputs used to produce subject merchandise. Thus, simply looking at the value of the transactions between POSCO and affiliated input

¹³¹ *Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Issues and Decision Memorandum (July 20, 2016), pp. 65-66 (“CRS I&D Memo (CVD)”) (Exhibit KOR-77).

¹³² 19 C.F.R. § 351.525(b)(6)(iv) (Exhibit KOR-80). Commerce’s regulations at 19 C.F.R. § 351.525(b)(6)(iv) explain that if there is cross-ownership between an input supplier and a downstream producer “and production of the input product is primarily dedicated to production of the downstream product,” then Commerce “will attribute subsidies received by the input producer to the combined sales of the input and downstream products produced by both corporations (excluding the sales between the two corporations).”

¹³³ USDOC, *Countervailing Duties: Final Rule*, 63 Fed. Reg. 65,348 (November 25, 1998), p. 65,401 (Exhibit KOR-78).

¹³⁴ USDOC, *Countervailing Duties: Final Rule*, 63 Fed. Reg. 65,348 (November 25, 1998), p. 65,401 (Exhibit KOR-78).

¹³⁵ USDOC, *Countervailing Duties: Final Rule*, 63 Fed. Reg. 65,348 (November 25, 1998), p. 65,401 (Exhibit KOR-78).

providers would not have provided the necessary information for Commerce to determine whether the input was primarily dedicated to downstream products.

Question 73 (Both parties)

We note Korea's argument that there was sufficient information on the record to demonstrate that the inputs at issue were not "primarily dedicated" to the production of the "subject-merchandise". Does the determination to be made by the USDOC for the purpose of attributing subsidies concern the production of the "subject merchandise" or the "downstream product"? What, if any, are the implications of the difference between "subject merchandise" and "downstream product" for purposes of the USDOC's analysis?

106. Commerce's analysis in the determinations at issue was whether an input was primarily dedicated to "downstream products." As discussed above, whether an input is primarily dedicated to "downstream products" is a complex and fact intensive inquiry that depends on the record of each investigation. Contrary to what Korea implies, the primarily dedicated inquiry is "not whether an input is primarily dedicated to production of subject merchandise, but to the downstream product (which could be subject merchandise, or also an intermediate input to subject merchandise)."¹³⁶ The implications of the difference between "subject merchandise" and "downstream product" is to expand the types of products in which inputs can be used and for Commerce to properly attribute subsidies received by the affiliated input supplier to a respondent.

Question 74 (United States)

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

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

107. The document provided by POSCO demonstrated that the inputs provided by the cross-owned affiliates were, *in fact*, used in the production of CRS. This document was provided to Commerce following specific questions at verification regarding POSCO's affiliate, POSCO Chemtech, and whether the limestone produced by Chemtech was used in the production of subject merchandise. To respond to Commerce's inquiry, POSCO provided Commerce with a list of inputs specific to the subject merchandise, which included the supplier, or suppliers, of each of those inputs.¹³⁷ Thus, the document indicated that POSCO Chemtech, POSCO P&S,

¹³⁶ CRS I&D Memo (CVD), pp. 67-68 (Exhibit KOR-77).

¹³⁷ *Countervailing Duty Investigation, Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Verification Report, POSCO and DWI (April 29, 2016), pp. 10-11 (Exhibit KOR-75(BCI)).

POSCO M-Tech, and POS-HiMetal, provided inputs that “could” be used to produce downstream products.¹³⁸

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

108. No, it is not the case that some information was “accepted” and other information was not “accepted” or “not taken into account.” To begin, this is not an accurate characterization of Commerce’s verification process. The purpose of verification is to *verify* the submitted information against the responding company’s actual records. Here, POSCO submitted to Commerce that “no affiliated companies located in Korea provided inputs used in the production of the subject merchandise.”¹³⁹ Thus, at verification Commerce sought to verify whether *this* statement was accurate. Therefore, a document listing input suppliers (including affiliated input suppliers) would be relevant in verifying POSCO’s statement that “no affiliated companies located in Korea provided inputs used in the production of the subject merchandise.”¹⁴⁰

109. However, the quantity of inputs purchased, would not be relevant to that inquiry. Specifically, as POSCO had not reported its purchases of inputs from affiliated input suppliers, there was no underlying information for Commerce to verify with the data. As such, the data would be regarded as new information. As Commerce noted, “{t}he purpose of verification is to check the accuracy of factual information already submitted on the record; it is not an opportunity to provide new factual information, as the deadlines to submit factual information are explicitly set forth under 19 CFR 351.301.”¹⁴¹

110. Moreover, as explained in the responses to Questions 72 and 73, it is also the case that the reported quantities were not relevant to Commerce’s analysis of whether inputs are primarily dedicated to downstream products. Rather, as explained above, Commerce’s inquiry into whether an input is primarily dedicated pertained to whether the input could be used to produce downstream products, such as subject merchandise or an intermediate input used in the production of subject merchandise. Thus, the quantity data regarding purchases in the document submitted at verification, would not have provided the necessary data for Commerce to determine whether the input was primarily dedicated to downstream products. Finally,

¹³⁸ CRS I&D Memo (CVD), pp. 65-67 (Exhibit KOR-77); *Countervailing Duty Investigation, Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Verification Report, POSCO and DWI (April 29, 2016), pp. 10-14 (Exhibit KOR-75(BCI)); POSCO Verification Exhibit PVE-3: Affiliates Business Reports and Inputs (KOR-76(BCI)) pp. 3-71 to 3-73.

¹³⁹ See CRS I&D Memo (CVD), p. 64 (Exhibit KOR-77).

¹⁴⁰ See CRS I&D Memo (CVD), p. 64 (Exhibit KOR-77).

¹⁴¹ CRS I&D Memo (CVD), p. 67 (Exhibit KOR-77).

Commerce was unable to verify the information “due to the untimely nature and large amounts of data required to fully establish the credibility of the submission.”¹⁴²

6.2 FEZ

Question 75 (United States)

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

111. The Government of Korea’s statement is ambiguous as to the period of investigation because subsidies received prior to the period of investigation may nevertheless result in a benefit to a respondent during the period of investigation. Indeed, as the Panel question notes, the DOC questionnaire asked whether companies “applied for, used, or *benefited* from that program during the POI.” Furthermore, Commerce explained in its questionnaire that it “allocates the benefits received from certain types of subsidies over time” and, “in order to appropriately measure any allocated subsidies,” Commerce relied on a 15-year average useful life.¹⁴³ Commerce further explained that although the period of investigation was a discrete and recent period, it was “investigating alleged subsidies received over a time period corresponding to the {average useful life}.”¹⁴⁴ Thus, a portion of a subsidy received several years before the period of investigation would be allocated to the 12-month period of investigation for purposes of calculating a CVD rate.¹⁴⁵

112. In response to Commerce’s questionnaire, the Government of Korea reported that “{d}uring the investigation period, none of the respondents received tax reductions or exemptions, lease-fee reductions or exemptions.”¹⁴⁶ However, Commerce determined that this statement was ambiguous regarding whether the respondents benefitted during the period of investigation from subsidies received prior to the period of investigation.¹⁴⁷ The Government of

¹⁴² CRS I&D Memo (CVD), pp. 66-67 (Exhibit KOR-77).

¹⁴³ Response of the Government of Korea to Section II of the Department’s September 16, 2015 Questionnaire (October 30, 2015), pp. 2-3 (Exhibit KOR-84(BCI)).

¹⁴⁴ Response of the Government of Korea to Section II of the Department’s September 16, 2015 Questionnaire (October 30, 2015), p. 3 (Exhibit KOR-84(BCI)).

¹⁴⁵ United States Response to Panel Questions Following the First Substantive Meeting paras. 113-115.

¹⁴⁶ Response of the Government of Korea to Section II of the Department’s September 16, 2015 Questionnaire (October 30, 2015), p. 108 (Exhibit KOR-84(BCI)).

¹⁴⁷ CRS I&D Memo (CVD), pp. 73-74 (Exhibit KOR-77).

Korea did not clarify whether the investigation period that it referred to is the year long period of investigation or the entire 15-year average useful life.¹⁴⁸

113. Furthermore, Commerce’s discovery at verification that POSCO and Hyundai maintained facilities in an FEZ contradicted the GOK’s response that Hyundai and POSCO did not have any facilities in an FEZ.¹⁴⁹ For these reason, the GOK’s response as to whether Hyundai and POSCO received subsidies during the period of investigation did not clarify whether POSCO or Hyundai received a benefit during or prior to the period of investigation.

6.3 DWI loans

Question 76 (Both parties)

In response to Panel question No. 28, the United States appears to suggest that the USDOC determined that the KORES loans were not tied to non-subject merchandise. Did the USDOC determine that the KORES loans to DWI were not tied to non-subject merchandise? Please explain your answer by reference to the USDOC's determination on the record (KOR-87, p. 24).

114. As discussed in the United States response to Panel questions,¹⁵⁰ in its preliminary determination, Commerce found that during the POI, POSCO maintained outstanding long-term loans from KNOC and KORES, while DWI maintained outstanding loans from KORES.¹⁵¹ However, Commerce found sufficient information on the record demonstrates that KNOC loans were tied to non-subject merchandise, but noted that it intended to verify this information.¹⁵² By contrast, Commerce did not find that the KORES loans were tied to non-subject merchandise.¹⁵³ This finding applied to KORES loans held by POSCO and DWI.¹⁵⁴ Specifically, as Commerce

¹⁴⁸ United States Response to Panel Questions Following the First Substantive Meeting paras. 115; CRS I&D Memo (CVD), pp. 73-74 (Exhibit KOR-77).

¹⁴⁹ CRS I&D Memo (CVD), pp. 73-74 (Exhibit KOR-77).

¹⁵⁰ U.S. RPOQ 28, pp. 119.

¹⁵¹ *Countervailing Duty Investigation, Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Decision Memorandum for the Preliminary Negative Determination (December 15, 2015), p. 24 (Exhibit USA-56).

¹⁵² *Countervailing Duty Investigation, Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Decision Memorandum for the Preliminary Negative Determination (December 15, 2015), p. 24 (Exhibit USA-56).

¹⁵³ *Countervailing Duty Investigation, Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Decision Memorandum for the Preliminary Negative Determination (December 15, 2015), pp. 23-24 (Exhibit USA-56).

¹⁵⁴ *Countervailing Duty Investigation, Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Decision Memorandum for the Preliminary Negative Determination (December 15, 2015), pp. 23-24 (Exhibit USA-56).

had found that the KNOC loans were tied to non-subject merchandise, Commerce noted: “our analysis solely pertains to loans from KORES to POSCO and DWI.”¹⁵⁵

Question 77 (Korea)

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

6.4 Selection of facts available

Question 78 (Korea)

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

Question 79 (United States)

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

115. To replace missing information Commerce applied subsidy rates calculated in the Cold-Rolled investigation or in previous subsidy investigations or administrative reviews involving Korea.¹⁵⁶ Consistent with paragraph 7 of Annex II, Commerce corroborated the use of secondary information by examining whether the secondary information to be used had probative value.¹⁵⁷

116. In examining whether secondary information is probative, Commerce examined whether the information was reliable and relevant. Regarding the reliability of the selected rates, Commerce noted that, “unlike other types of information, such as publicly available data on the national inflation rate of a given country or national average interest rates, there typically are no independent sources for data on company-specific benefits resulting from countervailable subsidy programs.” In other words, the lack of benefits-related data meant that Commerce was limited in its ability to corroborate the selected rates from independent sources that are reasonably at Commerce’s disposal. However, “{a}ctual rates calculated based on actual usage by Korean companies are reliable where they have been calculated in the context of an

¹⁵⁵ *Countervailing Duty Investigation, Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Decision Memorandum for the Preliminary Negative Determination (December 15, 2015), pp. 23-24 (Exhibit USA-56).

¹⁵⁶ CRS I&D Memo (CVD), p. 15 (Exhibit KOR-77).

¹⁵⁷ Paragraph 7 of Annex II of the Antidumping Agreement.

administrative proceeding.”¹⁵⁸ They also reflect the amounts of subsidies that the Government of Korea has provided.

117. As to relevance, Commerce “strive{d} to assign AFA rates that are the same in terms of type of benefit...because these rates are relevant to the respondent.”¹⁵⁹ As Commerce noted, it first tried to identify rates associated with the identical subsidy program in the investigation or a CVD proceeding involving the same country; only if such rates were unavailable, Commerce identified rates associated with a similar program in a CVD proceeding involving the same country; or, finally, absent rates from a similar program, Commerce would use a rate associated with a program identified in a CVD proceeding from the same country “that could conceivably be used by the non-cooperating {respondent}.”¹⁶⁰

Question 80 (Korea)

Given the USDOC's statement that "there typically are no independent sources for data on company-specific benefits resulting from countervailable subsidy programs" (KOR-77, p. 15), what could be "practicable" for the USDOC to do in order to check the selected subsidy rates pursuant to paragraph 7 of Annex II?

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

7.1 Cross-owned affiliate inputs

Question 81 (Both parties / Both parties)

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

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

¹⁵⁸ *Countervailing Duty Investigation, Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Response to Ministerial Error Comments filed by Hyundai Steel Co. Ltd. and POSCO (August 24, 2016), p. 4 (Exhibit USA-102).

¹⁵⁹ *Countervailing Duty Investigation, Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Response to Ministerial Error Comments filed by Hyundai Steel Co. Ltd. and POSCO August 24, 2016), p. 4 (Exhibit USA-102).

¹⁶⁰ CRS I&D Memo (CVD), p. 12 (Exhibit KOR-77).

in the production of hot-rolled steel? What, if any, are the implications of such a difference?

118. To begin, POSCO was required to report that it had affiliated input suppliers, which it did not do. If POSCO had responded in the affirmative that it had affiliated input suppliers, the affiliated input supplier would have been asked to report inputs that could be used in the production of downstream products.¹⁶¹ As POSCO answered in the negative with respect to whether it had affiliated input suppliers, POSCO’s affiliated input suppliers were never asked to report inputs that could have been used in the production of downstream products and Commerce was never given the opportunity to examine whether those inputs were primarily dedicated to the production of the downstream product. Nonetheless, the inquiry regarding whether inputs could be used in the production of downstream products was a threshold consideration and determined whether subsidies received by an affiliate could be attributed to a respondent.¹⁶²

119. Under Commerce’s regulation, Commerce considers whether an input provided by an affiliate could be used in the production of downstream products for purposes of attributing subsidies received by the affiliated input supplier.¹⁶³ In situations where an affiliate receives subsidies and manufactures inputs into downstream products, “the purpose of a subsidy provided to the input producer is to benefit production of both the input and downstream products.”¹⁶⁴

120. Thus, for affiliated input suppliers and a downstream producer, where the “production of the input product is primarily dedicated to production of the downstream product, the Secretary will attribute subsidies received by the input producer to the combined sales of the input and downstream products produced by both corporations (excluding the sales between the two corporations).”¹⁶⁵ However, as explained above, it would not be appropriate to attribute subsidies to the downstream products where the downstream products are disparate such as automobiles and appliances.¹⁶⁶

121. As this response suggests, and for purposes of clarification, the first part of the Panel’s cited language (asking POSCO to report cross-owned affiliates that supplied inputs) helps to establish whether Commerce must seek additional information from affiliated input suppliers,

¹⁶¹ *Certain Hot-Rolled Steel Flat Products from the Republic of Korea*, Issues and Decision Memorandum (August 4, 2016), p. 64 (“HRS I&D Memo (CVD)”) (Exhibit KOR-98).

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

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

¹⁶⁴ USDOC, Countervailing Duties: Final Rule, 63 Fed. Reg. 65,348 (November 25, 1998), p. 65,401 (Exhibit KOR-78).

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

¹⁶⁶ USDOC, Countervailing Duties: Final Rule, 63 Fed. Reg. 65,348 (November 25, 1998), p. 65,401 (Exhibit KOR-78).

while the second part of the cited language (reporting inputs that could be used in the production of downstream products) allows for the correct attribution of subsidies.

b. Both parties: In light of your answer, please explain if you consider that the scope of the information requested was the same as the information that was considered to be "necessary" for the USDOC's determination. Did the USDOC fault POSCO for not reporting inputs that "could be used", or for not reporting inputs which, in POSCO's view, were used but were not "primarily dedicated"?

122. Commerce's threshold inquiry was whether a "cross-owned company supplies an input product to you for production of downstream product produced by the respondent."¹⁶⁷ This was the first consideration of Commerce's inquiry into whether to attribute subsidies received by an affiliate input provider to a respondent.¹⁶⁸ Thus, the onus is on the respondent to provide information about inputs it received from affiliates.

123. Here, POSCO declined to report whether affiliated input providers provided any inputs used in downstream products.¹⁶⁹ However, the exhibit submitted by POSCO at verification showed that "each of the four aforementioned affiliated companies is listed as providing inputs."¹⁷⁰ Thus, because POSCO declined to report whether affiliated input providers provided any inputs used in downstream products, Commerce applied facts available.¹⁷¹ In applying facts available, based on the table POSCO provided at verification, Commerce found that the inputs produced by POSCO Chemtech, POSCO P&S, POSCO M-Tech, and POS-HiMetal "could have been used in the production of subject merchandise."¹⁷²

124. In sum, because Commerce found that the inputs provided by POSCO's four affiliates were used in the production of downstream products, including subject merchandise, contradicting what POSCO initially reported, Commerce relied on facts available to attribute subsidies that the affiliates may have received in determining a CVD rate for POSCO.

¹⁶⁷ *Countervailing Duty Investigation, Certain Hot-Rolled Steel Flat Products from Korea*, Affiliated Companies Response, POSCO/Daewoo (October 13, 2015), pp. 4 (KOR-91(BCI)).

¹⁶⁸ HRS I&D Memo (CVD), p. 64 (Exhibit KOR-98).

¹⁶⁹ *Countervailing Duty Investigation, Certain Hot-Rolled Steel Flat Products from Korea*, Affiliated Companies Response, POSCO/Daewoo (October 13, 2015), pp. 4-6 (KOR-91(BCI)).

¹⁷⁰ HRS I&D Memo (CVD), p. 61, 64 (Exhibit KOR-98); *Countervailing Duty Investigation, Certain Hot-Rolled Steel Flat Products from the Republic of Korea*, Verification Report, POSCO and DWI (June 30, 2016), p. 4 (Exhibit KOR-96(BCI)).

¹⁷¹ HRS I&D Memo (CVD), pp. 61-64 (Exhibit KOR-98).

¹⁷² HRS I&D Memo (CVD), pp. 61-64 (Exhibit KOR-98); *see also Countervailing Duty Investigation, Certain Hot-Rolled Steel Flat Products from the Republic of Korea*, Verification Report, POSCO and DWI (June 30, 2016), pp. 4-5 (Exhibit KOR-96(BCI)); POSCO Verification Exhibit VE-5: Input Suppliers (KOR-97(BCI)) pp. 9-11.

7.2 FEZ

Question 82 (United States)

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

125. As explained above, the purpose of verification is to *verify* responses provided by a company against that company's actual books and records. Here, POSCO submitted to Commerce that "POSCO has no facilities located in a {FEZ} and thus was not eligible for and did not receive any tax reductions, exemptions, grants or financial support."¹⁷³ DWI also reported that it "has no facilities located in a {FEZ} and thus was not eligible for and did not receive any tax reductions, exemptions, grants or financial support."¹⁷⁴ Thus, at verification, Commerce sought to verify POSCO's and DWI's statements that they had no facilities located in a FEZ and were not eligible for and did not receive any tax reductions, exemptions, grants or financial support.

126. At verification, POSCO informed Commerce it had "discovered that it has a Global R&D Center in Songdo International City, which is part of the Incheon FEZ."¹⁷⁵ Thus, this information was relevant to POSCO and DWI's previous reporting regarding whether they had a facility in an FEZ.

127. Commerce was not in a position to verify the information regarding use. As Commerce explained, "we would not verify as to the use or non-use of alleged FEZ programs as its response only stated the company had no facilities located in an FEZ."¹⁷⁶ Thus, because POSCO had reported that it did not maintain any facilities within an FEZ, there was no information on the record regarding use for Commerce to verify.

¹⁷³ *Countervailing Duty Investigation, Certain Hot-Rolled Steel Flat Products from Korea: Initial Questionnaire Response* (November 2, 2015), p. 45 (KOR-90(BCI)).

¹⁷⁴ *Countervailing Duty Investigation, Certain Hot-Rolled Steel Flat Products from Korea: Initial Questionnaire Response* (November 2, 2015), p. 45 (KOR-90(BCI)).

¹⁷⁵ *Countervailing Duty Investigation, Certain Hot-Rolled Steel Flat Products from the Republic of Korea, Verification Report, POSCO and DWI* (June 30, 2016), p. 3 (Exhibit KOR-96(BCI)); HRS I&D Memo (CVD), p. 69 (Exhibit KOR-98); HRS I&D Memo (CVD), pp. 68-70 (Exhibit KOR-98).

¹⁷⁶ *Countervailing Duty Investigation, Certain Hot-Rolled Steel Flat Products from the Republic of Korea, Verification Report, POSCO and DWI* (June 30, 2016), p. 3 (Exhibit KOR-96(BCI)).

7.3 Selection of facts available

Question 83 (United States)

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

128. Korea's assertion that the selected rates were "excessive and unrealistic," appears to be based on two arguments (1) that POSCO's CVD rate in the preliminary determination was significantly lower and (2) the subsidies would account for a large share of the government of Korea's budget.¹⁷⁷ Neither of these assertions demonstrate a breach of Article 12.7 of the SCM Agreement. With respect to the first argument, it should be no surprise that the subsidy rate with the application of facts available is higher than without the application of facts available. Regarding the second, as the United States has previously noted, the information Korea provides regarding the budget of the government of Korea was not on the record before Commerce, and in any event, is not legally relevant under U.S. domestic law or the covered agreements.

129. Nonetheless, the record shows that Commerce applied reliable and relevant subsidy rates in light of the facts of the particular case, which were calculated in the Hot-Rolled investigation or in previous Korea CVD investigations or administrative reviews.¹⁷⁸

130. 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, USDOC 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, USDOC applied the higher calculated rate for the particular subsidy program at issue, as no information on the record indicated that that rate was inaccurate or inappropriate.

131. With respect to using rates found in previous CVD proceedings involving Korea, as discussed above in our response to Question 79, regarding the reliability of the selected rates, "unlike other types of information, such as publicly available data on the national inflation rate of a given country or national average interest rates, there typically are no independent sources

¹⁷⁷ Korea FWS, paras. 648-650.

¹⁷⁸ HRS I&D Memo (CVD), p. 15 (Exhibit KOR-98).

for data on company-specific benefits resulting from countervailable subsidy programs.”¹⁷⁹ In other words, the lack of benefits-related data means that Commerce is limited in its ability to corroborate the selected rates from independent sources that are reasonably at Commerce’s disposal. However, “{a}ctual rates calculated based on actual usage by Korean companies are reliable where they have been calculated in the context of an administrative proceeding.”¹⁸⁰ They also reflect the amounts of subsidies that the Government of Korea has provided.

132. As to relevance, Commerce “strive{d} to assign AFA rates that are the same in terms of type of benefit ... because these rates are relevant to the respondent.” As Commerce noted, it first tried to identify rates associated with the identical subsidy program in the investigation or a CVD proceeding involving the same country; if such rates were unavailable, Commerce identified rates associated with a similar program in a CVD proceeding involving the same country; or, finally, absent rates from a similar program, Commerce would use a rate associated with a program identified in a CVD proceeding from the same country “that could conceivably be used by the non-cooperating {respondent}.”¹⁸¹

133. POSCO’s subsidy rates were based on rates from countervailable programs determined from information provided by the Government of Korea in the Hot-Rolled investigation or other CVD investigations or administrative reviews in Korea.¹⁸² Commerce first relied on the rate for identical programs calculated for Hyundai in the same investigation, where possible. Only where there was no rate calculated for an identical or similar program, did Commerce look for other programs in another investigation or administrative review of Korean merchandise.¹⁸³

134. Additionally, Commerce did not apply a facts available program specific subsidy rate for programs determined not to be countervailable or determined not to be used by POSCO.¹⁸⁴ Commerce also rejected arguments raised by domestic parties, which argued that Commerce should rely on program specific CVD rates of 3.59 and 1.83 percent, from prior investigation into structural beams and DRAMs, because the alleged program specific rates could not have been used by POSCO.¹⁸⁵ In sum, the record shows that Commerce acted consistently with

¹⁷⁹ HRS I&D Memo (CVD), p. 15 (Exhibit KOR-98).

¹⁸⁰ *Countervailing Duty Investigation, Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Response to Ministerial Error Comments filed by Hyundai Steel Co. Ltd. And POSCO August 24, 2016), p. 4 (Exhibit USA-102).

¹⁸¹ HRS I&D Memo (CVD), p. 12 (Exhibit KOR-98).

¹⁸² HRS I&D Memo (CVD), p. 11 (Exhibit KOR-98).

¹⁸³ HRS I&D Memo (CVD), pp. 12-14 (Exhibit KOR-98).

¹⁸⁴ HRS I&D Memo (CVD), pp. 25-26 (Exhibit KOR-98).

¹⁸⁵ HRS I&D Memo (CVD), p. 62 (Exhibit KOR-98).

Article 12.7 of the SCM Agreement and Korea has failed to demonstrate that the rates selected by Commerce were excessive and unrealistic.

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

8.1 POR2

Question 84 (United States)

Given that HHI had reported all revenues and expenses, albeit not separately but as part of the values concerning the subject merchandise, and given also that it had explained the reasons for not separately reporting them, what is the basis for your argument that HHI did not submit any information at all, and as a result that the USDOC's obligations pursuant to paragraph 6 of Annex II never arose (United States FWS para. 218)?

135. The issue is not whether Hyundai did or did not submit information, but rather that Hyundai chose to report its data a certain way and misled Commerce regarding its reasons for doing so. By adopting this course of action, Hyundai never gave Commerce an opportunity to inform Hyundai of any deficiencies.

136. Prior to USDOC's remand in POR2 and final determination in POR3, USDOC accepted HHI's reporting of revenues and expenses based on USDOC's understanding of Hyundai's reporting at that time. In its final determination in POR2, USDOC recalled that it had previously concluded that HHI "invoices on a lump-sum, project basis and that it does not separately invoice customers for services."¹⁸⁶ Thus, based on Hyundai's reporting, USDOC determined that "Hyundai was not obligated to report separate expenses and revenues for reimbursed services related to its U.S. sales and that its reported gross unit price for each sale is the appropriate basis for the calculation of CEP for its final dumping margin."¹⁸⁷ Furthermore, in response to petitioners' claim that USDOC should have capped Hyundai's service-related revenue, USDOC responded that it was not relevant as "Hyundai has not reported revenues from reimbursements and the record does not suggest it should have done so."¹⁸⁸ In conclusion, USDOC noted:

In general, reimbursed expenses only arise when the expenses are listed as separate line items on a sales invoice and there is a clear distinction between the line-item price of a product and its invoice price (*i.e.*, including the price of the product and additional expenses). Further, it is incumbent upon a respondent

¹⁸⁶ *Final Results of the Administrative Review of the Antidumping Duty Order on Large Power Transformers from the Republic of Korea*; 2013-2014, Second Review, Issues and Decision Memorandum (March 8, 2016) ("LPT I&D Memo (March 8, 2016)"), p. 40 (Exhibit KOR-110), citing *Large Power Transformers from the Republic of Korea* (July 2, 2012), Issues and Decision Memorandum, Comments 4, p. 29 (Exhibit USA-80).

¹⁸⁷ LPT I&D Memo (March 8, 2016), p. 40 (Exhibit KOR-110).

¹⁸⁸ LPT I&D Memo (March 8, 2016), p. 40 (Exhibit KOR-110).

company to report such expenses and corresponding revenues in separate data fields from the field for gross unit price in its sales listing as instructed in our antidumping duty questionnaire. In the current review, Hyundai did not report any of these expenses or revenues and based its reported gross unit price for U.S. sale on the invoice price....{and a} review of sales documentation on the record, including the sales traces reviewed at verification, show no indication that Hyundai improperly reported its sales data.¹⁸⁹

137. By contrast, USDOC capped the sales-related revenues of Hyosung, the other respondent reviewed in POR2.¹⁹⁰ USDOC noted that Hyosung’s request that USDOC not cap Hyosung sales-related revenue “contradicts the Department’s own policies and statutes.”¹⁹¹ USDOC continued that it “has consistently stated that the statute and its regulations do not permit the Department to raise U.S. prices for revenues in excess of the related expense.”¹⁹² Thus, in POR2, both companies received the same questionnaires¹⁹³ and the same instructions, but based on whether the company properly reported the requested information, USDOC was able to remove service revenue in excess of service expenses, as required. Thus, although USDOC’s approach was the same, the results were different due to HHI’s decision not to report the requested information, ignoring USDOC’s specific request for such information, as well as the statute and the agency’s regulations.

138. Following USDOC’s final results in POR2, both petitioners and respondents appealed to the U.S. Court of International Trade, challenging various aspects of USDOC’s determination.¹⁹⁴ After briefing was complete, USDOC requested that the court grant the agency a voluntary remand (*i.e.*, a remand to examine a particular issue, without admitting error as to that issue). USDOC’s aim was to “examine whether Commerce applied its revenue capping methodology consistently for both Hyundai and Hyosung.”¹⁹⁵ In granting the voluntary remand to USDOC, the court stated it “agrees that in articulating a desire for consistent treatment with respect to both

¹⁸⁹ LPT I&D Memo (March 8, 2016), pp. 39-40 (Exhibit KOR-110).

¹⁹⁰ LPT I&D Memo (March 8, 2016), p. 23 (Exhibit KOR-110).

¹⁹¹ LPT I&D Memo (March 8, 2016), p. 23 (Exhibit KOR-110).

¹⁹² LPT I&D Memo (March 8, 2016), p. 23 (Exhibit KOR-110).

¹⁹³ USDOC’s questionnaire required respondents to “{r}eport the information requested concerning the quantity sold and the price per unit paid in each sale transaction. All **price adjustments** granted, including **discounts** and **rebates**, should be reported in these fields. The gross unit price less price adjustments should equal the net amount of revenue received from the sale. If the invoice to your customer includes separate charges for other services directly related to the sale, such as a charge for shipping, create a separate field for reporting each additional charge.” See Department of Commerce Large Power Transformers Initial Antidumping Questionnaire (December 1, 2014), p. C-18 (emphasis original) (Exhibit USA-23).

¹⁹⁴ *ABB Inc. v. United States*, Slip Op. 17-138, (October 10, 2017) (Exhibit KOR-206).

¹⁹⁵ Department of Commerce Final Results of Redetermination Pursuant to Court Remand (February 8, 2018), p. 5 (Exhibit USA-29 (BCI)).

respondents, Commerce has identified a concern that is substantial and legitimate.”¹⁹⁶ On remand, USDOC found that the evidence collected at verification and on the record, showed that, contrary to Hyundai’s reporting, 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 requested.¹⁹⁷

139. It should be recalled, in situations in which Hyundai separately negotiated the price of services from the price of the subject merchandise, Commerce needs to be able to remove the service-related revenue, including any profit for the service-related revenue, from the price of the subject merchandise in order to determine the actual price of the of the subject merchandise to be used in the dumping comparison. As Hyundai did not separately report service-related revenues from the price of the subject merchandise, Commerce could not isolate the U.S. price of the subject merchandise from the price of the services provided to perform the basic dumping calculation. The inclusion of revenues from services in the price of the subject merchandise overstates U.S. price and would thus, artificially lower the dumping margin.

140. In situations in which HHI did not separately negotiate the services but only provided a lump-sum price in its negotiating documents with the customer, USDOC must remove the expenses associated with the services because they are not expenses for the subject merchandise but are instead for the service. As such, they should not be included in the price of the subject merchandise.

141. Contrary to Hyundai’s claim, Hyundai was not initially (prior to remand in the 2nd review) required to report service-related revenue *only* if it was required to provide a service under the terms of sale.¹⁹⁸ As USDOC explained, “Commerce’s capping methodology is not dependent upon whether a respondent must provide the service under the terms of sale as Hyundai contends, but whether such service were provided and whether the revenue amounts collected for the provision of such services exceed the cost of those services.”¹⁹⁹ USDOC continued, “{i}f a respondent collects, as a portion of the final price to customer, a portion of revenue which is dedicated to covering a service-related expense, and that service-related

¹⁹⁶ *ABB Inc. v. United States*, Slip Op. 17-138, (October 10, 2017), p. 8 (Exhibit KOR-206).

¹⁹⁷ Department of Commerce Final Results of Redetermination Pursuant to Court Remand, (Exhibit USA-29 (BCI)), p. 20 (Exhibit KOR-208).

¹⁹⁸ Department of Commerce Final Results of Redetermination Pursuant to Court Remand (February 8, 2018), p. 19 (emphasis added) (Exhibit USA-29 (BCI)).

¹⁹⁹ Department of Commerce Final Results of Redetermination Pursuant to Court Remand (February 8, 2018), p. 21 (Exhibit USA-29 (BCI)).

expense is less than the revenue set aside to cover the expense, then this is service related revenue which is part of material terms of sale and must be capped.”²⁰⁰

142. As HHI failed to separately report its service revenues and expenses, it deprived Commerce of the opportunity to cap Hyundai’s revenues. As Commerce noted in its final determination in POR2, “it is incumbent upon a respondent company to report such expenses and corresponding revenues in separate data fields from the field for gross unit price in its sales listing as instructed in our antidumping duty questionnaire.”²⁰¹ Hyundai failed to do just that. Thus, while Hyundai did provide Commerce with gross unit prices that included service revenues and expenses, as noted above, Hyundai misled Commerce by mischaracterizing its need to report revenues and expenses separately. As such, Hyundai never provided Commerce with the opportunity to inform Hyundai of any deficiencies.

Question 85 (Both parties)

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

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

143. Commerce did not examine those documents for purposes of reviewing Hyundai’s service-related revenues and expenses for the final determination. It was not until the remand proceedings that Commerce focused on the reporting discrepancy and examined the documents for purposes of service-related revenues and expenses.

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

144. The only other SEQU for which there was such documentation was [[***]]. Sales trace documents for [[***]] were submitted in response to one of USDOC’s questionnaires and have

²⁰⁰ Department of Commerce Final Results of Redetermination Pursuant to Court Remand (February 8, 2018), p. 22 (Exhibit USA-29 (BCI)).

²⁰¹ *Final Results of the Administrative Review of the Antidumping Duty Order on Large Power Transformers from the Republic of Korea, 2014-2015*, Issues and Decision Memorandum (March 6, 2017) (“LPT I&D Memo (March 6, 2017)”), p. 39 (Exhibit KOR-121).

the relevant information.²⁰² Commerce used those documents for the sales they represented and used partial AFA for the sale for which Hyundai did not properly report the requested information. We note that Commerce found that [[***]] did not contain information indicating that service-related revenues were separately negotiated and, as a result, Commerce made no adjustment for those sales.²⁰³

8.2 POR3

Reporting of a part as non-subject merchandise

Question 86 (Korea)

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

Question 87 (Both parties)

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

145. The deficiency in HHI's initial reporting is that when it submitted its home market prices, it failed to include the price of a particular part necessary to complete the LPT. It was upon reviewing the sample sales documentation that Commerce determined that HHI had excluded this particular part from the home market price, but included it as a subject part in HHI's reported U.S. prices, thereby artificially lowering its margin of dumping. As Commerce noted, "Hyundai knew that such part should have been included in the gross unit prices for home market sales. While Hyundai excluded the part in the gross unit prices for home market sales, Hyundai included the same part in the gross unit prices for U.S. sales."²⁰⁴ Specifically, for the home market sales, the particular part was improperly classified as non-foreign like product in

²⁰² Department of Commerce Final Results of Redetermination Pursuant to Court Remand, Second Remand Redetermination (April. 26, 2019), pp. 16-18 (Exhibit USA-103 (BCI)).

²⁰³ Department of Commerce Final Results of Redetermination Pursuant to Court Remand, Second Remand Redetermination (April. 26, 2019), pp. 16-18 (Exhibit USA-103 (BCI)).

²⁰⁴ LPT I&D Memo (March 6, 2017), p. 25 (Exhibit KOR-121).

the documents submitted to Commerce and improperly excluded from HHI's gross unit home market price reported to Commerce.²⁰⁵

Question 88 (Both parties)

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

146. The question of HHI's misreporting of a particular part is a verification issue and goes directly to the reliability of HHI's reported home-market database. In this case, Commerce made a factual finding that Hyundai did not report correct home market prices for the vast majority of its home market sales. As Commerce explained:

To verify the accuracy of Hyundai's reporting, we requested full documentation for certain home market sales, only to determine, at such a late stage in the review, that there is a significant issue which could be related to Hyundai's entire reporting of home market gross unit prices.

Specifically, as detailed above, Hyundai failed to include a certain part (*i.e.*, foreign like product) in the reported gross unit prices for particular home market sales. Hyundai knew that such part should have been included in the gross unit prices for home market sales. While Hyundai excluded the part in the gross unit prices for home market sales, Hyundai included the same part in the gross unit prices for U.S. sales.

Including such parts in U.S. price, but not in home market price, is a serious issue because it renders U.S. price and normal value incomparable. Furthermore, the vast majority of the reported gross unit prices provided by Hyundai, pursuant to the Department's request for full documentation for a limited number of sample sales, as described above, display the understatement of such reported prices. Thus, we find that Hyundai's misreporting is grounds to find Hyundai's reported home market prices in their entirety are unreliable.

Finally, as described above, Hyundai knew at the onset of this review that this part is covered by the scope of the order. Hyundai should have reported this information in its initial response to the Department's AD Questionnaire. Alternatively, Hyundai should have alerted the Department of its misreporting at some earlier point in the course of the review. Hyundai did neither.

For the reasons identified above, we determine that Hyundai impeded this review by failing to act to the best of its ability in providing the Department with accurate

²⁰⁵ LPT I&D Memo (March 6, 2017), p. 25-26 (Exhibit KOR-121).

information. As a result, the facts and circumstances in this review indicate that Hyundai has systematically understated home market sales in its reporting by excluding foreign like product, rendering Hyundai's reported home market gross unit prices unreliable.²⁰⁶

147. It is noteworthy that when Commerce requested reporting of sales data, it provided the respondent with the type of computer files in which the data is to be reported. Commerce did not require the respondents to submit all sales documentation for each sale, but instead just the data necessary for performing the dumping calculations. Part of Commerce's method of checking the reliability of the reported database was to request support documentation for a few sales and check to see if the reported data in the questionnaire responses was accurate. When the submitted documents for the few sales do not support the information submitted, it undermines the reliability of the entire database. To treat such failures otherwise would force a Member to require all sales documents for all sales in each review to check the reliability of the reported data, which would place an unreasonable burden on both the administering authority and the respondents.

148. In this case, HHI's home market database failed this reliability check. The home market database was determined to be unreliable when the sales documentation for 4 out of the 5 sales for which Commerce requested specific documentary support demonstrated that HHI had improperly reported the particular part as non-foreign like product merchandise.²⁰⁷ Had the documents for the 5 sales that Commerce requested been consistent with the reported data, Commerce would have considered the home market database to be reliable.

149. In its case brief, Hyundai reported corrected home market gross unit prices for the particular part for the few home market sales for which Commerce requested all the sales documentation, but Hyundai did not report a corrected home market price for the vast majority of its home market sales.²⁰⁸ In the *Final Results*, Commerce explained that simply providing corrected home market gross unit prices for the few home market sales for which Commerce requested sales information did not restore the integrity of the unexamined home market sales.²⁰⁹ Commerce explained that requesting the full sales documentation for a few sales was intended as a check of the data submitted and Hyundai's submissions failed the check.²¹⁰ Moreover, Commerce found that Hyundai, in contrast to its treatment of the particular part for the home market sales, had actually included the particular part as part of the subject merchandise and

²⁰⁶ LPT I&D Memo (March 6, 2017), p. 26-27 (Exhibit KOR-121).

²⁰⁷ *Case Brief of Hyundai Heavy Industries Co., Ltd.* (Jan. 5, 2017), p. 21 and Exhibits 1 and 2 (USA-33 (BCI)).

²⁰⁸ LPT I&D Memo (March 6, 2017), p. 25-26 (Exhibit KOR-121).

²⁰⁹ LPT I&D Memo (March 6, 2017), p. 25-26 (Exhibit KOR-121).

²¹⁰ LPT I&D Memo (March 6, 2017), p. 25-26 (Exhibit KOR-121).

included it in the U.S. gross unit price.²¹¹ Commerce found that this inconsistent treatment of the particular part between U.S. and home market price rendered the prices incomparable for dumping purposes and understated the home market gross unit price.²¹²

150. Commerce also found that the timing and manner in which Hyundai's failure was identified and Hyundai's meager attempt to remedy the deficiency in its administrative case brief did not provide Commerce with sufficient time to verify the accuracy of Hyundai's late submission.²¹³ Based on the reasons identified above, Commerce found that Hyundai did not act to the best of its ability by systematically understating its home market gross unit price by excluding the particular part rendering its home market sales database unreliable.²¹⁴

Question 89 (Korea)

You refer to Exhibit KOR-129 as containing the Petitioner's comments on HHI's reporting of home-market sales (Korea FWS para. 706). However, this exhibit appears to contain the Petitioner's comments on HHI's US sales. Please submit the appropriate exhibit or indicate where in the record can the Panel find the Petitioner's comments on this issue.

Accessories

Question 90 (United States)

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

151. From Hyundai's questionnaire response, it was apparent that there were significant differences in cost between similar products. Commerce, in trying to determine if the cost differences were based on differences in physical characteristics or something else, such as the inclusion of what Hyundai identified in sales documentation as an accessory, asked Hyundai to explain what Hyundai characterized as an "accessory".

152. Because the same parts could have been treated as optional or non-optional (*i.e.*, as accessories or not as accessories), there was a serious concern that certain parts could be selectively included/excluded from Hyundai's home market and U.S. sales and reported gross unit prices at Hyundai's discretion, which could have led to manipulation of the gross unit price (*i.e.*, could lead to the over/understatement of gross unit prices, thereby manipulating the margin). To address this concern, Commerce requested this information in order to analyze and determine whether the identified accessories should be properly included in, or excluded from, the gross unit price. In addition, to determine whether product matches are based on accurate

²¹¹ LPT I&D Memo (March 6, 2017), p. 25-26 (Exhibit KOR-121).

²¹² LPT I&D Memo (March 6, 2017), p. 25-26 (Exhibit KOR-121).

²¹³ LPT I&D Memo (March 6, 2017), p. 26 (Exhibit KOR-121).

²¹⁴ LPT I&D Memo (March 6, 2017), p. 26 (Exhibit KOR-121).

physical characteristics, Commerce sought to obtain the cost information for such accessories because knowing such information would have enabled Commerce to determine whether the differences in costs between similar products could be attributed to factors other than the physical characteristics of LPTs.

Selective reporting

Question 91 (United States)

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

153. It is a separate deficiency concerning the allocation of installation costs. In addition to the issues described above, Commerce's Issues and Decision Memorandum (Revenue Reporting, Exclusions of Certain Parts of Subject Merchandise in the Home Market, and Failure to Separately Report the Price and Cost for Accessories), describes how Hyundai was "systematically selective in providing various documents to the Department, thereby impeding the course of the review."²¹⁵ For example, Commerce notes that rather than provide Commerce with requested documentation, Hyundai selectively reported what it considered "necessary" and "sufficient," thereby stripping the Department of its ability to determine what is, in fact, necessary and sufficient to calculate an accurate margin."²¹⁶

154. As the United States has noted many times in this dispute, respondents do not have the right to decide what information is necessary for Commerce to make its final margin determination. As Commerce stated, "Hyundai cannot excuse itself from submitting all related documents, such as invoices, which are vital for the Department to verify a respondent's reporting. In other words, Hyundai was obligated to submit the requested information whether it agreed with the request or not; despite its obligation, it failed to provide the requested information."²¹⁷

155. In addition to the installation costs, Commerce cited additional discrepancies on the record, including international freight and marine insurance reported U.S. Customs and Border Protection and what was reported to Commerce, and brokerage expenses.²¹⁸ Indeed, Commerce found that "these specific examples demonstrate that Hyundai has engaged in a pattern of behavior that leaves the Department with a response that, taken as a whole, is incomplete and

²¹⁵ LPT I&D Memo (March 6, 2017), p. 27 (Exhibit KOR-121).

²¹⁶ LPT I&D Memo (March 6, 2017), p. 28 (Exhibit KOR-121).

²¹⁷ LPT I&D Memo (March 6, 2017), p. 28 (Exhibit KOR-121).

²¹⁸ LPT I&D Memo (March 6, 2017), p. 28 (Exhibit KOR-121).

unreliable.”²¹⁹ As discussed in the U.S. response to panel questions²²⁰ following the first substantive hearing, while these discrepancies on their own were not the basis of Commerce’s application of facts available, Commerce found that collectively, these discrepancies and issues further undermine the reliability of Hyundai’s data.²²¹

Question 92 (Both parties)

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

156. Where the use of facts available becomes necessary, the information originally sought was not provided and remains missing from the record. In addition, the information available to use as a proxy is limited. To determine whether the margin from the petition has probative value – i.e., that it is reliable and relevant – para. 7 of Annex II provides that authorities should, where practicable, check the information “from the information obtained from other interested parties during the investigation.” This is precisely what Commerce did in this case.

157. Commerce found that the margin from the petition was lower than the transaction-specific margin from a cooperating party, which indicates that the non-cooperative party may have been able to engage in pricing practices that are reflected in the petition margin. It demonstrates that the non-cooperating party may have sold subject merchandise at a similar margin of dumping. In reality, the non-cooperating party may have sold the merchandise at a dumping margin greater than the petition margin, as the transaction-specific margin demonstrates. While no investigating authority can determine the actual margin of dumping without the necessary information that the non-cooperative party fails to provide, the aim of para. 7 of Annex II is fulfilled where, as here, the investigating authority is able to check the petition margin using information obtained from another interested party during the investigation.

Question 93 (Korea)

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

8.3 POR4

8.3.1 HHI

Accessories

²¹⁹ LPT I&D Memo (March 6, 2017), p. 27 (Exhibit KOR-121).

²²⁰ U.S. RPQ 37, paras. 142-44.

²²¹ LPT I&D Memo (March 6, 2017), p. 28 (Exhibit KOR-121).

Question 94 (Korea)

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

Question 95 (United States)

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

158. Commerce fully considered and addressed Attachment 2SD-9 in the context of the “accessories” issue and found that Hyundai did not provide the information Commerce requested. In addition, Commerce did not make a determination that “accessories” were not subject merchandise. Hyundai incorrectly attributes its claim that such merchandise was non-subject to Commerce. It is unclear how Commerce could make such a determination without knowing what products constituted Hyundai’s accessories during the administrative review. In making its preliminary determination in POR4, Commerce stated:

On July 24, 2017, Hyundai filed its response to the Department’s July 11, 2017, Second Cost Supplemental Questionnaire to Hyundai, in which Hyundai stated that despite its requests for clarification, “the Department still is considering the meaning of the term ‘accessories’” and in which it reiterated that because the Department defined “accessories” as non-subject merchandise in the Department’s October 7, 2016, Supplemental Questionnaire to Hyundai in the prior review, “{p}ursuant to this definition,” it reported “any component that is not attached to, imported with or invoiced with the active parts of LPTs as ‘accessory.’” However, while providing costs for a list of parts for which a separate revenue was listed in its sales documentation, Hyundai did not identify whether such parts are accessories and instead claims that “{b}ecause the Department is still considering the definition of an ‘accessory,’ it is unclear whether some of these items will ultimately be considered to be parts.” It adds that since it did not have any sales of a component that is not “attached to, imported with or invoiced with the active parts of LPTs,” it reported no costs for accessories.²²²

On July 25, 2017, Hyundai filed comments regarding various issues, including “accessories,” reiterating that there is no consistent commercially meaningful

²²²Large Power Transformers From the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review; 2015-2016, 82 Fed. Reg. 42,289 (Dep’t of Commerce) (September 7, 2017) (Exhibit KOR-139), and the accompanying LPT I&D Memo (PDM) (August 31, 2017), p. 15 (citation omitted) (Exhibit KOR-140) (“LPT PDM (August 31, 2017)”).

definition of the term “accessories” and stating that it continues to seek clarification on “accessories.” Also, it asked the Department to articulate the role that “accessories” will play in the calculation of the dumping margins and to issue supplemental questionnaires to Hyundai in advance of the verifications while asking the Department to issue a supplemental questionnaire to the petitioner to provide the definition of “accessories.”²²³

On August 15, 2017, Hyundai filed comments, including comments regarding “accessories,” arguing that it reported the revenues and costs incurred on “accessories” as non-subject merchandise by utilizing “the definition of ‘accessories’ employed by the Department in the prior administrative review.” Hyundai also requested that the Department (1) arrange a technical meeting with Hyundai’s representatives to discuss the definition of the term “accessories,” (2) provide a definition, (3) direct the petitioner to provide a definition employed in the petitioner’s normal course of business, and (4) direct the petitioner to explain the reason for requesting separate accessories reporting.²²⁴

Given all of the above, as the record indicates, despite multiple requests by the Department to provide information regarding “accessories,” Hyundai continues to refuse to provide such information. Instead, it attempts to place the burden on the Department to define the term “accessories.” Hyundai claims that its sales documentation indicates that there is no consistent use of the term accessories between its different customers, and that the same customers refer to the term accessories differently. However, because the same parts can be treated as optional or non-optional (*i.e.*, as accessories or not as accessories), there is a serious concern that certain parts could be selectively included/excluded from Hyundai’s home market and U.S. sales and reported gross unit prices at Hyundai’s discretion, which could lead to manipulation of the gross unit price (*i.e.*, could lead to the over/understatement of gross unit prices, thereby manipulating the margin).²²⁵

To address this concern, we requested this information in order to analyze and determine whether the identified accessories should be properly included in, or excluded from, the gross unit price. In addition, to determine whether product matches are based on accurate physical characteristics, we have attempted to obtain the cost information for such accessories because knowing such information would have enabled us to analyze more effectively whether the differences in costs between similar products could be attributed to factors other

²²³ LPT PDM (Aug. 31, 2017), pp. 15-16 (citations omitted)(Exhibit KOR-140).

²²⁴ LPT PDM (Aug. 31, 2017), p.16 (citations omitted)(Exhibit KOR-140).

²²⁵ LPT PDM (Aug. 31, 2017), p.16 (citations omitted)(Exhibit KOR-140).

than the physical characteristics of LPTs. However, despite our multiple attempts detailed above, Hyundai repeatedly failed to provide such requested information, thereby impeding further analysis of this issue by the Department.²²⁶

Not only did Hyundai fail to provide the requested information, but Hyundai also attempted to shift the burden on the Department to determine how Hyundai treats accessories and negotiates the prices for such parts with its customers. It is not the Department's responsibility to provide the definition of what constitutes "accessories" since Hyundai's own sales documentation contains the repeated usage of the term. Further, sales documentation between Hyundai and its customers displays the term "accessories." This documentation, at a minimum, connotes that Hyundai understands the term "accessories" and the types of such components when it negotiates and completes its sales with customers who may identify or request such components. Even though the definition of such a term might occasionally differ among customers, it is reasonable for us to conclude that Hyundai should have been able to distinguish components that are "accessories" from those that are not "accessories" because accessories are identified in its own sales documentation and Hyundai produces/sells such components. Through its technical knowledge and sales experience, Hyundai, not the Department, should have an understanding of the ranges/types of accessories for LPTs. Importantly, the other respondent, Hyosung, attempted to convey what it understands accessories to be and reported such components. Specifically, Hyosung states that "{a}ccessories are devices not *per se* essential to LPT's function, but instead add to the convenience or effectiveness of a feature of the LPT" and that "{a}ccessories include, for example, fiber optics, dissolved gas monitors, electric temperature monitors, AEP auxiliary panels, dynamic rating-site commissioning, and other devices not essential to the core function of the transformers." Further, Hyosung adds that "{t}hese accessories, generally provided to the customer on special request, help the customer in checking and monitoring the LPT." It is unclear to the Department why Hyosung was able to provide such requested information with respect to accessories, while Hyundai claims it is unable to do so. In addition, Hyundai should have known that the Department would be asking for information concerning "accessories" in this administrative review as it knew that this was a significant issue during the prior administrative review. More importantly, with repeated supplemental questionnaires and Hyundai's failure to provide such information, Hyundai's responses illustrate its refusal to cooperate with the Department. Hyundai's failure to cooperate thus hindered the Department's ability to complete its analysis. As such, we preliminarily determine that Hyundai impeded the review by failing to

²²⁶ LPT PDM (Aug. 31, 2017), p.16 (citations omitted)(Exhibit KOR-140).

act to the best of its ability by withholding the requested information concerning “accessories.”²²⁷

159. In sum, Commerce did take into account the “complementary chart” Hyundai submitted, but Hyundai refused to identify the products that constituted Hyundai’s accessories and thus the chart could not be used by Commerce.

Question 96 (Korea)

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

Gross-unit price

Question 97 (United States)

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

160. As Commerce discussed in its Issues and Decision Memorandum, there were several issues and concerns with Hyundai’s reported gross unit prices. First, with respect to accessories, “because ‘accessories’ could be selectively included/excluded from Hyundai’s home market and U.S. sales and reported gross unit prices at Hyundai’s discretion, this could lead to the over/understatement of gross unit prices, thereby enabling Hyundai to manipulate our calculations, resulting in a lower dumping margin.”²²⁸

161. Second, Commerce found that Hyundai understated home market prices by improperly reporting its home market gross unit prices for certain home market sales.²²⁹ “Specifically, for reporting purposes, Hyundai continued to use the values of the line items from the initial contract to report its gross unit prices for certain home market sales, although the total contract amount, which includes the values for these sales, subsequently changed in revised contracts.”²³⁰

162. Third, the record indicated that Hyundai treated the same item differently between home market sales. As Commerce explained, “by comparing one home market sale, which is included in the contract at issue, with a second home market sale on the record (which treats a certain item as part of a foreign like product), we discovered that Hyundai excluded this certain item in its

²²⁷ LPT PDM (Aug. 31, 2017), pp.16-17 (citations omitted)(Exhibit KOR-140).

²²⁸ See *Large Power Transformers From the Republic of Korea: Final Results of Antidumping Duty Administrative Review: 2015-2016*, 83 Fed. Reg. 11,679 (Dep’t of Commerce) (March 16, 2018) (Exhibit KOR-109), and the accompanying LPT I&D Memo (March 9, 2018), p. 10 (“LPT I&D Memo (March 9, 2018)”) (Exhibit KOR-211).

²²⁹ LPT I&D Memo (March 9, 2018), p. 15 (Exhibit KOR-211).

²³⁰ LPT I&D Memo (March 9, 2018), p. 15 (Exhibit KOR-211).

aforementioned contract as a nonforeign like product and, thus, understated its home market prices.”²³¹

163. While Commerce found many concerns with Hyundai’s gross-unit prices, the scope of misreported gross-unit prices is not known. USDOC did not require the respondents to submit all of the company’s supporting sales documentation. Such a request would typically be impractical and unreasonable, particularly if there are many sales. Rather, Commerce asked the respondents to submit the sales data in a database and requested a limited amount of sales documentation from the company’s books and record to check the accuracy of the database. If the database failed the accuracy check based on the limited supporting documents requested, the reliability and accuracy of the database would be undermined.

164. Here, Commerce looked at a limited number of sales and their related documentation. With respect to accessories, the record was ambiguous and thus Commerce continued to have concerns that gross unit prices were understated.²³² Similarly, with respect to Hyundai’s treatment of the same/similar parts differently in the home market, Commerce noted that Hyundai’s inaccurate reporting gave “rise to concerns of the manipulation of gross unit prices.”²³³ Finally, the documentation Hyundai submitted failed to clarify whether changes in the contract prices between the initial contract and later revised contracts was related to a certain non-foreign like product, as Hyundai alleged.²³⁴ As the I&D Memo explains, Commerce’s “review of this documentation, and the fact that Hyundai failed to cooperate to the best of its ability by not providing the requested information regarding accessories, raises serious concerns with respect to the accuracy of Hyundai’s reporting of its home market gross unit prices and calls into question of its treatment/reporting of components consisting of merchandise under review, e.g., ‘accessories.’”²³⁵ As such, Commerce found the submitted data to be “inaccurate and unreliable warranting the application of facts available.”²³⁶

Question 98 (Both parties)

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

²³¹ LPT I&D Memo (March 9, 2018), p. 16 (Exhibit KOR-211).

²³² LPT I&D Memo (March 9, 2018), p. 16 (Exhibit KOR-211).

²³³ LPT I&D Memo (March 9, 2018), p. 16 (Exhibit KOR-211).

²³⁴ LPT I&D Memo (March 9, 2018), p. 15 (Exhibit KOR-211).

²³⁵ LPT I&D Memo (March 9, 2018), pp. 17-18 (Exhibit KOR-211).

²³⁶ LPT I&D Memo (March 9, 2018), pp. 17-18 (Exhibit KOR-211).

initial and revised contracts be a non-issue if the USDOC had accepted HHI's reporting of accessories?

165. With respect to the Panel's first question, the issue of understatement of home market prices is separate from the accessories issue.

166. Regarding the Panel's second question, even if HHI's reporting of accessories were accepted, the difference between the initial and revised contracts would still be an issue. As part of its check on the reliability of submitted information, Commerce selected certain sales and requested the documentation for them as a spot check to see if the information in the submitted sales database was accurate. In this spot check, Commerce found that Hyundai had failed to include the figures in revised contracts. Therefore, Hyundai's sales database failed the spot check. Because Hyundai failed to report the contract amendments (other than the spot check documents provided), the amended contract data for the other sales are not on the record. Due to Hyundai's failure to submit the contract amendment data, there is no way in which Commerce can know how many sales are affected or how to adjust for the missing data, which undermines the reliability of Hyundai's sales database.

Question 99 (Korea)

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

8.3.2 Hyosung

Service-related revenues

Question 100 (United States)

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

167. Please see the United States' response to Question 101.

Question 101 (United States)

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

168. The United States is providing a single response to Questions 100 and 101.

169. As explained in response to question 84, Commerce requested the reporting of all service-related revenues so it could determine if the service-related revenues were an indistinguishable part of a lump-sum price for the subject merchandise or were separately

negotiated. Therefore, because the OAFs contain the requested information, Hyosung was required to report it. The issue is not whether a specific type of documentation was identified, but rather whether Commerce requested Hyosung to report specific information, which Hyosung failed to provide. Hyosung did not report the requested information. And, as is evidenced by Hyosung's OAFs on the record, Hyosung clearly had the requested information in its books and records.

170. In section B of Commerce's questionnaire, at page B-1, Commerce requested that Hyosung "report revenue in separate fields (*e.g.*, ocean freight revenue, inland freight revenue, oil revenue, installation, *etc.*) and identify the related expense(s) for each revenue."²³⁷ Commerce made the same request for section C of the questionnaire at page C-1.²³⁸ Commerce thus requested, from the start of the administrative review, that Hyosung report service-related revenues and expenses separately. Commerce did not assume that these revenues and expenses were tied to any particular documentation, but did require that they be reported.

171. Hyosung, in its February 27, 2017 response, stated that it had complied with Commerce's instructions.²³⁹ Hyosung further stated that it reported a gross unit price net of service-related revenues, and separately reported these service-related revenues, but only in instances where the revenues in question were listed on the invoice to the customer. Hyosung also stated that the separately negotiated services provided to customers were often included in the lump-sum payment made by the customer.²⁴⁰

172. As Commerce had asked that Hyosung report service-related revenues, not just those listed on the commercial invoice, Commerce asked if there were any other sales document or other communication with the customer regarding service-related revenues. Commerce made this request in the supplemental questionnaire of April 12, 2017 (the first sales supplemental, at question 65d).²⁴¹ In its response on May 8, 2017, Hyosung stated that there were no listed revenue items on sales documents or other communications.²⁴² Commerce also requested further clarification of Hyosung's sales process in both markets, and requested copies of the OAFs

²³⁷ Department of Commerce Initial Anti-Dumping Questionnaire, Hyosung (Jan. 5, 2017), p. B-1, para. 7 (Exhibit USA-46).

²³⁸ Department of Commerce Initial Anti-Dumping Questionnaire, Hyosung (Jan. 5, 2017), p. C-1, para. 7 (Exhibit USA-46).

²³⁹ Hyosung Second Supplemental Cost Response (February 27, 2017), B-2 (Exhibit KOR-153).

²⁴⁰ Hyosung Second Supplemental Cost Response (February 27, 2017), B-2 – B-3 (Exhibit KOR-153).

²⁴¹ *Administrative Review of the Antidumping Duty Order on Large Power Transformers from the Republic of Korea; 2015-2016: First Sales Supplemental Questionnaire* (April 12, 2017) (Exhibit USA-104 (BCI)).

²⁴² Hyosung Supplemental Questionnaire Response (May 8, 2017), S-34 (Exhibit KOR-154).

pertaining to all U.S. sales, at question 43.²⁴³ Many of the OAFs provided by Hyosung were partially legible.

173. As Hyosung stated that it negotiates services with customers,²⁴⁴ Commerce continued to attempt to identify whether there was documentation demonstrating the separate service-related revenues associated with the expenses and services provided. At Question 9 of Commerce’s second sales supplemental, dated May 26, 2017, Commerce asked if sales documentation separately listed, or otherwise itemized, any sales-related service revenues.²⁴⁵ Commerce also requested a gross unit price for U.S. sales inclusive of all parts and accessories, but net of service-related revenues, at question 32b. At question 32i, Commerce asked how Hyosung calculated the reported service-related revenues. If they were not on the invoice, Commerce requested an example of the documentation which contained the revenues. Commerce asked other questions regarding other service-related revenues throughout the questionnaire. Finally, Commerce requested complete sales documentation for a number of U.S. sales at question 66.²⁴⁶

174. Hyosung’s response to question 32 was to continue to base its response on whether the service-related revenue was listed on the invoice, and did not otherwise break out the service-related revenues included in the gross unit price.²⁴⁷ With the complete sales documentation in response to question 66, Commerce had fully legible OAFs for those sales. It was with these documents, and absent Hyosung’s complete response to Commerce’s requests that service-related revenues for all sales be reported separately, that Commerce determined the OAFs were the best documents available to calculate service-related revenues. These documents were issued in the normal course of doing business and contain information from which the service-related revenues can be calculated. In particular, the OAFs contain information where Hyosung estimates service-related expenses, but the method by which Hyosung (or, more specifically, HICO America) makes this estimate is to allocate a portion of the revenues to be received from the customer to cover the expenses in question. As the actual service-related expenses were nearly always lower than the revenue amounts allocated to cover the expenses, and since Hyosung did not refund any of these excess allocations/estimations to the customer, the “estimated expenses” on the OAFs were *de facto* service-related revenues in excess of the expenses, and should have been capped.²⁴⁸

Overlapping invoice

²⁴³ Hyosung Supplemental Questionnaire Response (May 8, 2017), S-21 (Exhibit KOR-154).

²⁴⁴ Hyosung Supplemental Questionnaire Response (May 8, 2017), S-23 (Exhibit KOR-154).

²⁴⁵ Second Sales Supplemental Questionnaire (May 26, 2017), p. 5 (Exhibit KOR-155).

²⁴⁶ Second Sales Supplemental Questionnaire (May 26, 2017), pp. 13-14 (Exhibit KOR-155).

²⁴⁷ Supplemental Questionnaire Response (June 21, 2017), pp. 23- 25 (Exhibit KOR-156).

²⁴⁸ LPT I&D Memo (March 9, 2018), pp. 28-29 (Exhibit KOR-211).

Question 102 (Korea)

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

Question 103 (Both parties)

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

175. No. The inaccuracy of the data and the overlapping invoices are separate issues.

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

Question 104 (Korea)

Please respond to the United States' argument, in paragraph 90 of its second opening statement, that "because the additional elements are legal characterisations, they are not susceptible to objective yes/no coding. Thus, this statistical approach really just tracks whether adverse inferences are adopted and whether non-cooperation is present, which as discussed above, does not address the alleged measure at issue".

Question 105 (Korea)

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

Question 106 (Korea)

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

Question 107 (Korea)

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

Question 108 (Korea)

In Certain Carbon and Alloy Steel Cut-to-Length Plate from Germany, the USDOC, in drawing an adverse inference, appears to have undertaken some analysis of the degree of

cooperation received, e.g., by noting that the information in question "is the type of information that a respondent should have reasonably anticipated being required to provide to its customers for quality assurance and warranty claims". How does this support your position that, whenever it reaches a finding of non-cooperation, the USDOC simply draws adverse inferences and selects facts available without taken into account the "degree of cooperation received"?

Question 109 (Korea)

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

Question 110 (United States)

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

176. In Exhibit USA-105, the United States provides the full version of Olives from Spain (USA-81).

177. In Exhibit USA-106, the United States provides the full version of Aluminum Extrusions from China (USA-89).

178. In Exhibit USA-107, the United States provides the full version of Welded Line Pipe from Korea (USA-90).

179. In Exhibit USA-108, the United States provides the full version of Softwood Lumber from Canada (USA-92).

180. In Exhibit USA-109, the United States provides the full version of Certain Cold-Rolled Steel Flat Products from the Russian Federation (USA-85).

181. In Exhibit USA-110, the United States provides the full version of Certain Uncoated Paper from China (USA-93).

182. In Exhibit USA-111, the United States provides the full version of Large Residential Washers from Korea (USA-94).

183. In Exhibit USA-112, the United States provides the full version of Certain Uncoated Paper from Indonesia (USA-95).