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

(WT/DS488)

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I. INTRODUCTION

1. The Republic of Korea challenges U.S. antidumping (AD) duties imposed on oil country tubular goods (OCTG) from Korea. Korea claims that the U.S. Department of Commerce's (USDOC) calculation of normal value and of export prices, as well as USDOC's procedural conduct in the investigation, "are inconsistent with the United States' obligations under the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*" ("AD Agreement").[1] Korea's claims are without merit.

2. The issues and decision memorandum that accompanies USDOC's final determination regarding the antidumping investigation of OCTG from Korea is 109 pages long.[2] This memorandum addresses 38 issues. For each issue, USDOC summarizes the relevant arguments and rebuttal arguments that it received from the interested parties and then explains why, based on its analysis of the evidence in the record, it reached a specific finding. Korea's assertion then that that USDOC "provided no rationale"[3] for its final determination is false on its face. As the record establishes and this submission explains, USDOC provided a reasoned and adequate explanation as to how the evidence on the record supported its factual findings and how those factual findings support its overall determination. And as this submission demonstrates, the arguments advanced by Korea otherwise fail to provide plausible alternative explanations of the record evidence before USDOC.

3. This submission is organized as follows: Section II contains a brief discussion of relevant procedural and factual background, and Section III addresses relevant rules related to interpretation, standard of review, and burden of proof. Section IV then responds to Korea's claims.

4. Section IV.A addresses Korea's "as such" claim related to the selection of the appropriate method to calculate normal value where home market sales cannot be used, and section IV.B addresses Korea's "as applied" claim related to the use of constructed value in the USDOC's final determination in the antidumping investigation of OCTG from Korea. We demonstrate that Korea errs in arguing that Article 2.2 of the AD Agreement prohibits Members from considering the volume of sales in assessing the appropriateness of third-country sales to determine normal value.

5. In section IV.C, we address Korea's claim regarding the calculation of CV profit. We demonstrate that Korea's claims are without merit for the following reasons:

- The U.S. determination that CV profit could not be calculated based on actual data was not inconsistent with the chapeau of Article 2.2.2 of the AD Agreement because neither HYSCO nor NEXTEEL had viable home market sales during the period of investigation;

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[1] First Written Submission of Korea (Confidential), para. 2 (Dec. 11, 2015) ("Korea FWS").

[2] Final Determination Notice (Exhibit KOR-24).

[3] Korea FWS, para. 1.

- The U.S. definition of the "general category of products" was not inconsistent with Articles 2.2.2(i) and 2.2.2(iii);

- The U.S. calculation of CV profit based on a reasonable method was not inconsistent with Article 2.2.2(iii); and

We also demonstrate that the United States did not act inconsistently with the obligations of Article 2.4 when USDOC used a reasonable method to select CV profit because CV profit cannot be characterized as an allowance undertaken to adjust to a difference between the export price and the normal value.

6. Section IV.D addresses Korea's claims on the USDOC's decision to disregard export price. Section IV.E addresses the USDOC's use of calculated costs based on a respondent's supplier's books and records. We demonstrate that the USDOC's decisions in both instances were based on proper findings of association.

7. In section IV.F, we address Korea's claims regarding respondent selection. The USDOC provided detailed explanations for its reasoning for limiting the number of respondents individually examined and for not individually examining voluntary respondents. The USDOC's explanations fall squarely within Articles 6.10 and 6.10.2 of the AD Agreement.

8. In section IV.G, we turn to Korea's procedural claims. We explain that the USDOC provided Korean respondents with ample opportunity to defend their interests and disclosed the essential facts forming the basis for its decision to apply definitive measures. We further demonstrate that the USDOC's public notice contained all relevant information on matters of fact and law and the reasons that led to the imposition of final measures.

9. In sections IV.H and IV.I, we address, respectively, Korea's claims under Article I:1 and Article X:3(A) of the GATT 1994. We demonstrate that the products of other countries in parallel antidumping investigations did not receive favorable treatment, and that Korea's Article X:3(A) claim relies on a misreading of the applicable obligations of that provision. Furthermore the United States administered its antidumping laws, regulations, decisions, and rulings in a uniform, impartial, and reasonable manner. Finally, in section IV.J, we address Korea's consequential claims related to the AD Agreement which, for the reasons set forth in the prior sections, are without merit.

10. The United States otherwise generally notes that Korea improperly references a decision of the U.S. Court of International Trade as support for some of its arguments.[4] Korea's reliance on a domestic court's decision to support a claim under the AD Agreement is misplaced as any such decision has no bearing on the Panel's interpretation of the covered agreements in this dispute. The task of a WTO panel is to review the consistency of a Member's actions with the

[4] *See* Korea FWS, para. 211 (citing *Husteel Co., Ltd.*, pp. 45-46).

covered agreements and not with that Member's domestic laws.[5] Further, the litigation at the domestic court is still ongoing and subject to change, including possibly appeal and reversal.

II. FACTUAL BACKGROUND

A. Product Under Investigation

11. The following facts on the product under investigation are drawn from the determination by USDOC and the record of the investigation. These facts are relevant to understanding the basis on which USDOC made certain choices relating to normal value and other issues and contradict Korea's assertions that any pipe product made by the Korean companies was equally relevant for purposes of the investigation.

12. OCTG "are either carbon or alloy tubular steel products used in oil and gas wells."[6] The OCTG covered by this investigation fall into two major categories: casing and tubing.[7] Casing is "a circular pipe that serves as the structural retainer for the walls of the well" and "is used in the drill hole to provide a firm foundation for a drill string by supporting the walls of the hole to prevent caving while drilling is taking place and after the well is completed."[8] Casing "must be sufficiently strong to carry its own weight and to resist both external pressure and pressure within the well."[9]

13. Tubing is also a product used inside the oil or gas well. Tubing is typically a "smaller-diameter pipe… installed inside a larger-diameter casing that is used to conduct the oil or gas from the subsurface strata to the surface either through natural flow or through pumping."[10] Tubing "must be strong enough to support its own weight, that of the oil or gas, and that of any pumping equipment suspended on the string."[11] Because "OCTG products are designed to withstand the extraordinary pressures and harsh working environment present in drilling fields,"[12] OCTG are subject to strict quality standards, testing, and certification more rigorous than those of other pipe products designed for above ground uses (such as line pipe and standard

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[5] The task of a WTO panel is to review the consistency of a party's actions with the covered agreements and not with that party's domestic laws. For example, DSU Article 7.1 sets forth the panel's terms of reference to examine the claims of the complaining party in the light of the relevant provisions of the covered agreement cited by the parties to the dispute.

[6] Petition for the Imposition of Antidumping and Countervailing Duties (July 2, 2013) ("Petition"), pp. 7-8 (Exhibit USA-01).

[7] Petition, p. 8 (Exhibit USA-01).

[8] Petition, p. 9 (Exhibit USA-01).

[9] Petition, p. 10 (Exhibit USA-01).

[10] Petition, p. 10 (Exhibit USA-01).

[11] Petition, p. 10 (Exhibit USA-01). Drill string is composed of drill pipes, drill collars, and the drill bit. Drill string is used to transmit power from the drill motor above the ground to the drill bit and to conduct drilling fluid (mud) down to the drill bit to flush drill cuttings to the surface for removal. *See* Amendment to Petition for the Imposition of Antidumping and Countervailing Duties (July 12, 2013) ("Amendment to Petition") at Exhibit Supp. I-56, p. I-30 and n.52 (Exhibit USA-02).

[12] Response of HYSCO to the Department's December 4 Supplemental Section D Questionnaire (January 7, 2014) ("HYSCO Supp. Sec. D"), p. SD-13 (Exhibit USA-03).

pipe).[13] Not surprisingly, OCTG sell at a premium above pipe products not suitable for use in an oil or gas well.[14]

14. There are other products that are used in the drilling and extraction of oil and gas not covered by the scope of the Korea OCTG investigation, including non-subject OCTG (e.g., stainless OCTG) and drill pipe. Stainless OCTG contain 10.5 percent or more of chromium and are used in applications requiring resistance to oxidization and corrosion.[15] Drill pipe is used in oil and gas wells "to transmit power from the drilling motor above ground to the drill bit, and to conduct drilling fluid (mud) down to the drill bit to flush drill cuttings to the surface for removal."[16] Like the OCTG products covered by this investigation, drill pipe must meet strict quality requirements, because it "must have sufficient tensile strength to support its own weight, the weight of contained drilling fluids, and that of drill collars and the drill bit."[17]

15. "OCTG products are designed to withstand the extraordinary pressures and harsh working environment present in drilling fields."[18] Products that do not meet the strict quality requirements of OCTG products cannot be used in the OCTG application (i.e., in the well), because of "the potential liability and cost in the event of a pipe failure."[19]

B. History of the Korea OCTG Investigation

16. On July 2, 2013, eight U.S. companies[20] filed a petitions for the imposition of antidumping and countervailing duties against imports of certain OCTG from multiple countries, including Korea. USDOC subsequently initiated an antidumping duty investigation on July 22, 2013.[21] On August 26, 2013, USDOC determined that because of the large number of exporters or producers involved in the investigation, and after careful consideration of USDOC resources, it was impracticable to individually examine each known exporter and producer. USDOC decided to limit the number of respondents for individual examination and selected the two

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[13] U.S. Steel Comments re. NEXTEEL Third Supplemental Section D Questionnaire Response ("U.S. Steel Comments") at Exhibit Q, p.1 (Exhibit KOR-19).

[14] U.S. Steel Comments at Exhibit Q, p.1 (Exhibit KOR-19).

[15] Amendment to Petition, p. 4 and Exhibit Supp. I-56, p. I-35, n.59 (Exhibit USA-02); *Certain Oil Country Tubular Goods from the Republic of Korea: Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances*, 79 Fed. Reg. 41,983, 41,985 (July 18, 2014) (KOR-24).

[16] Amendment to Petition at Exhibit Supp. I-56, p. I-30 (Exhibit USA-02).

[17] Amendment to Petition at Exhibit Supp. I-56, p. I-30 (Exhibit USA-02).

[18] HYSCO Supp. Sec. D, p. SD-13 (Exhibit USA-03).

[19] HYSCO Supp. Sec. D, p. SD-13 (Exhibit USA-03).

[20] United States Steel Corporation, Maverick Tube Corporation, Boomerang Tube, Energex Tub, a division of JMC Steel Group, Northwest Pipe Company, Tejas Tubular Products, TMK IPSCO, Vallourec Start, L.P., and Welded Tube USA Inc. (petitioners).

[21] *See Certain Oil Country Tubular Goods from India, the Republic of Korea, the Republic of the Philippines, Saudi Arabia, Taiwan, Thailand, the Republic of Turkey, Ukraine, and the Socialist Republic of Vietnam*, 78 Fed. Reg. 45,505, 45,512 (July 29, 2013) (Exhibit KOR-02).

exporters or producers accounting for the largest volume of exports from Korea to the United States, Hyundai HYSCO ("HYSCO") and NEXTEEL Co. Ltd. ("NEXTEEL").[22]

17. On September 10, 2013, HYSCO and NEXTEEL reported to USDOC that they did not have a viable home market or third country market for OCTG products and thus would not be reporting home market or third country market sale prices, but instead would report cost of production.[23] HYSCO and NEXTEEL reported to USDOC that they sold OCTG mostly in the U.S. market. [24]

18. HYSCO later confirmed that all the OCTG it sold in Korea was "non-prime," that non-prime OCTG did not meet the specifications of the American Petroleum Institute (API) for OCTG (i.e., API Spec 5CT, ISO) and thus was "not marketed to the customer as OCTG," and the domestic customer used the non-prime OCTG "for structural purposes."[25] "HYSCO classified products as non-prime when any of the relevant product qualities in the final test stage did not satisfy the requirements set forth in the API specification."[26]

> Prime products are used in oil drilling applications, as defined by API 5CT. Nonprime OCTG is generally used for structural purposes. Non-prime OCTG cannot be used for applications defined under API 5CT because non-prime products do not satisfy the relevant API standard. As their name implies, prime OCTG products are designed to withstand the extraordinary pressures and harsh working environment present in drilling fields. As a practical matter, customers would not attempt to use non-prime OCTG products in OCTG applications because of the potential liability and cost in the event of a pipe failure.[27]

19. NEXTEEL also later confirmed that it did not sell OCTG in Korea and that while it sometimes identified products as OCTG sales, such sales could refer "to secondary (non-prime)

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[22] *Antidumping Duty Investigation of Certain Oil Country Tubular Goods from the Republic of Korea: Respondent Selection Memorandum* ("Respondent Selection Memorandum"), p. 8 (Exhibit KOR-03).

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

[24] Response of HYSCO to Section A of the Department's August 27, 2013 Questionnaire (September 17, 2013) ("HYSCO Sec. A Response"), p. A-2 and Exhibit A-1 (Exhibit USA-06) (**BCI**); Response of NEXTEEL to Section A of the Department's August 27, 2013 Questionnaire (September 17, 2013) ("NEXTEEL Sec. A Response"), p. A-2 and Exhibit A-1 (Exhibit USA-07) (**BCI**).

[25] *Verification of Hyundai HYSCO's Sales Responses in the Antidumping Duty Investigation of Certain Oil Country Tubular Goods from the Republic of Korea* (June 5, 2014) ("HYSCO Sales Verification Report"), pp. 22, 25 (Exhibit USA-08).

[26] HYSCO Supp. Sec. D, p. SD-12 (Exhibit USA-03); *see also* HYSCO Supp. Sec. D, pp. SD-12 - SD-13 ("Examples of such qualities include irregular outside diameter; thickness beyond permissible tolerances; or where either the yield point, tensile strength, or product elongation are less than permissible API specified levels") (Exhibit USA-03).

[27] HYSCO Supp. Sec. D, p. SD-13 (Exhibit USA-03).

products that continued to be identified as OCTG 'casing' or 'tubing' products, but were sold to customers as standard pipes."[28]

> We asked the company if it made sales of non-prime OCTG, and asked the company to explain whether it considered the concept of "non-prime OCTG" to be a meaningful one. The company stated that if was attempting to produce some pipes to a specific API 5CT grade, but the resulting product did not meet all of the requirements for the specification (including those of the grade in question), the product would very likely not meet the requirements of the specification such that it could be classified under one of the other API 5CT grades. Therefore, the company noted, it would routinely downgrade such pipe, and typically would sell it as standard pipe. The company clarified that it initially used the term "standard pipe" to apply to a limited number of products, such as water pipe and some structural pipes, but it now uses the term more loosely to mean pipes other than OCTG or line pipe.[29]

20. Respondents reported that they also sold other products in Korea that could not be used in OCTG applications, including standard pipe, line pipe, and downgraded or defective pipe.[30]

21. The interested parties submitted comments to USDOC concerning the CV profit calculation prior to USDOC's preliminary determination. NEXTEEL and HYSCO both argued that USDOC should calculate CV profit using cost and sales data associated with the companies' non-OCTG sales in Korea (i.e., pursuant to Article 2.2.2(i) of the AD Agreement) or the weighted average profit of Korean OCTG producers (i.e., pursuant to Article 2.2.2(iii)).[31]

22. Petitioners argued that USDOC should calculate CV profit based on Tenaris's profit ratio (also pursuant to Article 2.2.2(iii)) given that Tenaris was the largest OCTG producer in the world, 85 percent of its sales consisted of OCTG, it sold OCTG in many regions throughout the world, it had a consistent profit margin over time, and its profit experience was in line with the profit experiences of other OCTG producers.[32] Petitioners further argued that USDOC should not use the respondents' sales of non-OCTG products in Korea because OCTG and non-OCTG are not in the same general category of products.[33] Both NEXTEEL and HYSCO submitted rebuttal comments to Petitioners' pre-preliminary comments about CV profit, arguing in part that

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[28] *Verification of the Sales Response of NEXTEEL Co. Ltd. (NEXTEEL) in the Investigation of Oil Country Tubular Goods (OCTG) from the Republic of Korea* (May 29, 2014) ("NEXTEEL Sales Verification Report"), pp. 20-21 (Exhibit USA-09).

[29] NEXTEEL Sales Verification Report, p. 16 (Exhibit USA-09).

[30] *See* NEXTEEL Sales Verification Report, pp. 16-17 (Exhibit USA-09); HYSCO Sales Verification Report, pp. 22-23 (Exhibit USA-08).

[31] Pre-Preliminary Comments of NEXTEEL (January 30, 2014), pp. 17-26 and Attachment A (Exhibit USA-10) (**BCI**); Pre-Preliminary Comments of HYSCO (January 30, 2014), pp. 16-25 and Attachment A (Exhibit USA-11) (**BCI**).

[32] Petitioners' Pre-Preliminary Determination Constructed Value Profit Comments (January 31, 2014) ("Petitioners' CV Profit Comments") (Exhibit USA-12).

[33] Petitioners' CV Profit Comments (Exhibit USA-12).

USDOC "should reject Petitioners' suggested use of Tenaris' financial data to calculate CV profit."[34]

23. USDOC published a negative preliminary antidumping duty determination on February 25, 2013.[35] USDOC determined normal value based on CV because respondents did not have a viable home or third country market.[36] In determining the CV profit, USDOC had preliminarily considered three sources: (1) profit recorded in financial statements of seven Korean OCTG producers; (2) profit earned by HYSCO on its home market sales of non-OCTG pipe products; and (3) a research paper that calculated Tenaris's profit.[37]

24. USDOC understood that the three CV alternatives "have their limitations."[38]

> The difficulty of this issue revolves around the conflict between the statutory preference for CV profit to reflect the production and sale of merchandise in the market under consideration and the need for the profit to reasonably reflect the merchandise under investigation. With this in mind, there are issues to consider for each of the above available options. For example, the profit on HYSCO's home market sales of non-OCTG pipe products reflect the profit on pipe products typically used in the construction industry, as opposed to the OCTG products used in the specialized oil and gas industry. Likewise, the profit reflected in the Korean OCTG producers' financial statements reflect the profits on the same non-OCTG pipe products, as well as the profits on OCTG sales predominantly to the United States. While the Tenaris profit information reflects predominantly OCTG sales, it represents neither production nor sales in the market under consideration. In addition, it is based on a research paper containing a disclaimer statement regarding its accuracy. [39]

25. In the end, for NEXTEEL, USDOC preliminarily used profit data recorded in financial statements the other Korean OCTG producers.[40] For HYSCO, USDOC used profit earned by HYSCO on its home market sales of non-OCTG pipe products.[41] USDOC noted "that after the

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[34] Pre-Preliminary Rebuttal Comments of NEXTEEL (February 10, 2014), pp. 3-4 (Exhibit USA-13); Pre-Preliminary Rebuttal Comments of HYSCO (February 10, 2014), pp. 3-4 (Exhibit USA-14).

[35] *Certain Oil Country Tubular Goods from the Republic of Korea: Negative Preliminary Determination of Sales at Less Than Fair Value, Negative Preliminary Determination of Critical Circumstances and Postponement of Final Determination*, 79 Fed. Reg. 10,480 (February 25, 2014) (Exhibit KOR-07).

[36] *Decision Memorandum for the Negative Preliminary Determination* (February 14, 2014) ("Prelim. Decision Memorandum"), pp. 20-21 (Exhibit KOR-05).

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

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

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

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

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

preliminary determination, we intend to continue to explore other possible options for CV profit for both respondents."[42]

26. Less than a week after USDOC stated that it would continue to explore other possible CV profit alternatives, USDOC issued a supplemental cost questionnaire to NEXTEEL asking for information that could be used in calculating profit, such as cost and revenue information for NEXTEEL's sales of OCTG, line pipe, standard pipe, and other products sold in Korea, the United States, and other markets.[43] USDOC requested that NEXTEEL segregate its sales and cost of goods sold by the type of product and by market.[44]

27. NEXTEEL's response to the supplemental cost questionnaire included information it claimed could be used in calculating CV profit.[45] Petitioner U.S. Steel soon thereafter commented on NEXTEEL's response. U.S. Steel's comments challenged the reasonableness of calculating CV profit for OCTG based on NEXTEEL's sales of non-OCTG products in Korea and attached the actual financial statements of Tenaris.[46]

28. USDOC subsequently verified both HYSCO's and NEXTEEL's cost responses.[47]

29. The interested parties filed case briefs on June 18, 2014, and rebuttal briefs on June 23, 2014. All of the interested parties extensively addressed the matter of USDOC's calculation of CV profit. For example, both NEXTEEL and HYSCO addressed in their case and rebuttal briefs whether USDOC should use Tenaris's financial statements for purposes of this calculation or, alternatively, respondents' profits from the sale of non-OCTG products. That said, neither NEXTEEL nor HYSCO advocated that USDOC should use actual profit data pertaining to production and sales in the ordinary course of trade of the like product by NEXTEEL or HYSCO, respectively. On June 26, 2014, petitioners and respondents participated in a hearing at USDOC in which they further discussed the merits of the potential alternatives for calculating CV profit.

30. USDOC published a final affirmative antidumping duty determination on July 18, 2014, in which it calculated a weighted-average dumping margin for HYSCO of 15.75 percent and a weighted-average dumping margin for NEXTEEL of 9.89 percent.[48] The issues and decision memorandum accompanying this final determination is 109 pages long and addresses 38 issues.[49] The memorandum explains that USDOC calculated CV profit for both respondents using the profit figure of 26.11 percent as reported in the 2012 audited financial statements of

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

[43] Response of NEXTEEL to the Department's February 20, 2014 Third Supplemental Section D Questionnaire (March 6, 2014) ("NEXTEEL Supp. Sec. D") (Exhibit USA-15).

[44] NEXTEEL Supp. Sec. D, pp. 3-4 (Exhibit USA-15).

[45] NEXTEEL Supp. Sec. D at Exhibit SD-1 (Exhibit USA-15).

[46] U.S. Steel Comments, Exhibits P and Q (Exhibit KOR-19).

[47] HYSCO OCTG Profit Data (Exhibit KOR-27) (**BCI**); NEXTEEL OCTG Profit Data (Exhibit KOR-28) (**BCI**).

[48] Final Determination Notice (Exhibit KOR-24).

[49] Final Decision Memorandum (Exhibit KOR-21).

Tenaris.[50] USDOC provided a detailed explanation of the available data for CV profit and the reasons for why it selected this figure.[51] The details of this explanation are presented in the Argument section of this submission.

III. GENERAL PRINCIPLES

A. Korea Bears the Burden of Proof

31. In WTO dispute settlement, the burden of proving that a measure is inconsistent with a covered agreement is on the complaining party. In *Canada – Dairy (Article 2.1.5 – New Zealand and US II)*, the Appellate Body explained that it had

> consistently held that, as a general matter, the burden of proof rests upon the complaining Member. That Member must make out a *prima facie* case by presenting sufficient evidence to raise a presumption in favour of its claim. If the complaining Member succeeds, the responding Member may then seek to rebut this presumption. Therefore, under the usual allocation of the burden of proof, a responding Member's measure will be treated as WTO-*consistent*, until sufficient evidence is presented to prove the contrary.[52]

32. It is also a "generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence."[53] Accordingly, the burden is on Korea to prove that U.S. measures exist that are inconsistent with U.S. obligations under the relevant covered agreement.

B. Standard of Review

33. Article 3.2 of the DSU provides that the dispute settlement system of the WTO "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law." The Appellate Body has recognized that Article 31 of the *Vienna Convention on the Law of Treaties* (VCLT) reflects such customary rules of interpretation.[54] Article 31 of the VCLT provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." A corollary of this customary rule of interpretation is that an "interpretation must give meaning and effect to all the terms of the treaty."[55]

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[50] Final Decision Memorandum, pp.14-23 (Exhibit KOR-21).

[51] Final Decision Memorandum, pp. 3-23 (Exhibit KOR-21).

[52] *Canada – Dairy (Article 2.1.5 – New Zealand and US II) (AB)*, para. 66 (emphasis in original).

[53] *US – Wool Shirts and Blouses (AB)*, p. 14; *see also China – Autos (US)*, para. 7.6.

[54] *US – Gasoline (AB)*, p. 17.

[55] *US – Gasoline (AB)*, p. 23.

34. The applicable standard of review to be applied by WTO dispute settlement panels is that provided in Article 11 of the DSU and, with regard to antidumping measures, Article 17.6 of the AD Agreement. Article 11 of the DSU provides that:

> The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

35. Article 17.6 of the AD Agreement provides that:

> (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. 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;
>
> (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

36. Accordingly, the Panel should "review whether the authorities have provided a reasoned and adequate explanation as to (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings support the overall determination."[56] It is well-established that the Panel must not conduct a *de novo* evidentiary review, but instead should "bear in mind its role as *reviewer* of agency action" and not as "*initial trier of fact*."[57] Indeed, the Appellate Body has held that a panel breached Article 11 of the DSU where that panel went beyond its role as reviewer and instead substituted its own assessment of the evidence and judgment for that of the investigating authority.[58] At the same time, however, this does not mean that the Panel "must simply *accept* the conclusions of the competent authorities."[59] Examination of the authority's

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[56] *China – Broiler Products (Panel)*, para. 7.4 (*citing US – Countervailing Duty Investigation on DRAMS (AB)*, para. 186 and *US – Lamb (AB)*, para. 103).

[57] *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 187-188 (emphasis in original).

[58] *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 188-190.

[59] *US – Cotton Yarn (AB)*, para. 69, note 42 (emphasis in original) (*citing US – Lamb (AB)*, para. 106, n. 41).

conclusions must be "in-depth" and "critical and searching."[60] Finally, a panel must examine the evidence before an investigating authority in its "totality," rather than pieces of it in isolation.[61]

37. Article 17.6 of the AD Agreement imposes "limiting obligations on a panel" in reviewing an investigating authority's establishment and evaluation of facts.[62] The aim of Article 17.6 is "to prevent a panel from 'second-guessing' a determination of a national authority when the establishment of the facts is proper and the evaluation of those facts is unbiased and objective."[63]

IV. ARGUMENT

A. Korea's "As Such" Claim Regarding the "Viability Test" is Without Merit

38. Korea claims that a U.S. measure that it refers to as the "viability test" is inconsistent "as such" with Article 2.2 of the AD Agreement. In particular, Korea argues that, under U.S. law, where home market sales cannot be used to determine normal value, third-country sales may be used only if such third-country sales are five percent or more of the quantity or value of sales to the United States.[64] In Korea's view, Article 2.2 requires only that the third-country sales price be "representative," and does not permit an investigating authority to consider the volume of third-country sales.[65]

39. Korea's claims are without merit. First, Korea has not established that Article 2.2 of the AD Agreement prohibits Members from considering the volume of sales in assessing the appropriateness of third-country sales. Second, Korea has not established that U.S. law requires, in all cases, that USDOC disregard low-volume third-country sales.

1. Article 2.2 of the AD Agreement Does Not Prohibit an Investigating Authority from Considering the Volume of Third-Country Market Sales

40. Where home market sales cannot be used to determine normal value, Article 2.2 permits an investigating authority to use either of two sources: third-country sales *or* cost of production plus a reasonable amount for administrative, selling and general costs and for profits ("constructed normal value"). Korea's claim under Article 2.2 seeks to read into that provision a limitation on when the investigating authority may decline to use the third-country sales

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[60] *See e.g., China – Broiler Products (Panel)*, para. 7.5 (*quoting US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 93).

[61] The Appellate Body in *US – Countervailing Duty Investigation on DRAMS* found that the panel had improperly engaged in *de novo* review of the evidence before USDOC because the panel had "examined whether certain pieces of evidence were sufficient to establish certain conclusions that the USDOC did not seek to draw, at least solely on the basis of those pieces of evidence. Moreover, it failed to examine the evidence in its *totality*." *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 188 (citing paras. 154-157 of the same report) (emphasis in original).

[62] *Thailand – H-Beams (AB)*, para. 114.

[63] *Thailand – H-Beams (AB)*, para. 117.

[64] Korea FWS, paras. 39, 55.

[65] Korea FWS, paras. 55, 57.

alternative methodology that is not present in the text. Very simply, Korea's claim fails because Article 2.2 does not require the use of third-country sales prices to determine normal value at all; the investigating authority could therefore decline to employ the third-country sales methodology and always choose the constructed normal value alternative methodology. As Korea expressly acknowledges, Article 2.2 "does not establish a hierarchy"[66] between the two methods an investigating authority is permitted to use for determining normal value where a producer does not have a viable home market. Therefore, Korea errs when it argues that, if an authority considers the use of third-country sales, the authority may not consider the volume of those sales in its assessment of whether the data would allow an appropriate comparison.[67] The text does not support Korea's interpretation of Article 2.2 and, accordingly, Korea's claim must fail.

41. A proper interpretation of Article 2.2 of the AD Agreement must begin with the text of that provision. Article 2.2 provides:

> When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country[2], such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling, and general costs and for profits.
>
> [2] Sales of the like product destined for consumption in the domestic market of the exporting country shall normally be considered a sufficient quantity for the determination of the normal value if such sales constitute 5 per cent or more of the sales of the product under consideration to the importing Member, provided that a lower ratio should be acceptable where the evidence demonstrates that domestic sales at such lower ratio are nonetheless of sufficient magnitude to provide for a proper comparison.

42. Article 2.2 provides the framework for the determination of normal value and sets certain parameters on the permissible methodology, but the text is silent on the manner for selecting the appropriate methodology in a given proceeding. Articles 2.1 and 2.2 establish that normal value is found by examining sales of the like product in the domestic market of the exporting country.[68] In certain circumstances, Article 2.2 permits use of other data sources to calculate normal value. If domestic market sales price data cannot be used, Article 2.2 prescribes two alternative data sources: third-country market sales prices or constructed normal value.[69]

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[66] Korea FWS, para. 54.

[67] Korea FWS, para. 57.

[68] Article 2.2, AD Agreement.

[69] Article 2.2, AD Agreement.

43. Korea's claim rests on a fundamental misunderstanding of the applicable obligations.[70]

44. First, as acknowledged by Korea, Article 2.2 does not state a preferred alternative method to calculate normal value. Rather, the provision's use of "or" makes clear that an authority may choose to use either of the two available methods. The relevant dictionary definition of "or" is "Introducing the second of two, or all but the first or only the last of several, alternatives."[71] Therefore, while the text of Article 2.2 limits the data sources for calculating normal value, it also permits the investigating authority to determine which of the two options is appropriate in a particular proceeding. The text, as Korea recognizes, does not favor one option over the other.[72]

45. Second, the text of Article 2.2 does not impose an obligation on an authority to consider or analyze both of the two alternative methods before choosing one. Therefore, there is no basis for Korea to contend that application of a "viability test" could lead to an impermissible prohibition on consideration of third-country sales.[73] Because Article 2.2 permits the use of either methodology, an investigating authority could simply choose to use constructed normal value to calculate normal value in a given investigation, based on some internal criteria or no criteria at all. In such a case, the investigating authority would not even need to collect, review, or consider a respondent's third-country sales.

46. Conversely, an investigating authority could choose to use third-country sales data without collecting, reviewing, or considering information to determine constructed normal value. Under Korea's interpretation, by contrast, a respondent would be required to submit all the data necessary to analyze *both* third-country sales and constructed normal value, increasing to a substantial degree the administrative burden on respondents and investigating authorities. Such an interpretation is not supported by any text in Article 2.2.

47. Third, Article 2.2 uses the qualifier "appropriate" in regard to the potential "third country" sales. This term indicates that, even were an investigating authority to consider third country sales in a particular instance, the authority would not breach Article 2.2 if it disregards third-country sales found not to be appropriate.

48. In this regard, footnote 2 of the AD Agreement provides relevant context to the phrase "appropriate third country." Footnote 2 states that sales of the like product in the domestic market "shall normally be considered a sufficient quantity for the determination of the normal value if such sales constitute 5 per cent or more of the sales of the product under consideration to the importing Member." That is, sales in excess of five per cent are normally considered

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[70] *See US – Hot-Rolled Steel (AB)*, para. 166; *EC – Tube or Pipe Fittings (AB)*, para. 77.

[71] *New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 2012 ("*New Shorter Oxford English Dictionary*") (Exhibit USA-16). *See China – Broiler Products (Panel)*, para. 7.416 (analyzing Article 4.1 of the AD Agreement, the panel observed that "the texts of the provision[] use the term 'or' rather than terms that would indicate a hierarchy, such as 'first' or 'if not, then.' The use of the term 'or' indicates the flexibility the agreements provide to investigating authorities with respect to defining the domestic industry."); *see also EC – Salmon (Norway)* (Panel), para. 7.165.

[72] Korea FWS, para. 54.

[73] Korea FWS, para. 56.

sufficient to provide for a "proper comparison." Sales below this would normally not provide a basis for a "proper comparison" unless the evidence demonstrates otherwise.

49. Korea suggests that the lack of a specific reference to quantitative factors in connection with third-country sales indicates that no such factors may be considered in determining whether to use that methodology.[74] But Korea is mistaken. The general rule of footnote 2 is intended to ensure that the home market sales prices used for normal value are representative and not an aberration, such as sample sales or sales made at an artificially high or low price to purposefully impact a dumping margin. If sales in the home market are of a particular quantity, there is a greater likelihood that those sales are being made at market, commercial prices, and therefore can provide a "proper comparison" for purposes of determining dumping. Footnote 2 thus provides useful guidance for how an investigating authority may, if it so chooses, evaluate what constitutes an "appropriate third-country," as the same rationale would apply to low-volume sales in third-country markets. If authorities were prohibited from considering volume, as Korea suggests, investigating authorities may use data that in other contexts is expressly acknowledged to be inadequate to provide for a proper comparison.

50. Fourth, Korea's citation to *Mexico – Rice AD Measures* exposes the fundamental error with Korea's interpretive analysis. In that case, the United States challenged Mexico's requirement that a party requesting an administrative or changed circumstances review demonstrate that the volume of exports during the review period is "representative"[75]. The Appellate Body found that Article 11.2 includes an exhaustive list of conditions on the initiation of a review, and that "if an agency seeks to impose additional conditions on a respondent's right to a review, this would be inconsistent with those provisions."[76]

51. Here, the situation is different. An interested party is not entitled to the use of third-country sales. As discussed above, Article 2.2 permits an authority to use either of two alternatives to calculate normal value – third-country sales or constructed normal value – without any preference, much less a requirement, to use one over the other. Moreover, the text does not preclude the imposition of considerations guiding an investigating authority's choice whether to use third-country sales in particular. To the contrary, Article 2.2 permits the use of an "appropriate" third-country market, but does not prescribe the factors that may be assessed in order to determine whether a particular market is appropriate. Therefore, Korea's reliance on the findings in *Mexico – Rice AD Measures* is to no avail.

52. Based on the foregoing, Korea has failed to demonstrate that consideration of quantitative factors when analyzing the use of third-country sales is inconsistent with Article 2.2. On this basis alone, Korea's claim that an alleged "viability test" guiding the use of third-country sales is "as such" inconsistent with Article 2.2 of the AD Agreement must be rejected.

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[74] Korea FWS, para. 57.

[75] *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 108.

[76] *Mexico – Anti-Dumping Measures on Rice (AB)*, paras. 314-315.

2. Korea's Claim Must Fail Because U.S. Law Does Not Impose a "Viability Test" As Argued by Korea

53. Even aside from Korea's erroneous legal interpretation of Article 2.2, which provides a sufficient basis to reject its claim under Article 2.2, Korea's claim fails for a second, independent reason. Korea's claim is premised on the assertion that the United States is required in all circumstances to impose a five percent threshold when considering the use of third-country sales to determine normal value. This assertion is incorrect. Therefore, Korea cannot demonstrate that application of U.S. law necessarily leads to a breach of Article 2.2 of the AD Agreement, even on Korea's understanding of that obligation.

54. The focus of the examination in evaluating an "as such" challenge is to ascertain the meaning of the measure itself, and not whether any particular instance of application was inconsistent with the provision. A complaining party must demonstrate that the challenged measure will "necessarily" result in WTO-inconsistent application.[77] As the Appellate Body explained in *US – Oil Country Tubular Goods Sunset Reviews*, a party making an "as such" claim is "asserting that a Member's conduct – not only in a particular instance that has occurred, but in future situations as well – will necessarily be inconsistent with that Member's WTO obligations."[78] In that proceeding, the Appellate Body found that the United States did not breach the AD Agreement because the measure in question did not "preclude" USDOC from considering relevant evidence under Article 11.3 of the AD Agreement.[79] The panel in *EC – IT Products* agreed that "measures challenged 'as such' should…'necessarily' result in a breach of WTO obligations."[80] In other words, the complainant must demonstrate that application of the challenged measure always will result in an inconsistency with a covered agreement, and not merely that the measure might result in an inconsistency in certain circumstances.

55. To make such a demonstration, Korea therefore must present to the Panel evidence and legal argument sufficient to show that application of U.S. law necessarily results in an inconsistency with Article 2.2 of the AD Agreement – that is, that the measure necessarily requires WTO-inconsistent action or precludes WTO-consistent action. Yet, Korea has submitted no evidence to show that the challenged provision necessarily precludes WTO-consistent action in the determination of normal value.

56. The meaning of a challenged measure must be determined according to the domestic legal principles in the legal system of the Member maintaining that measure. In the United States, U.S. legal principles establish that interpretation of a federal statute or regulation begin with the ordinary meaning of the text of that statute or regulation, and in appropriate circumstances may take account of legislative history, judicial decisions, and application by an

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[77] *US – Carbon Steel (India) (AB)*, para. 4.477 (finding that "it is insufficient for an appellant simply to disagree with a statement or to assert that it is not supported by evidence"); *see US – Shrimp II (Viet Nam) (AB)*, para. 4.39; *EC – IT Products*, para. 7.116; *China – Auto Parts (Panel)*, para. 7.540; *Argentina – Textiles and Apparel (AB)*, para. 62.

[78] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 172.

[79] *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina) (AB)*, para. 121.

[80] *EC – IT Products (Panel)*, para. 7.154.

administering authority.[81] Korea cites to the applicable statute and regulations, but fails to account for the discretion conferred to the authority in the text of the applicable regulation.[82]

57. The U.S. regulation at issue states that USDOC will consider the home market or third-country to be a "viable market" if sales are of a "sufficient quantity."[83] The regulation then defines the term in the following manner:

> *Sufficient quantity.* "Sufficient quantity" *normally* means that the aggregate quantity (or, if quantity is not appropriate, value) of the foreign like product sold by an exporter or producer in a country is 5 percent or more of the aggregate quantity (or value) of its sales of the subject merchandise to the United States.[84]

58. The regulation's use of "normally" indicates that USDOC may define "sufficient quantity" based on the facts of a particular proceeding. The dictionary definition of "normally" is "under normal or ordinary conditions; as a rule, ordinarily."[85] This definition suggests a preference, not a requirement, as distinguished from the use of "shall" or "in all cases." U.S. judicial decisions support this understanding of "normally." In the context of other USDOC regulations, U.S. courts have recognized that the use of "normally" "hedges the text, and indicates that there are exceptions to the general principle set forth."[86]

59. Korea has failed to demonstrate that the U.S. regulation requires USDOC to make its decision whether to use third-country sales on the basis of a "viability test." Korea has therefore not shown that U.S. law necessarily results in a breach of Article 2.2, even on Korea's understanding of Article 2.2. Accordingly, Korea's "as such" claim must fail.

B. Korea's "As Applied" Claim Regarding the "Viability Test" is Also Without Merit

60. Korea's claim that USDOC's final determination in the OCTG investigation is inconsistent with Article 2.2 of the AD Agreement fails for the first reason its claim on the "viability test" "as such" fails: when the conditions are met for employing an alternative to home market sales for determining normal value, Article 2.2 does not require the use of third-country sales or limit the basis on which an investigating authority could choose to use constructed normal value. Therefore, USDOC's decision in the investigation at issue to use third-country sales data only if a sufficient volume of sales existed does not breach Article 2.2.

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

[82] *See* Korea FWS, paras. 37, 39.

[83] 19 C.F.R. § 351.404(b)(1) (Exhibit KOR-57).

[84] 19 C.F.R. § 351.404(b)(2) (emphasis added) (Exhibit KOR-57).

[85] *New Shorter Oxford English Dictionary*, Volume 2, p. 1940 (Exhibit USA-16)

[86] *Zhejiang Machinery Import & Export Corp. v. United States*, Slip Op. 07-15, p. 7 (Exhibit USA-20). *See also Amanda Foods (Vietnam) Ltd. v. United States*, Slip Op. 09-106, p. 21 (finding that "the word 'normally' leaves the agency some flexibility") (Exhibit USA-21).

61. In its first written submission, Korea complains that USDOC found that respondents did not have a viable third-country market due to low volumes of sales, and "in effect prohibited respondents from submitting third-country sales data."[87] As a factual matter, as is clear from Korea's own submission, USDOC did not "prohibit," in effect or otherwise, respondents from submitting information and, indeed, there is no evidence that USDOC would have refused sales data had it been submitted. But as a legal matter, and as discussed above, the AD Agreement does not require an authority to use third-country sales data, much less to seek or accept third-country sales data when using constructed value to calculate normal value. Therefore, USDOC did not breach U.S. obligations under Article 2.2.

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

1. Introduction

62. Korea alleges that the United States acted inconsistently with the obligations of Article 2.2.2 of the AD Agreement because it failed to calculate CV profit based on:

a. actual data pertaining to production and sales in the ordinary course of trade of the like product by HYSCO or by NEXTEEL[88];

b. actual amounts incurred and realized by HYSCO or by NEXTEEL in respect of production and sales in Korea of the "same general category of products"[89];

c. a reasonable method in which the profit so established did not exceed the profit normally realized by other exporters or products on sales of products of the same general category in Korea ("profit cap")[90]; or

d. generally, a reasonable method. [91]

But, as will be explained in more detail below, the data required to calculate CV profit as alleged in points (a) and (b), as well as the data required to calculate the profit cap as alleged in point (c), did not exist in the record of the OCTG investigation. And contrary to point (d), the record in the Korea OCTG investigation demonstrates that USDOC provided a reasoned and adequate explanation why the use of Tenaris's financial statement is a reasonable method to calculate CV profit. Therefore, the United States did not act inconsistently with the obligations of Article 2.2.2 when USDOC based CV profit on a reasonable method by using profit from OCTG sales of a major OCTG producer that operates in several countries, including Korea.

63. Korea also alleges that the United States acted inconsistently with the obligations of Article 2.4 because the CV profit amount used by USDOC failed to make a fair comparison

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[87] Korea FWS, paras. 65.

[88] Korea FWS, paras. 70-77.

[89] Korea FWS, paras. 78-106.

[90] Korea FWS, paras. 107-123.

[91] Korea FWS, paras. 124-139.

between normal value and export price.[92] However, CV profit cannot be characterized as an allowance "undertaken to adjust to a difference relating to a characteristic of the export transaction in comparison with a domestic transaction."[93] Therefore, the United States did not act inconsistently with the obligations of Article 2.4 when USDOC used a reasonable method to calculate CV profit. The United States explains below why Korea's claims under Articles 2.2.2 and 2.4 regarding the calculation of CV profit are in error and should be rejected.

2. Article 2.2.2 of the AD Agreement

64. Article 2.2.2 provides four methodologies for the calculation of CV profit – one preferred method and three alternative methods. It states that, "[f]or the purpose of paragraph 2, the amounts [to construct value] . . . shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation" ("preferred method"). Article 2.2.2 further provides that, if the amount for certain costs and profit "cannot be determined on that basis, the amounts may be determined on the basis of:

> (i) the actual amounts incurred and realized by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products;
>
> (ii) the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;
>
> (iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.

65. Article 2.2.2 establishes no hierarchy among the three alternative methodologies.[94] Therefore, if the preferred method is not available, the investigating authority may determine which of these alternatives is appropriate in a given investigation.

66. The introductory clause of Article 2.2.2 – "[f]or the purpose of paragraph 2" – indicates that the calculation of CV profit relates to the obligations established by Article 2.2.[95] In this way, each of the methodologies is intended to create a reasonable proxy for the profit amount

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[92] Korea FWS, paras. 140-155.

[93] *US – Zeroing (EC) (AB)*, para. 158.

[94] *EC – Bed Linen (Panel)*, para. 6.62 (The order in which the three above options are set out "is without any hierarchical significance").

[95] *See EU – Biodiesel (Panel)*, para. 7.226 (finding with respect to Article 2.2.1.1 that the "opening phrase '[f]or the purpose of paragraph 2' makes clear that Article 2.2.1.1 elaborates on how the 'cost of production in the country of origin' in Article 2.2 is to be determined in constructing the normal value).

from the sales of the like product in the ordinary course of trade in the domestic market, the ordinary basis for determining normal value.

67. The preferred method and alternatives (i) and (ii) specify the source of the data that can be used to calculate the profit amount for each method. That is, the preferred method requires the use of actual amounts pertaining to production and sales in the ordinary course of trade *of the like product by the exporter or producer under investigation*. Alternative (i) permits the authority to calculate profit based on actual amounts in respect of production and sales *of the same general category of products in the domestic market*. And alternative (ii) permits the authority to average the actual amounts of *other* exporters or producers *of the like product in the domestic market*.

68. Alternative (iii) does not specify the source of the data that may be used. Instead, alternative (iii) allows the authority to calculate profit amounts based on "any other reasonable method." If the authority chooses such an alternative methodology, however, the profit amount may not exceed the profit normally realized by other exporters or producers on sale of products in the same general category in the domestic market.

69. The term "reasonable" means "[i]n accordance with reason; not irrational or absurd."[96] In the context of Article 2.2.2, whether a methodology is reasonable must be determined in light of the aim of that article, i.e., to approximate the profit from the sales of the like product in the domestic market. The "any other reasonable method" alternative thus permits the investigating authority to calculate profit using a wide range of methods as well as profit sources without explicitly limiting the choice for profit to sales of a particular product, or to a particular industry or market, so long as the methodology is reasonable in light of specific evidence in the record of the relevant investigation.

70. Korea argues that USDOC's refusal to use HYSCO's or NEXTEEL's actual market data because the companies did not have a viable home market or third country market was inconsistent with Article 2.2.2 of the AD Agreement. Korea points to the Appellate Body finding in *EC – Tube or Pipe Fittings* that low volume sales are not excluded from the actual data that must be used to calculate the profit rate under the preferred method.[97] In this regard, Korea further argues that USDOC had access to actual profit data pertaining to the like product from both respondents' home market and third country market sales that it could have used for this calculation.[98]

71. Korea's interpretation of Article 2.2.2 selectively bundles various provisions together to imply the existence of a limitation where none exists. Korea's interpretation of Article 2.2.2 also fails to read the provision contextually with the obligations established by Article 2.2 generally. Indeed, Korea's overall approach would distort the constructed normal value of OCTG by insisting that the profit from the sales *of OCTG*, which USDOC used, should be discarded in favor of profit from sales of products *that are outside the same general category of products as*

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[96] *New Shorter Oxford English Dictionary*, Volume 2, p. 2496 (Exhibit USA-16).

[97] Korea FWS, paras. 70-75.

[98] Korea FWS, para. 77.

OCTG (i.e., line pipe, standard pipe and defective or downgraded pipe), merely because the sales of these very different products occurred in the home market, or perhaps outside the ordinary course of trade.

3. Korea Has Failed to Establish that USDOC Acted Inconsistently with the Chapeau of Article 2.2.2

a. An Investigating Authority Cannot Use the Preferred Method to Calculate CV Profit Absent a Viable Home Market

72. In the underlying proceeding, HYSCO and NEXTEEL both informed USDOC soon after they received the AD questionnaire that sales of the like product in the ordinary course of trade in the home market do not permit for a proper comparison to export prices because of the low volume of sales in the home market.[99] Both respondents told USDOC that they would not be providing data related to sales of the like product in the domestic market (or in any third country market), but would be providing data about the cost of sales of the subject merchandise in the U.S. market instead.[100]

73. USDOC subsequently verified HYSCO's and NEXTEEL's declarations and confirmed that respondents' sales of the like product in the home market do not permit for a proper comparison because of the low volume of such sales.[101] USDOC concluded as follows:

> [N]either HYSCO nor NEXTEEL had a viable home or third-country market during the POI. Because neither company had home or third-country market sales to serve as the basis for normal value (NV), NV must be based on constructed value (CV). Likewise, absent a viable home or third-country market, we are unable to calculate a CV profit using the preferred method under section 773(e)(2)(A) of the Act. When the preferred method is unavailable, section 773(e)(2)(B) of the Act establishes three alternatives for determining CV profit.[102]

74. As noted above, the chapeau of Article 2.2.2 begins with the phrase "[f]or the purposes of paragraph 2." That is, Article 2.2.2 provides methodologies for use when, under Article 2.2, sales of the like product in the ordinary course of trade in the home market "do not permit a proper comparison." Such a comparison is not permitted, for example, when there is: (1) a particular market situation or (2) a low volume of sales in the home market.

75. With respect to low volumes, footnote 2 to Article 2.2 provides that sales shall normally be considered sufficient "if such sales constitute 5 per cent or more of the sales of the product under consideration." Therefore, despite the fact that dumping normally is calculated using the

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[99] HYSCO Notification of Non-Viable Comparison Market, p. 1 (Exhibit USA-04); NEXTEEL Notification of Non-Viable Comparison Market, p. 1 (Exhibit USA-05).

[100] HYSCO Notification of Non-Viable Comparison Market, p.2 (Exhibit USA-04); NEXTEEL Notification of Non-Viable Comparison Market, p. 2 (Exhibit USA-05).

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

[102] Final Decision Memorandum, p. 14 (footnote omitted) (Exhibit KOR-21).

sales price of the like product in the home market, where sales in the home market fall below 5 percent, those sales no longer "permit a proper comparison." In such cases, the authority instead may calculate the margin of dumping based on "the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits," as USDOC did here.

76. Notwithstanding the obligations established by Article 2.2, Korea now argues that the preferred method for calculating profit necessitates that an investigating authority always use actual data pertaining to sales of the like product in the ordinary course of trade, regardless of the volume of sales represented by such data.[103] Korea's proposed interpretation does not reflect the text or context of Article 2.2.2.

77. The chapeau of Article 2.2.2 does not require that an investigating authority "use" actual data from the production and sale of the like product. Rather, the chapeau requires that the amount for profits "shall be *based on*" actual data. An obligation that something be "based on" something else does not create an obligation to "use" something else.

78. As the Appellate Body noted in *EC – Hormones*, "[a] thing is commonly said to be 'based on' another thing when the former 'stands' or is 'founded' or 'built' upon or 'is supported by' the latter."[104] In the context of the SPS Agreement, the Appellate Body distinguished the ordinary meaning of "based on" from the meaning of "conform to," finding that "much more is required before one thing may be regarded as 'conform[ing] to' another,"[105] i.e., while a measure that "conforms to" a standard must be "based on" that standard, it is not equally true that a measure based on a standard necessarily must "conform to" that standard.[106]

79. The Appellate Body has also found that "[t]he word 'use' refers to the action of using or employing something."[107] "The term 'use' is defined as 'the action of using something; the fact or state of being used; application or conversion to some purpose'."[108] While a requirement to "use" certain data to calculate an amount suggests that the amount must be "based on" that data, it is not equally true that an obligation that an amount must be "based on" certain data requires an investigating authority to always "use" the data. Thus the obligation of Article 2.2.2 that "profit shall be based on actual data" cannot be read as a strict requirement to *use* actual data in every circumstance.

80. The context provided by Article 2.2, as discussed above, also suggests an interpretation under which not all domestic market sales data may be considered appropriate for purposes of calculating dumping. As discussed, low volume sales in the domestic market will be rejected under Article 2.2 for purposes of calculating normal value, because such sales "*do not permit* a

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[103] Korea FWS, paras. 70-77.

[104] *EC – Hormones (AB)*, para. 163.

[105] *EC – Hormones (AB)*, para. 163.

[106] *EC – Hormones (AB)*, para. 163.

[107] *US – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products (AB)*, para. 4.374.

[108] *US – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products (AB)*, para. 4.374, n.1009 (quoting *New Shorter Oxford English Dictionary*, Volume 2, p. 3484 (1993)).

proper comparison." If domestic market sales do not permit a proper comparison for purposes of normal value, it is not clear why such sales would then be *required* for use when calculating CV profit. That is, having already resorted to cost of production because domestic market sales did not permit a proper calculation of normal value – and thus already relying on an approximation of normal value – Korea would have an investigating authority employ in this approximation a data source that has otherwise been deemed inappropriate for the purposes of determining normal value.

81. Korea's interpretation is not only unsupported by the text and context of Article 2.2.2, but ignores the aim of Article 2 of the AD Agreement to provide for a proper determination of dumping. Such an interpretation is not sustainable and should be rejected by the Panel.

82. We note that, as support for its interpretation, Korea relies on the Appellate Body's finding in *EC – Tube or Pipe Fittings*. However, the issue before the Appellate Body in that dispute is distinguishable from the facts of the instant dispute.

83. In that dispute, the EC had rejected low-volume sales from Brazil under Article 2.2, but nonetheless chose to use such sales for the calculation of CV profit. The issue before the Appellate Body was "whether an investigating authority *must* exclude data from low-volume sales when determining the amounts for SG&A and profits under the chapeau of Article 2.2.2, having disregarded such low-volume sales for normal value determination under Article 2.2."[109] After examining the text of the provision, the Appellate Body concluded that "a requirement that low-volume sales be excluded from the calculation of SG&A and profits cannot be read into the text of Article 2.2.2."[110] The Appellate Body also observed that Article 2.2.2 "imposes a general obligation ('shall') on an investigation to *use* 'actual data pertaining to production and sales in the ordinary course of trade' when determining amounts for . . . profits."[111] However, this statement concerning the "use" of actual data was not necessary to its resolution of the question put before it on appeal.

84. We also note that the Appellate Body's brief discussion of the text of Article 2.2.2 did not address the phrase "shall be based on." Instead, the statement quoted above appeared to assume, without explanation, that this term was equivalent to "shall use." The absence of interpretation of relevant text further limits the utility of this statement to this dispute.

85. Moreover, the report did not fully address the context of Article 2.2, including footnote 2, or explain why data found not to "permit" a proper comparison in one context could nonetheless achieve the objective of permitting such a comparison in another context. Unlike other definitional phrases used in the AD Agreement,[112] footnote 2 does not include a limiting phrase,

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[109] *EC – Tube or Pipe Fittings (AB)*, para. 92 (emphasis added).

[110] *EC – Tube or Pipe Fittings (AB)*, para. 98 (emphasis added).

[111] *EC – Tube or Pipe Fittings (AB)*, para. 97 (emphasis added).

[112] *Compare* footnote 2 (not limit "for purposes of this paragraph") *with* footnote 11 of the AD Agreement (limited "for purposes of this paragraph").

such as "for purposes of this paragraph." Therefore, the context provided in that footnote should inform the interpretation of other relevant articles, including Article 2.2.2.

86. As explained above, the text of Article 2.2.2, understood in its context, does not require an investigating authority to use data from low-volume domestic sales to calculate CV profit. Therefore, Korea has failed to show that the United States acted inconsistently with Article 2.2.2 of the AD Agreement when USDOC determined that CV profit could not be calculated based on the chapeau because neither HYSCO nor NEXTEEL had sufficient home market sales during the period of investigation.

b. Actual Profit Data Pertaining to Sales in the Ordinary Course of Trade of the Like Product Otherwise Do Not Exist in the Record

87. Korea argues that USDOC impermissibly disregarded respondents' actual data for calculating profits under the preferred method provided in the chapeau of Article 2.2.2. Article 2.2.2 refers to "actual data pertaining to the production and sales in the ordinary course of trade of the *like product* by the exporter or producer under investigation" (emphasis added). According to Article 2.6 of the AD Agreement, "like product" means

> a product which is identical, i.e., alike in all respects to the product under consideration, or in the absence of such product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.[113]

The notion of "like product" excludes the "product under consideration," i.e., the product for which an investigating authority is calculating the export price (in this dispute, OCTG manufactured in Korea and exported to the United States).

88. The profit data of NEXTEEL and HYSCO consisted almost exclusively of profits from the allegedly dumped sales *in the U.S. market* and Korean sales of products *outside the general category of products*.[114] This data do not meet the requirements of Article 2.2.2, which clearly requires that the data used to calculate CV profit pertain to the production and sales of the "like product." Therefore, as the profit data recorded in the financial statements of NEXTEEL and HYSCO does not relate to the "like product," by definition, profit cannot be determined on this basis pursuant to the chapeau of Article 2.2.2.

89. In this regard, Korea's assertion that "USDOC had access to actual data pertaining to like product from both the respondents' home market"[115] is incorrect. HYSCO and NEXTEEL reported to USDOC that they sold OCTG almost exclusively in the U.S. market and did not sell OCTG in Korea.[116] They also reported that they sold various products in Korea that could not be

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[113] Article 2.6, AD Agreement. Korea accepts this definition in paragraph 84 of its first written submission

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

[115] Korea FWS, para. 77.

[116] HYSCO Sec. A. Response, p. A-2 and Exhibit A-1 (Exhibit USA-06) (**BCI**); NEXTEEL Sec. A Response, p. A-2 and Exhibit A-1 (Exhibit USA-07) (**BCI**).

used in OCTG applications, such as line pipe, standard pipe, and defective or downgraded pipe.[117] Although respondents designated some of their downgraded pipe as "non-prime OCTG," the record confirms that these products "were OCTG in name only" and, as HYSCO acknowledges, "not marketed to the customer as OCTG."[118] The data Korea references thus does not relate to OCTG – i.e., the like product. The data Korea references also is insufficient to demonstrate that the sales used to derive the profit figures in question are in the ordinary course of trade. Therefore, contrary to Korea's assertion, USDOC did not have access to actual data pertaining to production and sales in the ordinary course of trade of the like product by HYSCO or by NEXTEEL in the home market during the period of investigation.

90. Korea advocates the use of sources that fail to meet the most basic requirements of the preferred method under Article 2.2 because the sources do not pertain to "sales in the ordinary course of trade of the like product." Therefore, the United States did not act inconsistently with the obligations of Articles 2.2 and 2.2.2 of the AD Agreement when USDOC determined that CV profit could not be calculated using the preferred method given neither HYSCO nor NEXTEEL had a viable home market during the period of investigation.

4. USDOC's Definition of the "Same General Category of Products" Is Consistent with Article 2.2.2(i) of the AD Agreement

91. Korea argues that "USDOC's determination that non-OCTG products, such as line pipe and standard pipe, are not within the 'same general category' as OCTG is premised on the erroneous interpretation and application of the terms 'same general category of products' in Article 2.2.2."[119] According to Korea, USDOC applied an impermissibly narrow interpretation of "same general category" because the drafters of this article intended to capture a broader set of product than those captured by the term "like product"[120] and "USDOC's definition of the 'same general category' resulted in a database that was identical to that containing only 'like products.'"[121] Korea's arguments fail because it is indisputable that USDOC defined "same general category of products" more broadly than "like product" so as to include drill pipe and non-scope OCTG such as stainless steel tubular products.

92. Article 2.2.2 uses both the terms the "same general category" of products and "like product." The term "like product" is used with respect to the preferred method under Article 2.2.2 and alternative (ii), which may be employed when the preferred method is unavailable. The term "same general category" is used with respect to alternatives (i) and (iii), albeit in the latter alternative the term is only used with respect to the profit cap, not the method itself. By

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[117] NEXTEEL Sales Verification Report, pp. 16-17 (Exhibit USA-09); HYSCO Sales Verification Report, pp. 22-23 (Exhibit USA-08).

[118] HYSCO Sales Verification Report, pp. 24-25 (acknowledging that the non-prime products listed on the invoice did not meet the API 5CT specification for OCTG") (Exhibit USA-08).

[119] Korea FWS, para 79.

[120] Korea FWS, para. 86.

[121] Korea FWS, para. 95.

their terms, and given their juxtaposition in the same provision, "like product" and "same general category" of products are distinct terms.

93. The term "category" is generally defined as "A class, a division."[122] The term "general" when used as an adjective is defined as "Including, involving, or affecting all or nearly all the parts of a . . . whole,"[123] and the term "same" when used as an adjective is defined as "Identical with what is indicated in the following context."[124] The double adjective combination "same general" modifies the noun "category," with each adjective naming separate attributes for the products that fall within the category. In the context of alternative (i), which is looking for actual profit amounts realized in domestic sales of the "same general category of products," and of alternative (iii), which is looking for a profit cap that does not exceed profit normally realized in domestic sales of "products of the same general category," the category thus encompasses products that fall within the definition of the "like product" plus other products that share many of the "same" fundamental characteristics of the "like product" without, of course, being the "like product."

94. This interpretation is supported by the panel's report in *Thailand – H-Beams*, which found that the phrase "same general category of products" provided for a broadening of the product database, indicating that it is alternative (i)'s intention "to obtain results that approximate as closely as possible the price of the like product in the ordinary course of trade in the domestic market of the exporting country."[125]

> Indeed, the narrower the category, the fewer products other than the like product will be included in the category, and this would seem to be fully consistent with the goal of obtaining [pursuant to Article 2.2.2(i)] results that approximate as closely as possible the price of the like product in the ordinary course of trade in the domestic market of the exporting country.[126]

95. The United States agrees that the "same general category" of products in most situations is broader than "like product." For the additional products to fit within the "same general category" suggests that the characteristics of the products are essentially the "same", which would also reinforce the aim "of these provisions [(i.e., Articles 2.2.2(i)-(ii))] . . . to obtain results that approximate as closely as possible the price of the like product in the ordinary course of trade in the domestic market of the exporting country."[127] As the *Thailand – H-Beams* panel observed, "[t]he broader the category, the more products other than the like product will be included, and thus in our view the more potential there will be for the constructed normal value to be unrepresentative of the price of the like product."[128] Therefore, it does not follow, as

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[122] *New Shorter Oxford English Dictionary*, Volume 1, p. 353 (Exhibit USA-16).

[123] *New Shorter Oxford English Dictionary*, Volume 1, p. 1073 (Exhibit USA-16).

[124] *New Shorter Oxford English Dictionary*, Volume 2, p. 2678 (Exhibit USA-16).

[125] *Thailand - H-Beams (Panel)*, para. 7.112.

[126] *Thailand – H-Beams (Panel)*, paras. 7.110-7.118.

[127] *Thailand - H-Beams (Panel)*, para. 7.112.

[128] *Thailand - H-Beams (Panel)*, para. 7.115.

Korea suggests, that an investigating authority has an obligation to define "same general category" of products so broadly as to include products it considers, based on the evidence before it, not to be the "same general category" of products as the like product.

96. In the proceeding subject to this dispute, USDOC defined "like product" as:

> certain oil country tubular goods (OCTG), which are hollow steel products of circular cross-section, including oil well casing and tubing, of iron (other than cast iron) or steel (both carbon and alloy), whether seamless or welded, regardless of end finish (*e.g.*, whether or not plain end, threaded, or threaded and coupled) whether or not conforming to American Petroleum Institute (API) or non-API specifications, whether finished (including limited service OCTG products) or unfinished (including green tubes and limited service OCTG products), whether or not thread protectors are attached. The scope of the investigation also covers OCTG coupling stock.
>
> Excluded from the scope of the orders are: Casing or tubing containing 10.5 percent or more by weight of chromium; drill pipe; unattached couplings; and unattached thread protectors.[129]

97. USDOC defined the "same general category of products" more broadly than it did "like product" as including "subject OCTG, non-scope OCTG such as stainless steel tubular products, and drill pipes."[130] USDOC's definition of "same general category of products" includes the "like product" plus "other tubular products that go into the exploration and production of oil and gas. These would be products that would exhibit the same fundamental characteristics for down hole applications." Therefore, in the Korea OCTG investigation, USDOC defined "same general category of products" more broadly than "like product."[131]

a. USDOC provided a reasoned and adequate explanation of how the evidence in the record supported its definition of "same general category" of products

98. USDOC outlined the criteria it would use to determine which products fit within the same general category of products.[132]

> In that regard, we considered whether subject merchandise and other pipe products such as line pipe, structural pipe, standard pipe, and downgraded pipe are similar enough to OCTG to be considered within the same general category of

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[129] Final Determination Notice, p. 41985 (Exhibit KOR-24). USDOC's definition of "like product" further explains that the merchandise covered by the like product definition is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS), noting that the HTSUS subheadings are for convenience and customs purposes only and that the written description of the like product is dispositive

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

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

[132] Final Decision Memorandum, p. 16 (footnote omitted) (Exhibit KOR-21).

> products. Determining which products are sufficiently similar to OCTG to be considered within the same general category of product is imperative under alternative (i) *i.e.*, profit for the same general category of products as subject merchandise.[133]

99. After outlining the above criteria, USDOC evaluated all "products in question from both a production and sales perspective since profit is a function of both cost and price"[134] and found as follows:

> Differences between the physical characteristics of products, differences in production processes, quality, testing and certification requirements, how the products will be used, and the market conditions associated with the industries and customers who purchase and use the different products all materially impact the profit earned on the different products. We have considered all of these points, and after careful consideration, we find that line, structural and standard and downgraded pipe products are not in the same general category of products as OCTG.[135]

100. USDOC set out in its final determination a reasoned and adequate explanation as to why it decided to exclude line, structural and standard, and downgraded pipe products from the definition of "same general category of products."[136] The following summaries of USDOC's explanation confirm that USDOC based its determination on the evidence in the record of the Korea OCTG investigation:

- Physical Characteristics. The "chemical, physical and mechanical characteristics" of OCTG "differ significantly" from the physical characteristics of non-OCTG because performance requirements for OCTG differ significantly from those for non-OCTG. For example, "OCTG casing and tubing performance requirements differ significantly from those for the noted non-OCTG products, because OCTG pipes are subjected to external collapse pressures, internal pressures, and tension strength requirements when used in oil or gas wells, whereas, standard pipe and line pipe are primarily intended for the conveyance of fluids and gases." OCTG "must be sufficiently strong in collapse strength to carry its own weight and threading sufficient to resist well pressures."[137]

- Use and Testing Requirements. "Comparing these differences further, the destructive and non-destructive testing requirements are much greater for OCTG casing and tubing [than for non-OCTG pipe] because of the stresses to which the [OCTG] products are subjected." Thus the quality standards,

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[133] Final Decision Memorandum, p. 16 (Exhibit KOR-21).

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

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

[136] Final Decision Memorandum, pp. 17-19 (Exhibit KOR-21).

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

> testing, and certification process for OCTG differ substantially from those associated with standard pipe and line pipe.[138] Indeed, as acknowledged by HYSCO, "'[a]s a practical matter customers would not attempt to use non-prime OCTG products in OCTG applications because of the potential liability and cost in the event of a pipe failure.'"[139]

- Production Processes. The difference in performance requirements between OCTG and non-OCTG necessarily means that OCTG must be manufactured from "steel possessing different characteristics" than the steel used to produce non-OCTG "(*i.e.*, the steel grade used to produce OCTG are not used to produce non-OCTG pipes)."[140] The differences in performance requirements between OCTG and non-OCTG also means that differences exist in how the pipes are connected, which, in turn, necessitate different production processes. For example, line pipe is generally connected by welding pipes together, while OCTG casing and tubing are connected through threading and coupling and integral joints.[141] To ensure that such connections and joints can be successfully applied and will function as intended over the life of the OCTG, producers of OCTG must apply different production processes, again starting from the grade of steel used.[142]

USDOC found that "[t]he record shows that OCTG and non-OCTG are sold to different end users for use in different applications, and that these different end users have distinct forces which drive prices, demand, and profitability."[143] The evidence in the record thus supports USDOC's final determination that "[t]he performance measures, production processes, alloys, and physical and mechanical characteristics of OCTG casing and tubing products differ in such significant ways from those of standard pipe and line pipe that these products should not be considered to be of the same general category of products as OCTG."[144]

101. Given the substantial differences between OCTG and non-OCTG, it is not surprising that the evidence in the record before USDOC also showed that the amounts for profit reported for non-OCTG failed to correspond closely to the amounts reported for OCTG:

> OCTG demand is driven by oil and gas exploration and production, which has been strong globally over the past few years, while demand for non-OCTG pipe products has been stagnant over the past few years. Strong demand, all other things being equal, generally translates into higher prices and higher profits. Record evidence indicates that demand for standard pipe is driven primarily by

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

[139] Final Decision Memorandum, p. 18 (quoting from HYSCO Supplemental Section D Response) (Exhibit KOR-21).

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

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

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

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

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

> construction activity. End users in the construction sector are generally unable and unwilling to pay the price premium paid in the oil and gas exploration and production sector.[145]

102. The United States thus provided a reasoned and adequate explanation for its findings on the definition of the "same general category of products" as it employed a "reasonable method" consistent with Article 2.2.2(iii).

b. Korea fails to provide a basis for why USDOC's definition is not consistent with Article 2.2.2

103. Because the record evidence contradicts Korea's contentions, Korea finds itself in the tenuous position of advocating that calculations concerning normal value of OCTG should be based on profit from non-OCTG products instead of the OCTG-specific data that USDOC used. Korea seeks to impose on the United States an obligation to define the "same general category" as broadly as possible to include line pipe and standard pipe, products that in certain applications compete with plastic pipe.[146] Korea has failed to show any support in the AD Agreement for its position. Most important, Korea has failed to show that USDOC's interpretation and application in the OCTG investigation is inconsistent with Article 2.2.2.

104. What constitutes the same general category of products is inherently a case-specific determination that depends on the product under consideration and the factual record of each investigation. As shown above, in this investigation, USDOC considered the factual evidence before it and provided a well-reasoned explanation for its decision. In an effort to give the impression that USDOC's definition of "same general category" of products is wrong, Korea argues that USDOC should have enlarged this definition because USDOC:

- included drill pipe, a product specifically excluded from the definition of "like product," in the definition of "same general category of products";
- before it had made a final (or even preliminary) determination based on all evidence in the record, had stated in a fact-finding questionnaire that line pipe and standard pipe are part of this definition; and
- in other AD proceedings, involving different evidentiary records, may have included line pipe and standard pipe in this definition.

105. First, the scope of the Korea OCTG investigation excludes "drill pipe" from the definition of "like product."[147] Therefore, by including drill pipe in the definition of "general category of products," USDOC defined "general category of products" more broadly than it defined "like product." None of the interested parties argued at any point in the proceeding that USDOC's final determination should exclude drill pipe from the definition of "same general

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[145] Final Decision Memorandum, p. 18 (footnote omitted) (Exhibit KOR-21).

[146] *See* U.S. Steel Comments on NEXTEEL Third Supplemental Section D Questionnaire Response, at Exhibit H, p. 34, and Exhibit Q, p. 222 (March 21, 2014) (Exhibit KOR-19).

[147] Final Determination Notice, Appendix I (Exhibit KOR-24).

category of products."[148] (In contrast, the interested parties argued extensively about whether line pipe and standard pipe should be included in this definition.) Contrary to Korea's assertion,[149] USDOC did not need to further analyze the similarities between OCTG and drill pipes for purposes of its final determination as it had already analyzed the relevant products and there were no further arguments by any interested party related to this issue.[150]

106. Also, although Korea argues that USDOC classified drill pipe as the like product in the AD duty investigation on OCTG from Mexico, the record here shows that USDOC did not find drill pipe to be part of the like product in this investigation. Indeed, drill pipe is not identical in all respects to OCTG.[151] The scope of another investigation does not mean that any subsequent investigation relating to that product may not deviate from a prior investigation. Indeed, Korea's argument would suggest that the *first* product definition in an investigation by *one* Member should fix the product definition for *any* subsequent investigation by *any* other Member. In sum, Korea has not explained what text in Article 2.2.2 of the AD Agreement may be understood to require the "like product" definition in the Korea OCTG investigation to be identical to that in an investigation on products from another country that had a broader scope.

107. Second, USDOC issued the supplemental questionnaires mentioned by Korea about three months before its preliminary determination.[152] The supplemental questionnaires indicated that the USDOC accountants had reviewed HYSCO's and NEXTEEL's respective responses to USDOC's initial questionnaire and had "identified several areas . . . for which we require further clarification as specified in this supplemental questionnaire."[153] Indeed, notwithstanding that the supplemental questionnaires talked about non-OCTG pipes as falling with the same general category as OCTG pipes, the USDOC accountants asked respondents to "segregate" the data reported "by OCTG, non-OCTG pipes, and other products" as opposed to combining the data. The questions asked reflect data-gathering and do not constitute decision-making. Indeed, without first receiving information that is potentially relevant, an investigating authority would not have the facts necessary to make any decision.

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[148] *See* Final Decision Memorandum, pp. 3-30 (Exhibit KOR-21). The record contains extensive evidence about the similarities between drill pipe and OCTG. *See, e.g.,* Amendment to Petition at Exhibit Supp. I-55, pp. I-26 through I-35 (describing the product, manufacturing process and applications of drill pipe) (Exhibit USA-02).

[149] Korea FWS, paras. 92-95.

[150] Also, contrary to Korea's assertion, the record contains extensive evidence regarding drill pipe in various submissions that supports USDOC's determination that drill pipe is in the same general category of products with the OCTG. *See, e.g.*, Amendment to Petition at Exhibit Supp. I-55, pp. I-26 - I-35 (describing the product, manufacturing process and applications of drill pipe) (Exhibit USA-02); *see* U.S. Steel Comments on NEXTEEL Third Supplemental Section D Questionnaire Response, at Exhibit H, p. 34, and Exhibit Q, p. 222 (March 21, 2014) (Exhibit KOR-19).

[151] In fact, as in this case, the prior investigation on OCTG from Korea did not cover drill pipe, a point which Korea does not address in its arguments. *Final results of the Administrative Review of the Antidumping Duty Order on Oil Country Tubular Goods, Other Than Drill Pipe, from Korea*, 72 Fed. Reg. 9,924 (March 6, 2007), pp. 2-3 (Exhibit KOR-35).

[152] *Compare* Korea FWS, para. 100 and USDOC letters dated Nov. 25, 2013, and Dec. 4, 2013 (Exhibit KOR-33) *with* Preliminary Determination Notice (Exhibit KOR-07).

[153] USDOC letter dated Nov. 25, 2013, p. 1, and USDOC letter dated Dec. 4, 2013, p. 1 (Exhibit KOR-33).

108. Finally, USDOC's decisions in different proceedings involving OCTG do not establish that standard pipe and line pipe are the same general category of products as OCTG. As to the two reviews of the previous antidumping duty order on OCTG from Korea, "the public financial statement used was the only information available for calculating CV profit expense and profit for OCTG" [154] and, unlike here, there was no dispute among interested parties in the different proceeding that a certain financial statement should be used given that particular evidentiary record.[155] As to the administrative review of OCTG from Mexico, USDOC calculated CV profit for a respondent OCTG producer based on the financial statements for the company's "tubular products division, a general pipe division that produces OCTG and products in the same general category."[156] Therefore, statements made by USDOC in other OCTG AD proceedings, involving different evidentiary records, do not support an argument that USDOC's definition of "same general category of products" in this OCTG AD proceeding is not consistent with Article 2.2.2(i).

109. In the instant case, the record and decision memoranda demonstrate that that USDOC engaged in an extensive analysis of the like product and general category of products. Korea, meanwhile, fails to engage the substantive issue, but instead implies that USDOC must be held to the scope definitions for other AD proceedings, preliminary statements in initial questionnaires, or different decisions made in other AD proceedings pursuant to unrelated evidentiary records. The arguments advanced by Korea with respect to the definition of "same general category" of products as understood for the purpose of alternatives (i) and (iii) thus do not provide plausible alternative explanations of the record evidence before USDOC. Korea thus has failed to establish that the United States did not provide a reasoned and adequate explanation for its definition of "same general category" of products.

110. For the reasons discussed above, Korea has failed to make out its claim. None of Korea's arguments that the United States should have defined the "same general category" of products more broadly than it did is grounded in Article 2.2, nor has Korea pointed to any error in the finding by USDOC that is contrary to any obligation in that provision. Therefore, the United States respectfully requests that the Panel find USDOC's definition of the "general category of products" in the Korea OCTG investigation was not inconsistent with Articles 2.2.2(i) and 2.2.2(iii)[157] of the AD Agreement.

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[154] *See Final results of the Administrative Review of the Antidumping Duty Order on Oil Country Tubular Goods, Other Than Drill Pipe, from Korea*, 72 Fed. Reg. 9,924 (March 6, 2007), p. 6 (Exhibit KOR-35).

[155] *See Final results of the Administrative Review of the Antidumping Duty Order on Oil Country Tubular Goods, Other Than Drill Pipe, from Korea*, 72 Fed. Reg. 9,924 (March 6, 2007), pp. 4 and 6 (Exhibit KOR-35); *Oil Country Tubular Goods, Other Than Drill Pipe, from Korea: Preliminary Results of Antidumping Duty Administrative Review*, 72 Fed. Reg. 51,793 (September 11, 2007), p. 10 (Exhibit KOR-34).

[156] Korea's FWS, para. 103 (quoting Exhibit KOR-37).

[157] Given Korea in its first written submission indicates that it considers the phrase "same general category of products" to have the same meaning as the phrase "products of the same general category" (Korea FWS, paras. 80-87), the Panel should find that the United States provided a reasoned and adequate explanation for its definition of "products of the same general category" for purposes of Article 2.2.2(iii). The United States reserves its right to address this matter further in a subsequent submission if Korea disagrees with our characterization of its position, or if Korea subsequently decides to address this matter

5. USDOC's Calculation of CV Profit Was Consistent with Article 2.2.2(iii) of the AD Agreement

111. As explained above, when an investigating authority cannot calculate a reasonable amount for profit based on the preferred method, alternative (iii) under Article 2.2.2 allows the investigating authority to use "any other reasonable method." Alternative (iii) is subject to the following proviso: "provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin."

112. As explained above, the circumstances under which USDOC could base CV profit on alternatives (i) or (ii), or apply the profit cap to the any other reasonable method selected under alternative (iii), do not exist in the record of the Korea OCTG investigation. Again, USDOC defined "products of the same general category in the domestic market" to include the "like product" plus "other tubular products that go into the exploration and production of oil and gas." USDOC provided a reasoned and adequate explanation for this finding on the "same general category of products."

113. Korea argues that USDOC otherwise had "abundant data" to calculate a profit cap from allegedly dumped OCTG in the United States or sales of non-OCTG products in Korea, but this argument serves to further confirm the soundness of USDOC's decision.[158] The profit cap, to the extent it may exist in the record of an AD proceeding, relates to "profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin." There is no support in alternative (iii), or anywhere else in the AD Agreement, for the proposition that normal value should be determined on the basis of profit from the allegedly dumped sales.

114. Indeed, the use of allegedly dumped sales in the export market to calculate normal value runs contrary to the concept of determining a dumping margin, which under Article 2.1 is a comparison of normal value with the export price. Again, as for sales of non-OCTG products in Korea, the evidence in the record clearly shows that none of these products are within the "same general category" of products as OCTG, and thus cannot serve as the basis under alternative (iii) for the profit cap based "on sales of products of the same general category."

115. Korea's other argument, that "the unavailability of data does not excuse a Member from complying with the requirements of the Anti-Dumping Agreement,"[159] simply does not address the fact that its proffered information is not relevant to the calculation of a cap under alternative (iii). Korea also ignores that the proviso in alternative (iii) itself conceives of circumstances in which there will be no basis to calculate the cap. The proviso is linked to "the profit *normally* realized" by other producers or exports, which recognizes that profits may vary. Where there are no producers or exporters making sales of products of the same general category in the domestic market, there is no basis to calculate a cap based on "profit normally realized."[160] The

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[158] Korea FWS, para. 116, n.121.

[159] Korea FWS, para. 113.

[160] Korea's argument that the absence of data to calculate a profit cap means no alternative method may be used at all is also contrary to the plain language of Article 2.2.2, which provides that an investigating authority "may" use

investigating authority must, in that circumstance, still make its determination of the amounts "on the basis of" a "reasonable method".

116. The panel reports cited by Korea do not support its position. In *EC - Bed Linen*, the panel found that the EC acted consistently with Article 2.2.2(ii) of the AD Agreement and that no separate reasonableness test is required when an investigating authority uses a method specified in alternative (ii). The panel did not address the issue presented in this dispute.

117. Likewise, in *Thailand - H-Beams*, the panel found that "AD Agreement Article 2.2.2(i), when applied correctly, necessarily yields reasonable amounts for profits, and that no separate reasonability test is required with respect to these amounts."[161] The issue of how a Member is to assess whether a method under alternative (iii) is reasonable – if there is no available data to calculate a profit cap – was not before the panel. Accordingly, the panel report does not support Korea's argument.

118. Both panels, however, suggested that "the use of actual data itself ensures that subjective judgments about the reasonability of the results do not affect the calculation of constructed normal value."[162] In this case, USDOC determined profit by using the actual data from the audited financial statements of an OCTG producer, and Korea has not disputed the accuracy of the profit data contained in these audited statements.

119. Finally, Korea argues that in *EU – Footwear* "the panel found that the investigating authority had made no attempt to calculate the cap called for in Article 2.2.2(iii) and, as a result, found the EU's measure to be inconsistent with that Article."[163] The facts of *EU – Footwear* are distinguishable from the facts here. In *EU – Footwear*, the investigating authority determined CV profit for footwear by using profit amounts from producers in chemical and engineering sectors that received market economy treatment in recent investigations.[164] Moreover, the investigating authority acknowledged that chemical and engineering sectors were different from footwear production.[165] Finally, it was undisputed that the EU "made no attempt to" calculate the profit cap under option (iii).[166] The panel explained:

> While we understand the European Union's argument as to why it would be inappropriate to use the data of other Chinese producers of footwear who had not been granted MET as a basis for calculating the cap, there is no indication, or

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one of the three alternative methods listed in subparagraphs (i) through (iii) as "the basis of" determining the amounts for costs and profit. *Cf. US – Upland Cotton (Panel)*, para. 7.1377. The word "may" should be given meaning and read so as to allow an investigating authority to use a reasonable method when data needed to calculate CV profit under the preferred method, alternative (i), or alternative (ii), or data needed to calculate the profit cap under alternative (iii), are unavailable. *Cf. US – Upland Cotton (Panel)*, para 7.1388.

[161] *Thailand - H-Beams (Panel)*, para. 7.128.

[162] *EC - Bed Linen (Panel)*, para. 6.99; *see also Thailand - H-Beams (Panel)*, para. 7125.

[163] Korea FWS, para. 113

[164] *EU – Footwear (China) (Panel)*, para. 7.296.

[165] *EU – Footwear (China) (Panel)*, para. 7.296.

[166] *EU – Footwear (China) (Panel)*, paras. 7.298 and 7.300.

> even any argument, that the Commission itself considered the calculation of the cap at the time it made its determination. Moreover, there is no indication that the Commission ever looked into whether there were producers who sold "products of the same general category" whose data might have been used in this regard.[167]

120. In contrast to the EU's use of profit information from chemical and engineering sectors to determine the costs and profits for the footwear industry, USDOC used profit information of an OCTG producer to determine CV profit for Korean OCTG producers. Also, unlike the EU, USDOC "looked into whether there were producers who sold products of the same general category"[168] whose data might have been used to calculate the profit cap. USDOC expressly explained in the Korea OCTG investigation that it was "unable to calculate a profit cap for Korea under section (iii) because we do not have home market profit data for other exporters and producers in Korea of the same general category of products."[169]

121. Korea has failed to demonstrate that USDOC's calculation of amounts of profit for constructed value is inconsistent with the positive obligation imposed by Articles 2.2 and 2.2.2 to determine amounts for profit on the basis of another "reasonable method". The evidence proffered by the Korean companies was not relevant to the profit cap calculation, and there was no other evidence in the record that would permit USDOC to calculate a profit cap. In that circumstance, the United States used a "reasonable method" as the basis to determine the amounts of profit and therefore did not act inconsistently with Articles 2.2 and 2.2.2.

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

122. Korea argues that Article 2.2.2 requires that any calculation method under option (iii) must be reasonable[170] and must be consistent with the AD Agreement. The United States agrees. However, the United States disagrees with Korea's assertion that USDOC's calculation of CV profit "defies fundamental principles of the Anti-Dumping Agreement, namely, the principle of 'dumping.'"[171]

a. USDOC provided a reasoned and adequate explanation why the use of Tenaris's financial statement is a reasonable method to calculate CV profit

123. In *EU – Biodiesel*, the panel understood "the term 'any other reasonable method' in Article 2.2.2(iii) to involve an enquiry into whether the investigating authority's determination of the amount for profits is the result of a reasoned consideration of the evidence before it, rationally directed at approximating what that margin would have been if the product under consideration [sic] were sold in the ordinary course of trade in the domestic market of the

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[167] *EU – Footwear (China) (Panel)*, para. 7.300.

[168] *See EU – Footwear (China) (Panel)*, para. 7.300.

[169] Final Decision Memorandum, pp. 21-22 (Exhibit KOR-21).

[170] Korea FWS, para. 124.

[171] Korea FWS, para. 126.

exporting country."[172] Therefore, if an investigating authority selects a CV profit margin under alternative (iii) based on a reasoned consideration of the evidence before it, rationally directed at approximating what the profit of a producer of the like product would have been if the like product had been sold in the ordinary course of trade in the domestic market of the exporting country, then an investigating authority's use of such a profit margin should be considered not inconsistent with the obligations of Articles 2.2 and 2.2.2 of the AD Agreement.

124. In the Korea OCTG investigation, USDOC considered three options for calculating CV profit based on the financial statements for:

> (1) Tenaris S.A., a multinational company that produces and sells OCTG worldwide; (2) six Korean pipe companies, all of which produce and sell line and standard pipes in addition to OCTG which is sold primarily in the United States; (3) three Indian pipe companies, all of which primarily produce line pipe and standard pipe, but also produce OCTG[] and a fourth Indian company that is a processor of OCTG.[173]

125. USDOC used four criteria to analyze the available options: (1) the similarity of the potential surrogate companies' business operations and products to the respondent's business operations and products; (2) the extent to which the financial data of the surrogate company reflects sales in the home market and does not reflect sales to the United States; (3) the contemporaneity of the data to the period of investigation; and (4) the extent to which the customer base of the surrogate and the respondent were similar (e.g., original equipment manufacturer versus retailer).[174]

126. USDOC "considered[ed] the Tenaris financial statements the best available option for determining CV profit in this case"[175]:

> As OCTG is a very specialized premium product used exclusively in the oil and gas exploration industry with significant quality differences, different end uses, different end customers, and different demand patterns than those of non-OCTG pipe, it is important that we rely on a source that closely reflects such product. We believe due to the nature of this product that it is more consistent with the statute to calculate profit using a company that mainly sells either the identical product or, alternatively, merchandise that is in the same general category of products. Because Tenaris is an OCTG producer that sells OCTG in significant quantities, and in virtually every market in which OCTG is sold, we find its average profit experience is representative of sales of OCTG across a broad range

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[172] *EU – Biodiesel (Panel)*, para. 7.336 (this panel report has not yet been adopted and may be subject to appeal); *see EU – Biodiesel (Panel)*, paras. 7.345-7.347 (referring to the "like product" instead of the "product under consideration").

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

[174] Final Decision Memorandum, p. 19 (indicating that USDOC analyzed the relevant financial statements using the criteria established in *CTVs from Malaysia*) (Exhibit KOR-21). The referenced criteria appear on page 16 of this exhibit.

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

> of different geographic markets. As the profit from its financial statements is predominantly of OCTG, it reflects more precisely the profit on products identical to the subject merchandise. While we would prefer to use the financial statements of an OCTG producer that primarily produces and sells OCTG in Korea, such information is not available. The financial statements of the six Korean producers' reflect sales of OCTG almost exclusively to the U.S., and predominantly sales of non-OCTG pipe products and other non-pipe products.[176]

127. USDOC's use of Tenaris's financial statement to calculate CV profit resulted from a reasoned consideration of the evidence before it, rationally directed at approximating what the Korean respondents' profit margin for the like product would have been if the like product had been sold in the ordinary course of trade in the Korea. USDOC thus provided a reasoned and adequate explanation for why the use of Tenaris's financial statement constitutes a reasonable method to calculate CV profit.

b. Korea fails to provide a basis for why USDOC's use of Tenaris's financial statement does not constitute a reasonable method to calculate CV profit

128. Korea does not identify any flaw, mistake, or inaccuracy in Tenaris's audited financial statement. Nor does Korea explain why profit from sales of OCTG does not reasonably reflect constructed profit for the same product. Korea instead puts forward four reasons why it believes the panel should reject the reasonable method used by USDOC to calculate CV profit: (1) the decision not to apply a profit cap is inconsistent with the "reasonable amount" requirements of Article 2.2[177]; (2) the inability to calculate a profit cap for the method used was premised on a narrow interpretation of "same general category"[178]; (3) obligations under the AD Agreement must be read in light of an ethereal "'central' interpretative principle" that emanates from Article 2.1[179]; and (4) the calculated amount is ipso facto unreasonable absent a profit cap.[180] The United States has already demonstrated above why the first two arguments lack merit, so its responses below are limited to the last two arguments.

129. According to Korea, Article 2.1 defines dumping in a manner that prohibits an investigating authority from calculating a dumping margin "by comparing an export price to a normal value that, for the most part, represents the international market (as opposed to the single

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

[177] Korea FWS, paras. 110-117.

[178] Korea FWS, paras. 120-123.

[179] Korea FWS, paras. 124-139. Korea also makes the conclusory statement that "if normal value were to reflect conditions outside of the exporting country, antidumping investigations will end up penalizing exporters for acts attributable to the enterprises operating outside the exporting country" and "would not be consistent with Article 2.1, 5.2 and 9.2 among others." As Korea provides no analysis of Article 5.2 and 9.2 or an explanation of the nature of alleged inconsistency with these two provisions, the panel should find that Korea has failed to meet its burden to make a prima facie case with respect to these provisions of the AD Agreement

[180] Korea FWS, paras. 118-119.

domestic market of the exporting country)."[181] In this regard, Korea takes the phrase "destined for consumption in the exporting country" to mean that the normal value can only be determined with respect to product sold in the exporting country.

130. Korea's interpretation is flawed. As an initial matter, Article 2.1 is a definitional provision that, "read in isolation, do[es] not impose independent obligations."[182] Although the Article 2.1 provides when "a product is to be considered as being dumped," it does not specify how the normal value is to be determined. The determination of normal value is governed by Article 2.2 instead. Moreover, Article 2.2.2(iii) provides for the determination of profits and costs using "any reasonable method" without limiting such profits and costs to profits realized and costs incurred in the exporting country. Korea's interpretation of Article 2.1 conflicts then with Article 2.2, which expressly permits use of sales that are destined for consumption in markets other than exporting country, and Article 2.2.2(iii), which does not limit the use of "any reasonable method" to a particular country or market.

131. The text and overall structure of Article 2.2.2 recognize that an investigating authority may be limited by the factual information before it and that ideal information for calculating constructed value profit may not always be available. In the absence of data specific to the product under consideration and the exporting country, an investigating authority has to find a reasonable proxy from data available in the record.

132. In this investigation, USDOC had to select one of the two alternatives for determining normal value: (1) data that is specific to the product under consideration from global sales of a company that operates in many countries, including Korea, but not specific solely to Korea; or (2) data that is not specific to the product under consideration or the general category of products, albeit specific to the exporting country. Korea has provided no basis in Article 2.2.2 to conclude that only home market sales and production data for products falling *outside* the same general category of products would provide a reasonable method for calculating CV profit, much less that global market (including Korea) profit data for a producer of the *like product*, OCTG, is not a reasonable method. Given the record evidence concerning the differences between OCTG and non-OCTG products, USDOC reasonably selected the data that it considered more accurately reflected the profit amount for the product under consideration.

133. Korea asserts that "no reasonable basis exists to conclude that Tenaris's profit rate is reflective of the profit rate that the Korean producers would have achieved if they had sold OCTG in the country of export,"[183] but Korea itself acknowledges that Tenaris produces and sells a broad range of OCTG products around the world.[184] As such, Korea has not demonstrated any flaw or inaccuracy in the audited financial statements of Tenaris, nor has it demonstrated that the global prices of OCTG are unrepresentative. Absent evidence to the contrary, there is nothing unreasonable about using the average profit from a broad range of OCTG products sold

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[181] Korea FWS, para. 130.

[182] *US - Zeroing (Japan) (AB)*, para. 140.

[183] Korea FWS, para. 135.

[184] Korea FWS, para. 136 (quoting Exhibit KOR-21, p. 21).

by a company that operates around the globe, including in Korea, as a reasonable proxy for the profit expected to be made from a sale of OCTG in a specific market.

134. Finally, a determination of the amounts of profit under Article 2.2.2(iii) without calculating a profit cap is inconsistent with Article 2.2 of the AD Agreement only when the evidence in the record permits an investigating authority to calculate such a cap. When such evidence does not exist, it is not inconsistent with the plain language of Article 2.2.2 for the investigating authority to calculate an amount for profit absent a cap using a "reasonable method" that reflects objective reality. It is indisputable that the evidence in the record of the Korea OCTG investigation did not permit USDOC to calculate a profit cap. Therefore, Korea is wrong when it argues that the cap's absence makes the calculated profit amount ipso facto unreasonable, especially in light of the reasoned and adequate explanation provided by USDOC for why use of Tenaris's financial statement constitutes a reasonable method to calculate CV profit.

135. The arguments advanced by Korea do not provide plausible alternative explanations as to why the use of Tenaris's financial statement does not constitute a reasonable method by which to calculate CV profit. Therefore, Korea has failed to establish that the United States acted inconsistently with Article 2.2.2 of the AD Agreement in its determination of CV profit.

7. USDOC's Acted Consistently with Article 2.4 of the Antidumping Agreement

136. Korea argues that USDOC has failed to make allowances for differences that affect price comparability and thus acted inconsistently with Article 2.4 of the AD Agreement. According to Korea, "there are significant differences between the products that Korean respondents sold in the U.S. market and those sold by the surrogate CV profit source (Tenaris) from which the CV profit rate was derived."[185] In this regard, Korea alleges a litany of differences such as mix of products, number of employees and manufacturing facilities, annual volumes of sales, methods of distribution.

137. The United States considers the issue of the calculation of a proper normal value a matter under Article 2.2.2 while issues related to the comparison between normal value and export prices are considered under Article 2.4. Korea's arguments thus are without merit because it has failed to demonstrate that the alleged differences it identifies affected the price comparability between normal value and export prices.

a. Article 2.4 of the AD Agreement

138. Article 2.4 of the AD Agreement provides in relevant part:

> A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences

[185] Korea FWS, para. 144.

which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.

139. Article 2.4 obligates an investigating authority to make a "fair comparison" between the export price and the normal value when determining the existence of dumping and calculating a dumping margin. The text of Article 2.4 presupposes that the appropriate normal value has been identified. Once normal value and export price have been established, the investigating authority is required to select the proper sales for comparison (sales at the same level of trade and as nearly as possible the same time) and make appropriate adjustments to those sales (due allowances for differences which affect price comparability).[186]

140. The essential requirement for any adjustment under Article 2.4 is that a factor for which adjustment is requested must affect price comparability. The use of constructed normal value does not preclude the need for due allowances or adjustments *between* the export price and the normal value.[187] However, the construction of normal value through the selection of costs pursuant to Article 2.2.1, or profit pursuant to Article 2.2.2, is not a relevant difference *between* the export value and the normal value, because these selections do not relate to a difference between the export and domestic transactions being compared.

b. USDOC Acted Consistently with Article 2.4 of the AD Agreement

141. Korea challenges the calculation of a component of constructed normal value, namely CV profit. Korea's Article 2.4 claim thus is entirely derivative of its claim under Article 2.2.2. If USDOC determined CV profit consistently with Article 2.2.2, the profit amount for purpose of normal value is reasonable. The profit component of normal value does not constitute a difference affecting price comparability between the export price and the normal value, and thus is not relevant to the fair comparison obligation between the export price and the normal value set forth under Article 2.4 of the AD Agreement.

142. Korea has otherwise failed to demonstrate that the alleged differences it identifies post-hoc affected price comparability. For example, Korea argues that Tenaris sells "specialized and premium products" and operates in the "niche market segment," whereas Korean respondents did not participate in that niche segment.[188] The record evidence demonstrates, however, that Tenaris is not a niche market producer but one of the world's largest producers, offering "a full

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[186] For instance, Article 2.4 articulates that to ensure a fair comparison between export price and normal value, due allowance shall be made with respect to models with differing physical characteristics, at distinct levels of trade, pursuant to different terms and conditions, and/or in varying quantities, all of which may affect price. *See EC –Tube or Pipe Fittings* (Panel), para. 7.157. The panel in *Egypt – Steel Rebar* explained, "[A]rticle 2.4 in its entirety, including its burden of proof requirement, has to do with ensuring a fair comparison, through various adjustments as appropriate, of export price and normal value." (para. 7.335).

[187] *EC – Fasteners (Article 21.5 – China) (AB),* para. 5.205 ("The fair comparison requirement of Article 2.4 applies in all anti-dumping investigations, irrespective of the methodology used to determine normal value"); *Egypt – Rebar* (Panel), para. 7.352 ("Article 2.4 . . . explicitly require[s] a fact-based, case-by-case analysis of differences that affect price comparability").

[188] Korea FWS, paras. 146-147.

product range with flexible supply options."[189] And while Korea characterizes Tenaris's products as high-end relative to the Korean respondents' products, it provides no analysis whatsoever of Tenaris's products offerings and the respective share of each particular product apart from asserting that Tenaris sells some premium products.

143. Korea argues that there is a "massive disparity in the profit rate recorded by Tenaris versus that of the Korean respondents"[190] because Tenaris' profit rate of 26.11 percent is "astounding."[191] But as Korea notes, although HYSCO's and NEXTEEL's home market sales of non-OCTG exhibit profit rates of [[ ]] and [[ ]] percent, respectively, HYSCO's and NEXTEEL's U.S. sales of OCTG exhibit rates of [[ ]] and [[ ]] percent, respectively.[192] So while a massive disparity may exist between respondents' reported non-OCTG rates and Tenaris's OCTG rate, a "massive disparity" does *not* exist between respondents' reported OCTG profit rates on U.S. sales and Tenaris's OCTG profit rate. This provides further support for USDOC's decision to select an OCTG rate rather than a non-OCTG rate. Korea's own examination of the record thus disproves its own assertion.

144. Korea argues that "Tenaris has the highest operating margin among its competitors due to the premium nature of its product and niche market segment."[193] But as evidenced by NEXTEEL's data, OCTG are themselves premium products that are more profitable than standard or line pipe; i.e., there is a [[ ]] percentage point difference between the [[ ]] percent [[ ]] on NEXTEEL's non-OCTG sales in the home market relative to NEXTEEL's [[ ]] percent profit on its OCTG sales in the U.S. market.[194]

145. Korea argues that "USDOC further failed to account for difference in the scale of the companies' operations, which would inevitably have an effect on the price comparability of the products produced by each company."[195] Although Korea recites several factors of questionable relevance, such as the number of production facilities, employees, and annual volume of sales, it fails to show how these factors affected price comparability between the export price and the normal value.

146. Finally, although the obligation to ensure a fair comparison "lies on the investigating authorities,"[196]

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[189] U.S. Steel Comments at Exhibit P, p. 11 (Exhibit KOR-19).

[190] Korea FWS, para. 154.

[191] Korea FWS, para. 153.

[192] Korea FWS, para. 154.

[193] Korea FWS, para 147.

[194] NEXTEEL OCTG Profit Data (Exhibit KOR-28) (**BCI**). As we explained earlier, Korean respondents did not sell any OCTG in Korea, but labeled certain non-OCTG products as "non-prime OCTG" in their internal accounting systems. These non-prime products do not meet OCTG specifications and were marketed and sold as standard pipe. Final Decision Memorandum, pp. 5, 18, 63-64 (Exhibit KOR-21).

[195] Korea FWS, para. 148.

[196] *EC – Fasteners (AB)*, para. 487 (quoting *US – Hot Rolled Steel (AB)*, para. 178) (emphasis omitted).

> exporters bear the burden of substantiating, 'as constructively as possible', their requests for adjustments reflecting the 'due allowance' within the meaning of Article 2.4. If it is not demonstrated to the authorities that there is a difference affecting price comparability, there is no obligation to make an adjustment.[197]

147. Respondents did not argue in the Korea OCTG investigation that due allowance should be made pursuant to obligations set forth in Article 2.4 for differences between the products they sold in the U.S. market and products sold by Tenaris. Instead, respondents argued that USDOC should reject Tenaris's financial statement because the differences between Tenaris and respondents made Tenaris "an unsuitable surrogate for calculating CV profit."[198] Contrary to Korea's assertions,[199] respondents never alleged in the AD investigation that due allowance within the meaning of Article 2.4 should be made for a purported difference between constructed normal value and export price. An investigating authority does not have to accept a request for an adjustment that is unsubstantiated.[200] The panel thus should not fault USDOC for not making an adjustment that respondents failed to request and substantiate in the underlying proceeding.

148. The arguments advanced by Korea do not establish that the United States failed to make a "fair comparison" between the normal value and the export price within the meaning of Article 2.4. Therefore, Korea has failed to establish that the United States acted inconsistently with Article 2.4 of the AD Agreement.

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

149. Korea claims that USDOC breached Article 2.3 of the AD Agreement with its decision to disregard NEXTEEL's export price. However, Korea's claim is based on a misinterpretation of the applicable obligations in Article 2.3 and a selective recitation of the factual basis for USDOC's finding of association that resulted in the use of constructed export price ("CEP"). USDOC properly relied on CEP after making the factual determination, based on significant record evidence, that NEXTEEL is associated with the Customer. Based on a proper interpretation of Article 2.3, USDOC's actions are not inconsistent with Article 2.3. Below, the United States sets forth (1) the proper legal interpretation of Article 2.3 and (2) USDOC's application of that standard in this case.

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[197] *EC – Fasteners (AB)*, para. 488 (quoting *EC – Tube or Pipe Fittings*, para. 7.158, and citing *Korea – Certain Paper (Panel)*, para. 7.147).

[198] HYSCO Case Brief, p. 45-50 (Exhibit USA-24) and NEXTEEL Case Brief, p. 42-48 (Exhibit USA-22); *see* HYSCO Rebuttal Brief, pp. 42-48 (confirming that HYSCO's arguments regarding Tenaris all centered on the alternatives for calculating CV profit) (Exhibit USA-25); NEXTEEL Rebuttal Brief, pp. 40-47 (confirming that NEXTEEL's arguments regarding Tenaris all centered on the alternatives for calculating CV profit) (Exhibit USA-23).

[199] Korea FWS, paras. 140-155.

[200] *See EC – Fasteners (China) (AB)*, para. 488.

1. Interpretation of Article 2.3

150. Korea's interpretation of Article 2.3 rests on two primary arguments. First, Korea maintains that the term "association" in Article 2.3 should be defined by reference to the definition of "related" in footnote 11 to Article 4.1 of the AD Agreement.[201] Korea argues that to disregard export prices, Article 2.3 sets a "requirement that a party must be in a position to exercise restraint and direction, i.e., to *actively and authoritatively* deprive another party of the ability to set its own prices."[202] Second, Korea argues that "Article 2.3 requires investigating authorities to provide a reasoned and adequate explanation regarding the basis of its finding that an association involving the exporter results in export prices being unreliable."[203] The text of Article 2.3 does not support Korea's proposed interpretation because that interpretation is based on a flawed understanding of "association."

151. Article 2.3 of the AD Agreement provides:

> In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.

152. Thus, Article 2.3 permits an investigating authority to disregard a producer's export price, "where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer." Under such circumstances, Article 2.3 allows the authority to construct export price "on the basis of the price at which the imported products are first resold to an independent buyer."

153. The term "association" does not indicate a limitation to only those entities that may be "related" to the exporter. The dictionary definition is the "the action of joining or uniting for a common purpose; the state of being so joined."[204] Therefore, an "association" may consist of a broad range of commercial relationships. The parallel treatment of "association" and "compensatory arrangement" in Article 2.3 provides important guidance for the interpretation of "association." A compensatory arrangement is a reciprocal agreement between two or more parties that affects transaction prices. For example, a party may reduce the price charged in exchange for the performance of certain services such that the reciprocal terms of the agreement result in a superficial pricing behavior. As with an association, the very nature of a compensatory arrangement suggests that the price does not reflect a transaction for that product made at arms-length between two or more independent parties. Thus, with both "association"

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[201] Korea FWS, paras. 163, 165.

[202] Korea FWS, para. 170 (emphasis in original).

[203] Korea FWS, para. 177.

[204] *New Shorter Oxford English Dictionary*, Volume 1, p. 132 (Exhibit US-16). The term is also defined as "the conjoining or uniting of things or persons with another or others; the state of being so conjoined, conjunction."

and "compensatory arrangements," Article 2.3 is addressing the concern that prices may not be reliable because of the relationship between the parties, absent a showing to the contrary.

154. The interpretation of "association" is also informed by the term "independent buyer." Article 2.3 states that where a price is unreliable "because of association," an authority may construct export price based on the price of the product when first sold to an "independent buyer." That is, the interpretation of "association" can be informed by what it is not: an independent buyer. The dictionary definition of "independent" is "not subject to the authority or control of any person, country; free to act as one pleases, autonomous."[205] An independent buyer engages in an arms-length transaction with an independent seller. In such a scenario, there are entities on both sides of the transaction with different – and often competing – interests. In a transaction with an independent buyer, both buyer and seller have an interest in maximizing profits; benefits to one party come at a cost to the other. The goals of a transaction between two independent entities are fundamentally different than the goals of two associated parties working together towards a "common purpose." Therefore, in contrast to an independent buyer-seller transaction, two parties that share an association cannot be assumed to engage in arms-length transactions based on market prices.

155. The nature of the relationship between the exporter and the importer, rather than actual pricing information, are what inform an authority's consideration of whether prices "appear" to be unreliable under Article 2.3. The plain language does not require an assessment or determination of price reliability before disregarding export price. Rather, the construction of the sentence, and the phrasing – "appears to the authorities concerned that the export price is unreliable *because of* association" – suggests that the authorities may form a view as to the unreliability of the prices based on the "association" between the relevant entities. The use of "unreliable" in Article 2.3 suggests that an investigating authority is to use those prices that provide for a reliable comparison of export price and normal value. The dictionary definition of reliable is "that may be relied on; in which reliance or confidence may be put; trustworthy, safe, sure."[206] To be usable for purposes of calculating a dumping margin, the export prices must be of such a nature that they can be trusted. The very nature of a particular buyer-seller relationship can be evidence that prices are inherently unreliable.

156. Korea attempts to equate the term "association" with the term "related," as defined in footnote 11,[207] and Korea devotes considerable discussion to interpreting footnote 11. Based on this interpretation, Korea concludes that, to establish "association," an authority must show that one entity "had an ability to exercise restraint or direction" over the other.[208] However, footnote 11 defines a *different* term in a *different* article of the AD Agreement. Article 2.3 refers to an "association" between the exporter and importer. Footnote 11 to Article 4.1 defines the term "related," which does not appear in Article 2.3. Moreover, the opening phrase of footnote 11 – "*[f]or purposes of this paragraph*" – makes clear that the definition that follows is limited only to the cited paragraph and is not providing a general definition for use in the AD Agreement.

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

[206] *New Shorter Oxford English Dictionary*, Volume 2, p. 2537 (Exhibit USA-16).

[207] Korea FWS, paras. 163-170.

[208] Korea FWS, para. 175.

Therefore, the existence of the footnote and its very terms undercuts Korea's interpretive argument and reinforces that the different term "association" in Article 2.3 should not be understood to mean "related" within the meaning of footnote 11.

157. Article 2.3 thus permits an authority to disregard export prices based on "association." Contrary to Korea's assertions, there is no requirement that the parties be "related" within the meaning of Footnote 11, and there is no separate requirement that an authority review pricing information and make a determination that prices are unreliable. Because Korea's claim is premised on its erroneous understanding of "association" in Article 2.3, its claim can be rejected on this basis alone.

2. USDOC's Use of the First Resale to an Independent Buyer Was Not Inconsistent with Article 2.3 of the AD Agreement

158. Korea disputes the factual basis for USDOC's determination of association. While acknowledging that the relevant parties maintained a "robust business relationship,"[209] Korea contends that the relationship between NEXTEEL and Customer did not extend beyond that of a normal buyer and seller relationship.[210] Korea's argument is without merit, and USDOC's finding of an "association" is reasoned and well-grounded in the record.

159. USDOC properly found NEXTEEL to be associated with the Customer, and therefore did not act inconsistently with Article 2.3 in disregarding export price. In its final determination, USDOC set forth the analysis and factual basis for its conclusion that NEXTEEL and Customer are associated by virtue of NEXTEEL's association with POSCO. The Panel's analysis must be guided by the text of Article 2.3, as interpreted above. USDOC's decision to not use NEXTEEL's export price comports with the text of Article 2.3 of the AD Agreement.

160. What Korea refers to as a "normal supplier-customer relationship" was in fact a remarkably interconnected partnership.[211] As described more fully below, POSCO, NEXTEEL's main supplier of hot-rolled coil ("HRC"), also played the unique role as NEXTEEL's [[ ]]; POSCO was involved, through an affiliate, in the production *and sale* of NEXTEEL's subject merchandise. The interconnected nature of this relationship formed the basis for USDOC's finding of association.

161. At the outset, a graphical depiction of the interconnected relationship between supplier, producer, and customer is helpful to understand the starting point for USDOC's analysis in this proceeding. The information presented in the illustration was included in USDOC's determination of association and was not contested by the Korean respondents in the underlying proceeding:

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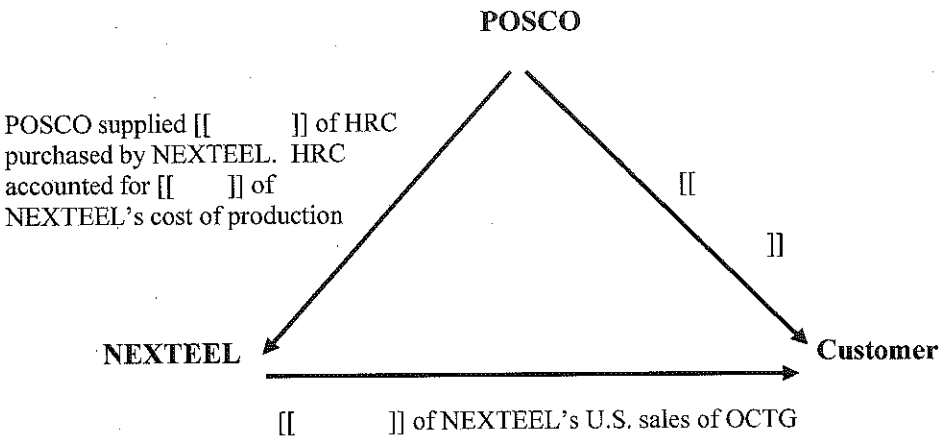
[209] Korea FWS, para. 172.

[210] Korea FWS, para. 173.

[211] Korea FWS, para. 173.



162. USDOC's analysis of association considered two relationships: (1) POSCO and NEXTEEL and (2) NEXTEEL and Customer. USDOC's factual determination for its finding of association is set forth below.

a. NEXTEEL and POSCO

163. USDOC's finding of association between NEXTEEL and POSCO was based on the unique and remarkably close relationship in which POSCO was positioned to "affect[] the pricing, production, and sale of OCTG" by NEXTEEL.[212] These are not two independent entities entering into a commercial transaction; as USDOC concluded in its final determination, NEXTEEL and POSCO coordinated closely in the production, marketing, and sale of OCTG.

164. *Production*: During the relevant period, USDOC found that POSCO supplied NEXTEEL with [[ ]] of its HRC used for the production of OCTG.[213] HRC accounts for an overwhelming percentage of the cost of producing OCTG: during the relevant period, USDOC determined that HRC accounted for [[ ]] percent of NEXTEEL's total OCTG cost of manufacturing.[214] USDOC explained that the HRC "used by NEXTEEL to produce OCTG represents the vast majority of the cost incurred to produce OCTG."[215]

165. USDOC's determination found that POSCO supplied [[ ]] of the HRC purchased by NEXTEEL during the relevant period.[216] USDOC concluded that POSCO supplied NEXTEEL with [[ ]] metric tons, while its other supplier accounted for only [[ ]] metric tons of HRC for OCTG production, all of which was used solely for testing

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[212] Final Decision Memorandum, p. 73 (Exhibit KOR-21).

[213] *Affiliation Memorandum for the Final Affirmative Determination in the Less than Fair Value Investigation of Certain Oil Country Tubular Goods from the Republic of Korea* ("USDOC Affiliation Memorandum"), p. 3 (Exhibit KOR-43) (**BCI**).

[214] USDOC Affiliation Memorandum, p. 3 (Exhibit KOR-43) (**BCI**).

[215] USDOC Affiliation Memorandum, p. 3 (Exhibit KOR-43) (**BCI**).

[216] USDOC Affiliation Memorandum, p. 3 (Exhibit KOR-43) (**BCI**).

purposes and not for production of OCTG.[217] In other words, the POSCO-sourced HRC accounted for [[ ]] percent of NEXTEEL's total purchases for OCTG production.

166. A separate but related metric analyzed by USDOC in its determination was NEXTEEL's consumption of HRC. During the period, NEXTEEL consumed [[ ]] metric tons of HRC from the following sources: [[ ]] metric tons from POSCO, [[ ]] from inventory from a non-domestic supplier, and the aforementioned [[ ]] metric tons from a separate Korea supplier.[218] As such, USDOC calculated that POSCO accounted for [[ ]] of the HRC consumed by NEXTEEL for OCTG production during the relevant period.[219]

167. The volume of HRC purchased and consumed by NEXTEEL from POSCO was a key basis of USDOC's finding of association.[220] USDOC concluded that the nature of this supplier relationship extended beyond that of an independent buyer-seller transaction.[221] Here NEXTEEL's production of OCTG was completely intertwined with POSCO's production of HRC.

168. *Marketing*: USDOC's determination also concluded that POSCO was involved in the production process and marketing of NEXTEEL's OCTG.[222] USDOC's final determination referred to public acknowledgements by POSCO that it "took charge of NEXTEEL's overseas {public relations} campaign for its global launch."[223] USDOC found that the two companies shared technology and market information pertaining to OCTG.[224]

169. *Sales*: USDOC determination concluded that NEXTEEL worked closely with POSCO at every step of the process: production, marketing, and sale of OCTG.[225] USDOC found that, during the relevant period, [[ ]] percent of NEXTEEL's sales in the United States were made through [[ ]].[226] USDOC explained that "POSCO has a history of working closely with on-sight NEXTEEL departments and providing marketing assistance and other promotional activities for the benefit of NEXTEEL."[227]

170. In sum, based on the evidence of coordination between NEXTEEL and POSCO in the production, marketing, and sale of OCTG, USDOC determined an association to exist. As

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[217] USDOC Affiliation Memorandum, p. 3 (Exhibit KOR-43) (**BCI**).

[218] USDOC Affiliation Memorandum, p. 3 (Exhibit KOR-43) (**BCI**).

[219] USDOC Affiliation Memorandum, p. 3 (Exhibit KOR-43) (**BCI**).

[220] USDOC Affiliation Memorandum, p.4 (Exhibit KOR-43) (**BCI**).

[221] USDOC Affiliation Memorandum, p. 4 (Exhibit KOR-43) (**BCI**).

[222] USDOC Affiliation Memorandum, p. 3 (Exhibit KOR-43) (**BCI**).

[223] *See* USDOC Affiliation Memorandum, p. 3 (Exhibit KOR-43) (**BCI**), *citing to* U.S. Steel Deficiency Comments of November 20, 2013 at Attachment C, p. 3-5 (Exhibit USA-17).

[224] USDOC Affiliation Memorandum, p. 3 (Exhibit KOR-43) (**BCI**).

[225] Final Decision Memorandum, p. 73 (Exhibit KOR-21).

[226] USDOC Affiliation Memorandum, p. 3 (Exhibit KOR-43) (**BCI**).

[227] USDOC Affiliation Memorandum, p. 3 (Exhibit KOR-43) (**BCI**).

explained in the USDOC determination: "Being in a position both to establish the primary input cost and [[ ]] enables POSCO to influence the cost of inputs and additionally to [[ ]][228] POSCO and NEXTEEL did not operate as two independent parties to a transaction; rather, they were two companies with a coordinated, mutual interest in selling OCTG in the most profitable manner possible.

b. NEXTEEL and Customer

171. USDOC's final determination demonstrates NEXTEEL's close association with POSCO. Accordingly, so too must NEXTEEL be associated with Customer.

172. USDOC found that, during the relevant period, [[ ]] percent of NEXTEEL's sales of OCTG in the United States were made through [[ ]].[229] Furthermore, USDOC's determination explained that "POSCO holds a [[ ]] percent investment interest in [[ ]]."[230] USDOC concluded that "[[ ]] and its [[ ]] U.S. affiliate [[ ]] are affiliated with NEXTEEL."[231]

173. USDOC properly found NEXTEEL to have an association relationship with Customer. Through [[ ]], POSCO was involved in the production and sale of OCTG; arguably, POSCO contributed significantly more value to the finished product than did NEXTEEL. POSCO provided marketing and production assistance to NEXTEEL, and ultimately [[ ]] Customer, through POSCO, was not an independent party to its transactions with NEXTEEL. The parties worked together to promote OCTG sales in the United States through the sharing of marketing and sales resources. Under this structure, it cannot be reasonably argued that NEXTEEL was making sales to an independent buyer.

174. USDOC's finding that export price was unreliable because of "association" between the producer / exporter and the importer [[ ]] was reasoned and adequate. USDOC concluded that NEXTEEL was associated with Customer, a relationship that, by its very nature, prevented an arm's length transaction of OCTG. USDOC appropriately utilized the first sale to an independent buyer of OCTG in the United States. Accordingly, Korea's claim fails because, in these circumstances, USDOC's use of a constructed export price was not inconsistent with Article 2.3.

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[228] USDOC Affiliation Memorandum, p. 4 (Exhibit KOR-43) (**BCI**).

[229] USDOC Affiliation Memorandum, p. 3 (Exhibit KOR-43) (**BCI**).

[230] The United States notes that [[ ]], in turn, has a [[ ]]. USDOC Affiliation Memorandum, p. 4 (Exhibit KOR-43) (**BCI**).

[231] USDOC Affiliation Memorandum, p. 4 (Exhibit KOR-43) (**BCI**).

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

175. Korea claims that USDOC acted inconsistently with Article 2.2.1.1 of the AD Agreement by using a market-based price to calculate certain of NEXTEEL's costs in the determination of normal value instead of costs that NEXTEEL paid to its associated supplier POSCO for raw materials. Korea's argues that "[b]ecause the USDOC's determination of affiliation was improper and such determination was the sole basis provided by USDOC to disregard NEXTEEL's costs, it follows that USDOC acted inconsistently with its obligations under Article 2.2.1.1 to calculate NEXTEEL's costs based on its own data."[232] Thus, Korea would appear to accept that a proper finding of association justifies deviation from a respondent's books and records in the cost calculation.[233] As demonstrated above, USDOC's final determination properly found an association to exist between NEXTEEL and POSCO. Accordingly, Korea's claim is without merit.

176. Article 2.2.1.1 of the AD Agreement permits an authority to depart from a respondent's books and records in calculating constructed value where the authority provides a rationale for doing so.[234] Article 2.2.1.1 provides:

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

177. Where an authority provides a reasoned explanation for why it was required to use market prices for a cost calculation – as here – the authority has not acted inconsistently with Article 2.2.1.1.[235] The obligation of Article 2.2.1.1 to use the books and records of the exporter under investigation is qualified by the use of "normally." The term 'normally' in conjunction with the two conditions ('provided that') in Article 2.2.1.1 indicates that use of a producer's or exporter's books or records is not necessary in every case and the investigating authority has the ability to consider other available evidence in limited instances.

178. The panel in *China – Broiler Products* articulated this obligation in the following manner:

> In our view, the use of the term "normally" in Article 2.2.1.1 means that an investigating authority is bound to explain why it departed from the norm and declined to use a respondent's books and records. The Appellate Body observed in *US – Clove Cigarettes* that the ordinary meaning of the term "normally" is defined as "under normal or ordinary conditions; as a rule". According to the

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[232] Korea FWS, para. 186.

[233] Korea FWS, para. 186.

[234] *China – Broiler Products*, para. 7.175.

[235] *China – Broiler Products*, para. 7.161.

> Appellate Body, "the qualification of an obligation with the adverb "normally" does not, necessarily, alter the characterization of that obligation as constituting a "rule"… [r]ather, the use of the term 'normally' ... indicates that the rule … admits of derogation under certain circumstances." As using the respondents' books and records is the rule and declining to do so is a derogation from that rule, it is for the investigating authority to decide to do so and to justify its decision on the record of the investigation and/or in the published determinations.[236]

179. As in this proceeding, Korea claimed in *US – DRAMS* that the United States did not rely on the proper costs and, therefore, breached Article 2.2.1.1. The panel found that Korea failed "to advance anything beyond conclusory arguments in supports of its claim"[237] and failed to identify record evidence to support its claim that USDOC, as an unbiased and objective authority, refused to consider costs that "reasonably reflect the costs associated with the production and sale" of the subject product.[238] In this dispute, Korea must demonstrate "that an objective and impartial investigating authority could not properly have found that" NEXTEEL's records "did not reasonably reflect the costs associated with the production and sale of" OCTG.[239]

180. As demonstrated above, USDOC's final determination explained the reasons justifying deviation from NEXTEEL's reported costs. Instead, USDOC used a market price based on POSCO's sales price of the raw materials to unaffiliated customers.[240] This decision was based on the interconnected business relationship between NEXTEEL and POSCO.[241] As detailed above, POSCO had the unique situation of both supplying inputs to NEXTEEL and [[ ]].[242] This business relationship presents a unique dynamic in which POSCO is in a position [[ ]] through the price it charges for the primary input, HRC. Recall that, during the relevant period, HRC accounted for [[ ]] percent of NEXTEEL's total cost of manufacturing the subject merchandise.

181. USDOC provided a thorough and reasoned explanation for its decision to deviate from NEXTEEL's books and records. USDOC did not create costs from thin air; rather, it used the actual sales prices of NEXTEEL's supplier. USDOC collected and verified POSCO's HRC sales data during the relevant period.[243] From that data, taken directly from POSCO's books and records, USDOC computed the market prices based on the weighted average price of POSCO's

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[236] *China – Broiler Products*, para. 7.161.

[237] *US – DRAMS*, para. 6.69.

[238] *US – DRAMS*, para. 6.67.

[239] *US – DRAMS*, para. 6.69.

[240] Final Decision Memorandum, p. 74 (Exhibit KOR-21).

[241] Final Decision Memorandum, pp. 73-74 (Exhibit KOR-21).

[242] USDOC Affiliation Memorandum, pp. 3-4 (Exhibit KOR-43) (**BCI**).

[243] Final Decision Memorandum, p. 74 (Exhibit KOR-21).

sales to unaffiliated customers.[244] USDOC's actions are not inconsistent with Article 2.2.1.1 of the AD Agreement.

F. Korea's Claims Regarding Respondent Selection Are Without Merit

182. Korea claims that USDOC's determination to limit its examination and calculate an individual dumping margin for two respondents was inconsistent with Articles 6.10 and 6.10.2 of the AD Agreement. As with several claims already discussed, Korea appears to acknowledge that the AD Agreement allows for the action taken by USDOC – that is, to limit the examination of respondents – but argues that the action was not appropriate under the circumstances of the proceeding at issue. Korea's argument is without merit. USDOC provided detailed explanations of its reasoning for limiting the number of respondents individually examined and for not individually examining voluntary respondents, and those explanations comport with the obligations of Articles 6.10 and 6.10.2 of the AD Agreement.

1. USDOC's Determination Was Not Inconsistent with Article 6.10 of the AD Agreement

183. Article 6.10 of the AD Agreement allows Members to determine individual margins of dumping for a reasonable number of exporters and producers, and does not require the determination of an individual margin of dumping for all exporters and producers where a large number of exporters and producers is involved. Specifically, Article 6.10 provides:

> The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.

184. The authority may limit its examination where the number of exporters or producers is so large as to make a determination of individual margins of dumping for all exporters or producers "impracticable." However, Article 6.10 of the AD Agreement does not define the term "impracticable." The ordinary meaning of the term "impracticable" is "unable to be carried out or done; impossible in practice."[245] Context is given by the final clause of Article 6.10, which permits the examination to be limited to the "largest percentage" of volume of exports "which can reasonably be investigated." When also read in the larger context of Article 6 of the AD Agreement, which concerns the conduct of investigations by administering authorities, the term "impracticable" is employed to strike a balance between the general obligation to individually

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[244] Final Decision Memorandum, p. 74 (Exhibit KOR-21).

[245] *New Shorter Oxford English Dictionary*, Volume 1, p. 1325 (Exhibit USA-16).

examine each exporter or producer and the limited resources of investigating authorities that may limit the number of exporters or producers the authority may "reasonably" investigate.

185. In other words, Article 6.10 permits the limiting of an examination when an authority does not have the resources to individually examine all parties involved in an investigation. The panel in *EC – Salmon (Norway)* came to a similar conclusion, finding:

> In our view, the volume of export sales that may be reasonable for an investigating authority to investigate is a question that must be assessed on a case-by-case basis, taking into account all relevant facts that are before the investigating authority, including the nature and type of interested parties, the products involved and the investigating authority's own investigating capacity and resources.[246]

186. USDOC's decision to limits its examination to two mandatory respondents fully complied with this requirement. Shortly after initiation of the investigation, USDOC solicited comments from interested parties regarding the respondent selection process. USDOC subsequently issued a "Respondent Selection Memorandum."[247] In the memorandum, USDOC carefully considered "its resources, including its current and anticipated workload and deadlines coinciding with the proceeding in question."[248] USDOC explained that the office responsible for the OCTG from Korea proceeding was simultaneously responsible for three investigations, approximately 16 administrative reviews, three remand proceedings, and one anti-circumvention inquiry, each of which involves multiple respondents.[249] The memorandum further explained that this office was also responsible for the investigations involving OCTG from Thailand and Vietnam, taking place concurrently with the subject proceeding.[250] Given the number of ongoing investigations, USDOC concluded that "it would not be practicable" to investigate all known exporters and producers.[251]

187. Korea appears to make two arguments under Article 6.10: First, that USDOC failed to establish that investigating additional mandatory respondents would have been impracticable; and second, that the selection of HYSCO and NEXTEEL was unreasonable.[252] Neither argument is well-founded, and both are contradicted by the record.

188. First, Korea does not dispute the evidence cited above and relied upon by USDOC for its determination or offer alternative, plausible explanations of the evidence to show why USDOC's determination was insufficient. In fact, Korea even acknowledges what is clear from the record:

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[246] *EC – Salmon (Norway) (Panel)*, para. 7.188.

[247] Respondent Selection Memorandum (Exhibit KOR-3).

[248] Respondent Selection Memorandum, p. 6 (Exhibit KOR-3).

[249] Respondent Selection Memorandum at footnote 48 (Exhibit KOR-3).

[250] Respondent Selection Memorandum at footnote 48 (Exhibit KOR-3).

[251] Respondent Selection Memorandum, p. 6 (Exhibit KOR-3).

[252] Korea FWS, para. 233.

that "the USDOC discussed at length its limitations in examining all identified exports."[253] On its face, this rebuts its assertion that USDOC provided "no explanation" for its conclusion.[254]

189. Second, similarly, Korea offers no evidence to support its contention that USDOC's investigation of two mandatory respondents was unreasonable.[255] Article 6.10 of the AD Agreement permits an authority to limit examination to the "largest percentage of the volume of the exports…which can reasonably be investigated." Here, USDOC analyzed the available resources and determined it would not be practicable to investigate all exporters and producers. It then determined, based on the analysis of available resources, that it could investigate producers that account for [[ ]] percent of the volume of exports.[256]

190. Based on the foregoing, Korea's claims under Article 6.10 of the AD Agreement must fail. As explained in the determination, USDOC did not have the resources to investigate additional respondents, and therefore reasonably limited the investigation to [[ ]] percent of total exports. Korea has presented no evidence to argue that USDOC's actions were unreasonable, and the Panel therefore should reject Korea's claims that the United States breached Article 6.10.

2. USDOC's Determination was not inconsistent with Article 6.10.2 of the AD Agreement

191. Korea claims that the United States breached Article 6.10.2 of the AD Agreement in failing to individually examine voluntary responses submitted by three Korean companies. Korea's claim fails, however, because USDOC's determination on this issue is consistent with and applies the language and requirements of this provision. Korea has not reconciled how USDOC's finding that resource constraints precluded investigation of the three companies is somehow inconsistent with the exception in Article 6.10.2 that an authority need not individually examine a voluntary response "where the number of exporters or producers is so large that individual examinations would be unduly burdensome to the authorities and prevent the timely completion of the investigation."

192. Article 6.10.2 provides an obligation and an exception:

> In cases where the authorities have limited their examination…they shall nevertheless determine an individual margin of dumping for any exporter or producer not initially selected who submits the necessary information in time for that information to be considered during the course of the investigation, except where the number of exporters or producers is so large that individual examinations would be unduly burdensome to the authorities and prevent the

[253] Korea FWS, para. 232.

[254] Korea FWS, para. 232.

[255] Korea FWS, para. 232.

[256] Respondent Selection Memorandum, p. 5 (Exhibit KOR-3).

> timely completion of the investigation. Voluntary responses shall not be discouraged.

193. The plain meaning of the terms of Article 6.10.2 requires an authority to determine an individual margin of dumping for each company that voluntarily submits necessary information, unless the number of exporter or producers is so large as to make an individual determination for each company that voluntarily submits information "unduly burdensome" and prevent timely completion of the investigation.

194. Korea itself acknowledges that the obligation to examine voluntary respondents does not apply "where doing so would be unduly burdensome,"[257] and even suggests that the phrase "[v]oluntary responses shall not be discouraged" means that investigating authorities are required to examine "as many producers/exporters *as permitted under its resources*.[258] Having not offered a different interpretation to this plain language reading of the Article 6.10.2, and given the evidence on the record, Korea has no basis to argue that USDOC acted inconsistently with these requirements.

195. As described above, in the Respondent Selection Memorandum, USDOC thoroughly analyzed its available resources for the investigation, and explained that it could individually examine two mandatory respondents.[259] USDOC further explained, however, that if a company submits a voluntary response, "then the Department recommends evaluating the circumstances as the investigation unfolds to determine whether the Department may examine any voluntary respondent in addition to the two mandatory respondents identified above."[260]

196. After three companies submitted voluntary responses, USDOC issued a "Treatment of Voluntary Respondents" memorandum setting out its determination regarding examination of these respondents.[261] USDOC explained that it was at the same time conducting 11 concurrent antidumping and countervailing duty investigations on OCTG from various countries, plus a substantial number of other investigations and administrative reviews.[262] The single office responsible for the OCTG from Korea investigation was also responsible for eight investigations and approximately 20 administrative reviews, and one anti-circumvention inquiry.[263] In short, USDOC thoroughly analyzed its available resources, ultimately concluding in its Treatment of Voluntary Respondents Memorandum that to investigate the voluntary responses would "be unduly burdensome and inhibit the timely completion of this investigation."[264]

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[257] Korea FWS, para. 235.

[258] Korea FWS, para. 234.

[259] Respondent Selection Memorandum, pp. 6-7 (Exhibit KOR-3).

[260] Respondent Selection Memorandum, p. 9 (Exhibit KOR-3).

[261] *Antidumping Duty Investigation of Certain Oil Country Tubular Goods from the Republic of Korea: Treatment of Voluntary Respondents* ("Treatment of Voluntary Respondents Memorandum") (Exhibit KOR-50).

[262] Treatment of Voluntary Respondents Memorandum, p. 6 (Exhibit KOR-50).

[263] Treatment of Voluntary Respondents Memorandum, p. 6 (Exhibit KOR-50).

[264] Treatment of Voluntary Respondents Memorandum, p. 7 (Exhibit KOR-50).

197. Contrary to Korea's assertion,[265] USDOC also cited to resource constraints related to the specific circumstances of the underlying proceeding based on the questionnaire responses submitted by the mandatory respondents. For NEXTEEL, USDOC determined there would be complex issues on corporate structure and affiliation, and for HYSCO, USDOC determined there would be complex issues related to the sales process.[266] USDOC further considered the fact that it would likely be necessary to issue multiple supplemental questionnaire given the complexity of the issues surrounding the entities and the subject merchandise.

198. Based on the record of the investigation, there is no basis upon which Korea can argue that USDOC did not comply with the requirements of Article 6.10.2, or that it failed to provide a reasoned and adequate explanation for its determination not to examine additional respondents. Indeed, one previous panel was "mystified" by nearly identical claims raised in past disputes.[267] In *EU – Footwear (China)*, China claimed that the EU breached Article 6.10.2 for failing to individually examine four voluntary responses. There, the EU determination considered the voluntary responses – in much less detail than USDOC has here – and concluded that individual examination would be unduly burdensome and prevent the timely completion of the investigation. The panel rejected China's claim that such a finding was inconsistent with Article 6.10.2, observing that "these are precisely the criteria set forth in Article 6.10.2 which an investigating authority may cite in order to justify declining to grant individual examination requests."[268]

199. In this proceeding, USDOC properly considered the voluntary responses, thoroughly reviewed the available resources, determined that it would be unduly burdensome to individually investigate the three voluntary responses, and explained the basis for its decision. Because Article 6.10.2 of the AD Agreement permits an authority to perform just such an assessment, Korea's claim must fail.

G. The Procedural and Due Process Safeguards of the Korea OCTG Investigation Complied with Articles 6.2, 6.4, 6.9, and 12.2.2 of the AD Agreement

200. According to Korea, several procedural aspects of the Korea OCTG investigation were not consistent with the AD Agreement. Specifically, Korea claims that USDOC: (1) failed to provide respondents with sufficient opportunity to respond to evidence placed on the record regarding profit, in breach of Articles 6.2, 6.4, and 6.9; (2) failed to disclose to interested parties certain Congressional correspondence that USDOC had received about the investigation, in breach of Articles 6.4 and 6.9; and (3) failed to include in its public notice all relevant information leading to the imposition of final measures, in breach of Article 12.2.2.

201. As discussed below, Korea misconstrues the obligations of Articles 6.2, 6.4, 6.9, and 12.2.2. Contrary to Korea's assertions, USDOC's antidumping investigation was consistent with

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[265] Korea FWS, para. 236.

[266] Treatment of Voluntary Respondents Memorandum, p. 6 (Exhibit KOR-50).

[267] *EU – Footwear (China) (Panel)*, para. 7.146.

[268] *EU – Footwear (China) (Panel)*, para. 7.146.

the AD Agreement because USDOC provided Korean respondents ample opportunity to defend their interests and disclosed the essential facts forming the basis for its decision to apply definitive measures. Moreover, USDOC's public notice contained all relevant information on matters of fact and law and the reasons that led to the imposition of final measures. Therefore, the panel should reject Korea's claims under Articles 6.2, 6.4, 6.9, and 12.2.2 of the AD Agreement.

1. USDOC Provided Respondents with a Full Opportunity To Defend Their Interests

202. Korea asserts that the United States acted inconsistently with Articles 6.2, 6.4, and 6.9 of the AD Agreement because USDOC accepted Tenaris's financial statements without providing Korean respondents a full opportunity to respond to that evidence. Korea's arguments are without merit because respondents were given ample opportunity to submit written information and argument, rebut information and argument submitted by other parties, and to present their views orally at a hearing.

a. Korea's Claim Under Article 6.2 is Without Merit

203. Article 6.2 of the AD Agreement states that, "[t]hroughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests." Article 6.2 further provides that, "[t]o this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered."

204. The Appellate Body has understood Article 6.2 as one of the provisions in the AD Agreement that "set[s] out the fundamental due process rights to which interested parties are entitled in antidumping investigations and reviews," requiring "that the opportunities afforded interested parties for presentation of evidence and defence of their interests be 'ample' and 'full.'"[269]

205. Throughout the Korea OCTG investigation, USDOC provided Korean respondents ample opportunity for the defense of their interests. Before the preliminary determination, respondents were on notice that USDOC might rely on Tenaris's financial data for its dumping calculations. On January 16, 2014, U.S. Steel placed on the record a research paper explaining Tenaris's financial information, along with other factual information related to CV profit.[270] Respondents argued against the use of the Tenaris profit margin through several written submissions before the preliminary determination. In their pre-preliminary determination comments, NEXTEEL and HYSCO both argued that the factual information provided in U.S. Steel's submission, including the information on Tenaris, contained profit data only for countries other than Korea and

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[269] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 241.

[270] U.S. Steel CV Profit Submission (January 16, 2014) at Exhibit J (Exhibit KOR-06). While the research paper contained a disclaimer as to its accuracy, it measured Tenaris's profit to be 23 percent, a figure close to the 26.11 percent profit margin reported in Tenaris's financial statements.

therefore would not capture Korea's home market experience.[271] Subsequently, after petitioners submitted comments arguing that USDOC should base its calculations on Tenaris's profit information,[272] respondents addressed the Tenaris profit margin extensively in their pre-preliminary determination rebuttal comments. NEXTEEL and HYSCO both argued that Tenaris's products and operating structure did not resemble that of the Korean producers and exporters, and advocated for other CV profit sources instead.[273]

206. Following the preliminary determination, NEXTEEL and HYSCO had the opportunity to provide views on the Tenaris financial statements that U.S. Steel placed on the record in response to NEXTEEL's Section D Questionnaire. NEXTEEL did so at least three times in writing – once in its request that USDOC reject the document, and twice more in its brief and rebuttal brief.[274] Similarly, HYSCO, AJU Besteel, and Husteel used the opportunity to challenge Tenaris's profit data, including the data in the financial statements, by providing written arguments against the use of the underlying data.[275] HYSCO, in particular, dedicated at least 15 pages in its case brief to the issue."[276]

207. Indeed, as Korea acknowledges in its first written submission, "Korean respondents made clear that they opposed the placement of the Tenaris financial statements on the record, by immediately objecting to the petitioner's submission."[277]

208. Respondents also had the opportunity to meet with petitioners and USDOC and to present their views on the Tenaris financial statements. USDOC organized a hearing on June 26, 2014, and Korean respondents used the opportunity to challenge the use of this evidence.[278]

209. Notwithstanding all the procedural opportunities provided to Korean respondents, Korea nonetheless alleges that respondents did not have a full opportunity to defend their interests with respect to the Tenaris financial statements.[279] Unsurprisingly, Korea's submission fails to

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

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

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

[274] NEXTEEL's Request to Reject Information (March 27, 2014), pp. 1-2 (Exhibit KOR-20); NEXTEEL Case Brief (Exhibit USA-22); NEXTEEL's Rebuttal Brief (Exhibit USA-23).

[275] *See* Case Briefs from HYSCO (Exhibit USA-24), AJU Besteel, Co., Ltd. (June 18, 2014), pp. 5-7 (Exhibit USA-18), and Husteel (June 18, 2014), pp. 17-24 (Exhibit USA-19); *see also* HYSCO Rebuttal Brief, pp. 34-41 (Exhibit US25).

[276] HYSCO Case Brief, pp. 41-55 (Exhibit USA-24).

[277] Korea FWS, para. 206.

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

[279] The plain text of Article 6.2 does not impose an obligation on investigating authorities to ensure that respondents seize opportunities to defend their interests. In this regard, the panel in *Egypt – Steel Rebar* aptly noted that "[f]ailure by respondents to take the initiative to defend their own interests in an investigation cannot be equated, through WTO dispute settlement, with failure by an investigating authority to provide opportunities for interested parties to defend their interests." *Egypt – Steel Rebar (Panel)*, para. 7.88. To the extent that Korean respondents did

acknowledge that in their written submissions made before and after the preliminary determination, as well as during oral arguments at USDOC's hearing, Korean respondents extensively argued that the information in Tenaris's financial data was not a proper CV profit source.

210. Korea has failed to establish that USDOC did not provide Korean respondents a full opportunity to defend their interests. Therefore, the panel should reject Korea's claim under Article 6.2 of the AD Agreement.

b. Korea's Claim Under Article 6.4 is Without Merit

211. Article 6.4 provides that interested parties must be aware of the information before an investigating authority in order to adequately present their arguments:

> The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.

212. Korea does not dispute that respondents had access to certain Tenaris financial data before USDOC's preliminary determination. Korea also does not dispute that Korean respondents were allowed to see all information in the Tenaris's financial statements. That is, once U.S. Steel filed Tenaris's financial statements on the record – nearly four months before the final determination – all interested parties had access to them.[280]

213. Korean respondents also had numerous opportunities to prepare presentations on the basis of Tenaris's financial data in general and Tenaris's financial statements in particular, as described in detail above. Both NEXTEEL and HYSCO submitted case briefs and rebuttal briefs in which they argued that USDOC should not use profit data from the financial statements.[281]

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not defend their interests, it would be because they lacked the initiative, not because USDOC did not afford them a full opportunity to do so.

[280] The circumstances in this investigation are notably different from those in *EC – Fasteners (Article 21.5 – China) (AB)*. In *EC – Fasteners*, the Appellate Body upheld the panel's finding that the European Communities breached Article 6.4 because it denied multiple requests by interested parties to see the information at issue. *EC – Fasteners (Article 21.5 – China) (AB)*, paras. 5.121-5.123. Here, Korean respondents had access to the Tenaris financial statements once U.S. Steel placed them on the record.

[281] For example, in its case brief, NEXTEEL focused on three reasons why it believed that "The Profit Information Contained in Tenaris' Financial Data Is Not an Appropriate Source for Deriving CV Profit": "(1) Tenaris's profit data includes a significant portion of U.S. sales, which render it unsuitable for purposes of calculating CV profit; (2) Tenaris's profit margin exceeds the profit cap; and (3) Tenaris's actual profit rate, by any measure, is aberrational and unrepresentative of the profit margin of other OCTG producers." NEXTEEL Case Brief, pp. 49-51 (Exhibit USA-22); *see* NEXTEEL Rebuttal Brief (Exhibit USA-23); HYSCO Case Brief (Exhibit USA-24); HYSCO Rebuttal Brief (Exhibit USA-25); *see also* Pre-Preliminary Rebuttal Comments of NEXTEEL, pp. 3-10 (Exhibit USA-13); Pre-Preliminary Rebuttal Comments of HYSCO, pp. 3-10 (Exhibit USA-14).

Korean respondents also prepared and presented oral arguments challenging the adequacy of the Tenaris financial data as a CV profit source.[282]

214. Korea does not explain why the opportunities provided to respondents in the Korea OCTG investigation did not comply with Article 6.4. The only argument that Korea offers in support of its claim under Article 6.4 is that "USDOC did not notify the Korean respondents of its decision to accept the Tenaris financial data."[283] In its preliminary determination, however, USDOC did notify the respondents that it had accepted Tenaris's financial data and examined it as one of three possible options for CV profit. In sum, the Korean respondents were aware that the evidence had been submitted by petitioners, respondents did "see" that information which was evidently relevant to the presentation of their case, and they not only had but utilized numerous opportunities to prepare presentations responding to the evidence.

215. Therefore, Korea has failed to establish that USDOC did not provide Korean respondents timely opportunities to see the Tenaris financial statements and to provide presentations on the basis of information in those statements. Accordingly, Korea's claims that the United States acted inconsistently with Article 6.4 of the AD Agreement must fail.

c. Korea's Claim Under Article 6.9 is Without Merit

216. Korea's claim under Article 6.9 is without merit because Korea fails to correctly identify the "essential facts" that are subject to the disclosure obligation of that provision. Korea alleges that "[w]hether the USDOC would *accept* the placement of the Tenaris financial statements on the record" was an essential fact.[284] Korea then argues that USDOC's *reliance* on the financial statements was an essential fact.[285] Either way, Korea misses the mark, because its arguments conflate "essential facts" with an investigating authority's deliberations and conclusions, which are not subject to the disclosure obligation contained in Article 6.9.

217. Article 6.9 states:

> The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

218. A "fact" is "[a] thing known for certain to have occurred or to be true; a datum of experience" and "[e]vents or circumstances as distinct from their legal interpretation."[286] The word "fact" is preceded by the adjective "essential." The ordinary meaning of "essential" is

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[282] OCTG Hearing Transcript, pp. 112-122 (Exhibit KOR-32).

[283] Korea FWS, para. 206.

[284] Korea FWS, para. 210 (emphasis added).

[285] Korea FWS, para. 212.

[286] *New Shorter Oxford English Dictionary*, Volume 1, p. 903 (Exhibit USA-16); *see also EC – Salmon (Norway) (Panel)*, para. 7.805 ("In our view, essential facts to be disclosed under Article 6.9 may qualify under any of these meanings of the word fact.") (citing these same definitions).

"absolutely indispensable or necessary."[287] Therefore, the disclosure obligation of Article 6.9 does not extend to all facts, but only the "absolutely indispensable or necessary" facts that the investigating authority considers in determining whether to apply definitive measures.[288]

219. Article 6.9 also distinguishes between the facts before an investigating authority and the authority's "consideration" of those facts. The term "consideration" is defined as "the action of taking into account."[289] Thus an authority's obligation under Article 6.9 is limited to disclosing the essential facts – not its reasoning or conclusions. The panel in *China – GOES* affirmed this distinction when it found that "the disclosure obligation does not apply to the *reasoning* of the investigating authorities, but rather to the 'essential facts' underlying the reasoning."[290]

220. USDOC thus was not required under Article 6.9 to inform respondents of whether it would choose or had chosen to accept the financial statements submitted by petitioners. Nor did Article 6.9 require USDOC to inform respondents that it would choose or had chosen to rely upon the information in those statements.

221. Moreover, contrary to Korea's arguments, Article 6.9 does not prescribe a particular manner of disclosure, so long as the disclosure takes place "in sufficient time for the parties to defend their interests." The Appellate Body affirmed this point when it explained that "an authority must disclose such essential facts, in a coherent way, so as to permit an interested party to understand the basis for the decision whether or not to apply definitive measures."[291]

222. Korea incorrectly relies on the panel's findings in *EC – Fasteners (Article 21.5 – China)* to support its contention that USDOC disclosed essential facts too late to allow parties sufficient time to defend their interests.[292] In that dispute, the EC applied its "analogue country" methodology, using information derived from an Indian producer of fasteners, Pooja Forge, to calculate a normal value for the investigation covering Chinese merchandise.[293] The EC kept Pooja Forge's list of products and certain detailed product characteristics confidential, and did not share the information with Chinese producers, despite multiple requests for that data.[294]

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[287] *New Shorter Oxford English Dictionary*, Volume 1, p. 852 (Exhibit USA-16).

[288] *See China – GOES (AB)*, para. 240 (finding that "essential facts . . . refer to those facts that are significant in the process of reaching a decision as to whether or not to apply definitive measures"); *see also China – Broiler Products (Panel)*, para. 7.86 (internal citations omitted); *China – X-Ray Equipment*, paras. 7.399-7.400 (internal citations omitted).

[289] *New Shorter Oxford English Dictionary*, Volume 1, pp. 485-86 (Exhibit USA-16).

[290] *China – GOES (Panel)*, para. 7.407 (emphasis in original) (citing *Argentina – Poultry Anti-Dumping Duties*, para. 7.228;); *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5-Argentina) (Panel)*, para. 7.148 ("The text of Article 6.9 clarifies that this obligation applies with respect to facts, as opposed to the reasoning of the investigating authorities"); *EC – Salmon (Norway) (Panel)*, para. 7.808 ("We can see nothing in Article 6.9 which would require any particular form of disclosure, or any particular degree of precision in tying facts to the information before the investigating authority").

[291] *China – GOES (AB)*, para. 240.

[292] Korea FWS, para. 210.

[293] *EC – Fasteners (Article 21.5-China) (Panel)*, para. 7.9.

[294] *EC – Fasteners (Article 21.5-China) (Panel)*, paras. 7.72-7.74.

Accordingly, the panel concluded that the "final disclosure was too late to afford the Chinese producers an appropriate opportunity to use the information in the presentation of their cases" under Articles 6.4 or 6.9 of the AD Agreement.[295]

223. The challenged investigation is distinct from that in *EC – Fasteners* because, here, respondents were informed of the Tenaris financial statements, and of the profit data they contained, at the same time as USDOC: when U.S. Steel submitted the data to the record.[296] The interested parties knew that USDOC was still evaluating CV profit sources and that U.S. Steel had introduced the financial statements for that purpose.[297] USDOC neither treated Tenaris's financial statements as confidential nor withheld them from interested parties. All parties were able to respond to the Tenaris CV profit data placed on the record before the preliminary determination and the Tenaris financial statements placed on the record after the preliminary determination.[298] Thus there was no concern that this information was provided "too late" for the parties to challenge that information and defend their interests. Korea's reliance on *EC – Fasteners (Article 21.5 – China) (Panel)* is therefore misguided.

224. As is clear from the record, all interested parties to the investigation had access to Tenaris's financial data and were aware that USDOC was considering that data in its investigation. As such, both petitioners and respondents made multiple presentations before and after USDOC's preliminary determination, through written submissions and at the hearing, regarding whether and how the USDOC should use the Tenaris CV profit data in its calculations. Korea has failed to establish otherwise.

225. Therefore, Korea has failed to establish that the information contained in the Tenaris financial statements was not disclosed to all interested parties in a manner consistent with Article 6.9 of the AD Agreement, and the panel should reject Korea's claims accordingly.

2. Korea Fails to Establish that the U.S. Breached Articles 6.4 and 6.9 of the AD Agreement with Respect to *Ex Parte* Communications

226. Korea argues that the United States breached Articles 6.4 and 6.9 because USDOC "delay[ed] in disclosing" certain *ex parte* communications, particularly several letters, to Korean respondents.[299] However, as described in section G.1 above, USDOC allowed timely

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[295] *EC – Fasteners (Article 21.5-China) (Panel)*, para. 7.91.

[296] *See* U.S. Steel Comments at Exhibit P (Exhibit KOR-19); NEXTEEL Request to Reject Information (March 27, 2014) (Exhibit KOR-20).

[297] *See* Prelim. Decision Memorandum, p. 22 ("after the preliminary determination, we intend to continue to explore other possible options for CV profit for both respondents") (Exhibit KOR-05); NEXTEEL Request to Reject Information, p. 5 (Exhibit KOR-20).

[298] *See, e.g.*, U.S. Steel CV Profit Submission at Exhibit J (KOR-06); U.S. Steel Comments, p. 9 (Exhibit KOR-19); NEXTEEL Request to Reject Information (Exhibit KOR-20); NEXTEEL Case Brief, pp. 49-51 (Exhibit USA-22); NEXTEEL Rebuttal Brief (Exhibit USA-23); HYSCO Case Brief (Exhibit USA-24); HYSCO Rebuttal Brief (Exhibit USA-25); OCTG Hearing Transcript pp.112-122 (Exhibit KOR-32).

[299] Korea FWS, para. 216. By the term "disclosing" the United States interprets Korea to mean place such communications on the record of the proceeding. Korea also claims "USDOC waited to disclose the letters." Korea FWS, para. 224. Notably, Korea makes no argument as to any specific procedural deadline that USDOC failed to

opportunities for interested parties to see all information that was relevant to the presentation of respondents' cases and which USDOC used in the investigation, and disclosed all "essential facts" forming that basis of its final determination. Such facts and information included costs of production, general and administrative expenses, product characteristics, sales, end uses, end customers, demand patterns, and affiliation between the supplier, producer, and the customer. Korea fails to explain why the communications referenced constituted information that was "relevant" to the presentation of the respondents' cases, or how the information would have been "used" by USDOC in its investigation. Korea also fails to demonstrate that the relevant correspondences were "essential facts" under consideration that formed the basis for USDOC's decision to apply definitive measures.[300]

227. The communications at issue contained the opinions and concerns of their senders regarding USDOC's preliminary determination and the impact of OCTG imports on the domestic market.[301] In some instances, the senders urged USDOC to carefully consider the information provided by Korean respondents.[302] However, the United States fails to see how the content of these letters included "relevant" information that USDOC could have "used" in its final determination, or how it included any "essential facts" that USDOC might have considered as a basis for its decision. Moreover, USDOC fully explained the reasons for its determinations, and explicitly stated that its findings were based upon the "the record evidence."[303]

228. Further, the record demonstrates that the Korean respondents had ample opportunity to respond to the relevant communications. On June 17, 2014, USDOC placed a letter, dated May 15, 2014, from members of the U.S. Senate on the record of the investigation.[304] On June 23, 2014, USDOC placed a letter, dated June 10, 2014, from members of the U.S. Congress on the record of the investigation.[305] In response, NEXTEEL and HYSCO addressed the letters from congressional representatives and U.S. industry representatives in their affirmative briefs[306] and

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meet. Korea also makes no argument that USDOC did not follow its normal procedures in placing the letters on the record.

[300] After identifying the relevant correspondences, Korea jumps to the conclusion that these were "'relevant' information used by the authorities" and "essential facts," without providing any basis for this conclusion. Korea FWS, para. 221.

[301] Ex Parte Letters and Meetings (Exhibit KOR-22).

[302] *See, e.g.*, Ex Parte Letters and Meetings, pp. 19, 27, 29 (Exhibit KOR-22).

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

[304] Senators Letter (Exhibit KOR-23).

[305] Ex Parte Letters and Meetings (Exhibit KOR-22).

[306] On June 18, 2014, NEXTEEL submitted its case brief in which it addressed the letter from the senators and commented that the final determination should be an objective assessment of the facts and in accordance with controlling U.S. law and remain free of any political influence. NEXTEEL also addressed memoranda that were placed on the record to memorialize meetings and phone calls between USDOC officials and the U.S. industry and members of Congress. NEXTEEL Case Brief, pp. 6-7 (Exhibit USA-22). *See also* HYSCO Case Brief, pp. 5-7 (Exhibit USA-24).

in their rebuttal briefs to USDOC.[307] The respondents also addressed the letters in their June 26 submission to USDOC.[308]

229. Therefore, Korea has failed to make a *prima facie* case under Articles 6.4 and 6.9 of the AD Agreement because USDOC was not required to disclose the referenced communications under Articles 6.4 and 6.9 and because USDOC made the letters available to Korean respondents in a timely manner.

3. USDOC's Public Notice Was Consistent with Article 12.2.2 of the AD Agreement

230. Korea asserts that the USDOC's public notice and explanation of its final determination did not satisfy the requirements of Article 12.2.2 of the AD Agreement. Once again, Korea fails to make out its claim. In its public notice, USDOC set forth in sufficient detail all the relevant information and reasons underlying the final determination.

231. Article 12.2 obligates investigating authorities to set forth "the findings and conclusions on all issues of fact and law considered material by the investigating authorit[y]." To this end, Article 12.2.2 provides that the investigating authority's public notice or separate report on a final affirmative determination shall contain "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures . . . as well as the reasons for the acceptance or rejection of relevant arguments or claims made by exporters or importers."

232. Therefore, if the investigating authority does not consider an issue of fact or law to be material to its determination, it is not required to address that issue in its public notice under Article 12.2.2. The Appellate Body in *China – GOES* affirmed this interpretation, finding that "with regard to 'matters of fact,'" Article 12.2.2 of the AD Agreement does not require that authorities "disclose *all* the factual information that is before them, but rather those facts that allow an understanding of the factual basis that led to the imposition of final measure."[309] Article 12.2.2 thus envisions "a degree of subjectivity and discretion on the part of the investigating authorities."[310] Such discretion is not unlimited, however. For example, the panel in *EC – Tube or Pipe Fittings* clarified that material information relates to those issues arising in

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[307] On June 23, 2014, NEXTEEL submitted its rebuttal case brief, addressing, *inter alia*, the letter USDOC placed on the record on June 17, 2014 from U.S. Senators. NEXTEEL Rebuttal Brief, p. 47 (Exhibit USA-23); HYSCO Rebuttal Brief, p.6 (Exhibit USA-25).

[308] On June 26, 2014, NEXTEEL and HYSCO submitted new factual information and argument to address the letters from members of congress that were placed on the record on June 17 and June 23. In particular, NEXTEEL and HYSCO placed on the record of the investigation two prepared statements delivered to the Senate Finance Committee by the President and Chief Executive Officer of U.S. Steel and the International President of the United Steel, Paper, and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("United Steelworkers"). NEXTEEL and HYSCO then made arguments to USDOC to "clarify the tone and nature of information conveyed by U.S. industry to members of Congress." Respondents Rebuttal Letter (Exhibit KOR-63).

[309] *China – GOES (AB)*, para. 256.

[310] *EC – Tube or Pipe Fittings (Panel)*, para. 7.422.

the course of an investigation that must "necessarily be resolved" for the investigating authority to reach its determination.[311]

233. With the above interpretation in mind, the United States will address below each of the claims raised by Korea under Article 12.2.2.

a. The Public Notice Contained All Information Relevant to the Tenaris Financial Data

234. Korea argues that the United States breached Article 12.2.2 because USDOC's public notice of the conclusion of the investigation did not address certain of the Korean respondents' arguments.[312] However, as described above, an investigating authority need not respond to every argument raised by the interested parties in its public notice to comply with Article 12.2.2.

235. USDOC's Issues and Decision Memorandum set forth a detailed analysis of the reasoning behind USDOC's determination to use the Tenaris financial data in the final determination.[313] As the public notice explains, after USDOC considered all arguments on the CV profit issue, it determined that it was not appropriate to use profit information derived from the Korean respondents because of the physical characteristics of the products sold by those respondents in the home market. USDOC determined that using information pertaining to the same product as that under consideration in the OCTG investigation was appropriate for purposes of its CV profit calculation.[314] Based on these considerations, USDOC provided a thorough explanation as to why Tenaris' profit data was the best available option, in light of Tenaris's OCTG production, volume of sales, and customer base.[315]

236. Based on the foregoing, Korea has failed to establish that the United States breached Article 12.2.2. USDOC's public notice contained the reasons for its acceptance of the Tenaris profit data and rejection of the Korean respondents' arguments to the contrary, consistent with Article 12.2.2.

b. The Public Notice Contained All Information Relevant to USDOC's Affiliation Determination

237. Korea next alleges that the United States acted inconsistently with Article 12.2.2 of the AD Agreement because USDOC's public notice did not address all arguments offered by NEXTEEL regarding its association with POSCO. To the contrary, USDOC's public notice

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[311] *EC – Tube or Pipe Fittings (Panel)*, para. 7.424. In this dispute, the panel found that a public notice must adequately reflect an investigating authority's assessment of, and conclusions on, factors set forth in Article 3.4 of the AD Agreement. The panel explained that the factors listed in Article 3.4 must be necessarily resolved because Article 12.2 contains a textual link to Article 12.2.1, and Article 12.2.1 provides that a public notice should contain considerations relevant to the injury determination as set out in Article 3. In contrast, the panel found that the elements of Article 15 were not of a similar nature. *EC – Tube or Pipe Fittings (Panel)*, paras. 7.425, 7.432.

[312] Korea FWS, para. 228.

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

[314] Final Decision Memorandum, pp. 14-23 (Exhibit KOR-21).

[315] Final Decision Memorandum, pp. 19-23 (Exhibit KOR-21).

properly addressed "all relevant information on matters of fact and law and reasons" that led to USDOC's final determination.

238. Korea's assertion that USDOC did not address NEXTEEL's arguments is not supported by the record. In explaining its association determination, USDOC's public notice properly addressed NEXTEEL's relevant arguments. In particular, and as summarized above,[316] the Issues and Decision Memorandum and accompanying confidential affiliation memorandum thoroughly set forth the factual findings that led USDOC to find that NEXTEEL, POSCO, and the Customer were associated for the purposes of the antidumping determination.[317] The public notice also explained that the USDOC determinations cited by NEXTEEL did not apply to the facts on the record of this investigation.[318]

239. In sum, USDOC's final determination explained the underlying facts and rationale that led USDOC to find the existence of an association between NEXTEEL, POSCO, and the Customer. Korea has failed to establish that USDOC did not provide all relevant information and reasons underlying its final determination, including relevant arguments presented by NEXTEEL. Therefore, the United States did not act inconsistently with the obligations of Article 12.2.2.

H. Korea's Claim Under Article I:1 of the GATT 1994 is Flawed

240. Korea alleges that the United States breached Article I:1 of the GATT 1994 because "USDOC's relatively lenient treatment of the products from other country respondents in parallel investigations of OCTG imports compared to its treatment of products from Korean respondents resulted in an "advantage, favour, privilege, or immunity" that was not granted to OCTG products originating in Korea."[319] Korea's claim is without merit.

241. Under Article I:1, Members must accord "any advantage, favour, privilege or immunity" granted to products imported from one Member "immediately and unconditionally" to like products originating from other Members with respect to customs duties and charges of any kind imposed on or in connection with importation or exportation, with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation. Korea appears to be concerned about procedural differences between the parallel OCTG investigations, but Korea fails to explain how any such difference would be with respect to duties or charges, the method of levying such duties and charges, or rules and formalities in connection with importation. That is, because of different facts that arise in antidumping proceedings, including differences in the responses, behavior, or situation of the companies under investigation, the application of the *same* method of levying duties or charges or rule or formalities in connection with importation may result in *different* and appropriate antidumping duties. Therefore, a bare allegation of different action in different antidumping

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[316] *See* Sections IV.D and IV.E.

[317] USDOC Affiliation Memorandum, pp. 3-4 (Exhibit KOR-43) (**BCI**).

[318] Final Decision Memorandum, p. 73 (Exhibit KOR-21).

[319] Korea FWS, para. 253.

proceedings would not suffice to demonstrate any relevant difference in the matters subject to GATT 1994 Article I:1.

242. Korea has also failed to demonstrate that respondents in parallel OCTG antidumping investigations received an "advantage" within the meaning of Article I:1 that was not accorded to the like Korean Product. In *US – Poultry*, the panel observed that, "to establish a violation of Article I, there must be an advantage, of the type covered by Article I and which is not accorded unconditionally to all 'like products' of all WTO Members."[320] The panel in *EU – Footwear* considered whether an antidumping measure that automatically granted individual treatment to products from market economies, and not to products from named non-market economies (NMEs), was inconsistent with Article I:1.[321] The panel found that the grant of individual treatment was an "advantage," and that the advantage was conditioned on the origin of the product from a market economy country.[322] Accordingly, the panel concluded that the measure breached the obligations of Article I:1.

243. Korea's argues that procedural differences constitute an "advantage." But Korea's argument fails to take into account that differences do exist in antidumping proceedings – even investigations involving like products – including differences among the companies under investigation. Here, USDOC made procedural decisions through the course of these proceedings that were based on the specific circumstances of the Korea OCTG investigation and the other OCTG investigations. Unlike in *EU – Footwear*, in which the measure at issue granted an advantage based solely on the country of origin of the products,[323] several factors may have contributed to the treatment accorded to Korean companies and other foreign companies, which resulted in their particular antidumping rates. Korea has failed to demonstrate that any different treatment was not explained by the facts immediately before the investigating authority, here, including the characteristics of the companies participating in the investigation.

244. Article VI of the GATT 1994 and the AD Agreement obligate Members to conduct individualized antidumping investigations in relation to the alleged dumping by foreign producers and exporters and market conditions and information available on foreign products and industries vary among Members.[324] As such, investigating authorities must necessarily conduct their investigations based on the particular circumstances of each case. The Panel should deny Korea's request for a finding that the challenged U.S. measures are inconsistent with Article I:1 of the GATT 1994.

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[320] *US – Poultry (China)*, para. 7.403.

[321] *EU – Footwear (Panel)*, paras. 7.98, 7.101.

[322] *EU – Footwear (Panel)*, para. 7.100.

[323] *EU – Footwear (Panel)*, para. 7.100.

[324] *See* Article VI:1 of the GATT 1994 ("Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability"); AD Agreement, Art. 6.10 ("The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation").

I. Korea Fails To Establish That the United States Administered Its Laws, Regulations, Decisions, and Rulings in a Manner Inconsistent With Article X:3(a)

245. Korea asserts that the United States breached Article X:3(a) because USDOC's findings in the final determination varied from those in the preliminary determination, and because USDOC did not reach identical results in its various investigations of OCTG products. Korea misconstrues the obligations of Article X:3(a). The United States administered its antidumping laws, regulations, decisions, and rulings in a uniform, impartial, and reasonable manner, consistent with Article X:3(a).

246. Article X:3(a) of the GATT 1994 provides that "[e]ach contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article." Pursuant to Article X:1, the measures subject to the requirements of Article X:3(a) include "laws, regulations, judicial decisions and administrative rulings *of general application*." Therefore, to establish a breach of Article X:3(a), the complainant must: (1) identify a law, regulation, decision or ruling of the responding Member, and (2) demonstrate that the respondent does not administer that law, regulation, decision or ruling in a uniform, impartial, and reasonable manner.

247. The Appellate Body has recognized that the analysis of consistency under Article X:3(a) focuses not on the substance of a particular law, regulation, decision or ruling, but rather on the administration of that measure.[325] In *EC – Poultry*, for instance, the Appellate Body found that Brazil's claim fell outside the scope of Article X to the extent that the claim "relate[d] to the substantive content of the EC rules themselves, and not to their publication or administration."[326] The Appellate Body has further observed that, "[t]o the extent that the laws, regulations, decisions and rulings themselves are discriminatory, they can be examined for their consistency with the relevant provisions of the GATT 1994."[327]

248. The Appellate Body has also explained that claims made under Article X:3(a) "must be supported by solid evidence" and that "the nature and scope of the claim and the evidence adduced by the complainant in support of it, should reflect the gravity of the accusations inherent in {such} claims."[328]

249. Here, Korea's claims must fail because Korea has not identified the law, regulation, decision or ruling of general application at issue. Korea's complaint regarding the substance of USDOC's antidumping determination on specific Korean producers and exporters would not itself establish non-uniform, unreasonable, or partial administration of laws, regulations, decisions or rulings of general application. And any change from a preliminary determination to a final determination would, again, be an issue for challenge on the substance, but not a matter

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[325] *EC – Bananas III (AB)*, para 200.

[326] *EC – Poultry (AB)*, para. 115; *see EC – Selected Customs Matters (AB)*, para. 200 (noting that the "substantive content of the legal instrument being administered is not challengeable under Article X:3(a)").

[327] *EC – Bananas III (AB)*, para 200.

[328] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para 216.

itself establishing non-uniform, unreasonable, or partial administration of a measure of general application. For all these reasons, Korea has failed to establish that the United States administered any measure of general application in a manner contrary to GATT 1994 Article X:3(a).

1. Korea's Claim Falls Outside the Scope of Article X:3(a) Because Korea Challenges the Content of USDOC'S Determination Instead of the Administration of a Law, Regulation, Decision or Ruling of General Application

250. All of Korea's claims under Article X:3(a) of the GATT 1994 must fail because Korea challenges the substance of USDOC's final determination, rather than the United States' administration of relevant laws, regulations, rulings or decisions.

251. As noted above, the requirements of Article X:3(a) apply to the *administration* of laws, not to their substance. Therefore, as a preliminary matter, the complainant must identify the law, regulation, decision or ruling at issue, in order to then demonstrate how the *administration of* that measure breaches Article X:3(a). Korea has not identified any such measure, instead referring generally to "[U.S.] Anti-Dumping Laws and Regulations" or simply to "[U.S.] laws and regulations."[329] In several places Korea also refers to a USDOC "practice", and suggests that it may challenge the administration of this agency "practice" as well.[330] However, Korea has not submitted any evidence to demonstrate the content of any such practice, or that it constitutes a law, regulation, judicial decision or administrative ruling of general application within the meaning of Article X:1. Having not identified a law, regulation, decision or ruling of general application, Korea's claims necessarily must fail.

252. Moreover, Korea challenges the substance of the underlying antidumping determinations, much as it has through its claims under the AD Agreement, rather than the administration of any law, regulation, decision or ruling. In particular, in the guise of a uniformity claim, Korea repeats its argument under Article 2.2.2 of the AD Agreement that USDOC should have calculated CV profit based on the home market profit experience of Korean respondents, instead of using the Tenaris profit data.[331] Similarly, in the context of impartiality and reasonability, Korea simply repeats its arguments regarding the change in results between preliminary and final determination, and again, USDOC's departure from its "practice" in calculating CV profit.[332] As in *EC – Poultry*, because Korea challenges the substance of a measure, Korea's claim therefore falls outside the scope of Article X:3(a).

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[329] *See, e.g.*, Korea FWS, paras. 261, 273, 274, 276.

[330] *See, e.g.*, Korea FWS, paras. 265, 272, 275.

[331] Korea FWS, para. 265. Korea makes this argument in an indirect way, stating that "The USDOC's use of Tenaris's profit data went against thirty years of established practice, undermining the consistency and predictability of the USDOC's practice with respect to the selection of a CV profit source. Specifically, the USDOC has an established agency practice of calculating CV profit based on home market profit experience." *See* para. 275 (Korea again challenges USDOC's decision to select a "CV profit source from the country of manufacture").

[332] Korea FWS, paras. 272-73.

253. Therefore, because Korea has failed to challenge the United States' administration of any law, regulation, decision or ruling of general application that is subject to the requirements of Article X:3(a), the Panel should reject Korea's claim on that basis.

2. USDOC Administered its Antidumping Laws, Regulations, Decisions or Rulings in a Manner Consistent With Article X:3(a)

254. Even aside from the fact that Korea has not identified any measure of general application for its claim to fall within the scope of Article X:3(a), Korea has failed to demonstrate that the United States did not administer any laws, regulations, decisions or rulings in a uniform, impartial, and reasonable manner, inconsistent with Article X:3(a).

a. USDOC Administered its Antidumping Laws, Regulations, Decisions, and Rulings in a Uniform Manner

255. Korea asserts that the United States administered its laws in a non-uniform manner because it departed from "past practice" when it used the Tenaris profit data, and because USDOC allowed Turkish respondents a greater opportunity than Korean respondents to "defend their positions vis-à-vis the [Tenaris financial statements]."[333] Korea's claims are based on an improper reading of the applicable obligations and are unsupported by the factual record.

256. The ordinary meaning of the term "uniform" relates to "[o]f one unchanging form, character, or kind; that is or stays the same in different places or circumstances, or at different times."[334] The panel in *US – Stainless Steel* clarified that "the requirement of uniform administration of laws and regulations must be understood to mean uniformity of treatment in respect of persons similarly situated; it cannot be understood to require identical results where relevant facts differ."[335] This is because "[t]here are many variations in products which might require differential treatment and . . . this provision should [not] be read as a general invitation for a panel to make such distinctions.[336] In separate antidumping investigations, there also would be differences between any WTO Members and the responding companies of those Members.

257. Korea's arguments do not demonstrate any breach of the legal obligations under Article X:3(a). Uniform administration requires that Members apply their laws or regulations

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[333] Korea FWS, paras. 260, 265. The United States notes that Korea unsuccessfully made a similar argument in *US – Stainless Steel (Korea)*. In that dispute, Korea alleged that the United States' double conversion methodology was inconsistent with Article X:3(a) of the GATT 1994 because it was an "unprecedented departure from the established policy of the DOC." The panel agreed with the U.S. that the WTO dispute settlement system was not intended to test the consistency of a Member's particular rulings with the Member's domestic laws." The panel cautioned that adopting Korea's approach could "effectively convert every claim that an action is inconsistent with domestic law or practice into a claim under the WTO Agreement." *US – Stainless Steel*, paras. 6.46, 6.50.

[334] *New Shorter Oxford English Dictionary*, Volume 2, p. 3488 (Exhibit USA-16).

[335] *US – Stainless Steel (Korea)*, para. 6.51.

[336] *Argentina – Hides and Leather*, para. 11.84 (noting that to interpret Article X:3(a) to require "identical" treatment "would be reading far too much into this paragraph which focuses on the day to day application of Customs laws, rules and regulations," para. 11.84).

"consistently and predictably."[337] There is no basis to argue that a "practice" is a measure of general application that must be "administered" uniformly. Moreover, Korea would have the Panel find that Article X:3(a) requires that antidumping investigations be identical in every respect, even when those investigations involve different Members and different responding companies.

258. Each determination must stand on its own, and the Korea OCTG determination, including the use of the Tenaris financial statement, was based on the factual record before the authority. Korea has not shown, nor could it, that the factual circumstances underlying an investigation regarding imports of OCTG produced in Korea required the same procedures as an investigation regarding the imports of OCTG produced in Turkey. Therefore, Korea has failed to establish that the United States did not administer its anti-dumping laws and regulations in a uniform manner.

b. USDOC Administered its Antidumping Laws, Regulations, Decisions, and Rulings in an Impartial Manner

259. USDOC properly administered its antidumping laws, regulations, decisions, and rulings in an impartial manner. The ordinary meaning of "impartial" is "[n]ot partial; not favouring one party or side more than another; unprejudiced, unbiased; fair."[338] Impartial treatment is distinguishable from identical treatment.[339] The Appellate Body has explained that allegations that a Member acted in a biased or unreasonable manner are "serious," and that "the nature and the scope of the claim, and the evidence adduced by the complainant in support of it, should reflect the gravity of the accusations inherent in claims under Article X:3(a) of the GATT 1994."[340] As such, the complainant must support its claim with "solid evidence."[341]

260. In asserting that the U.S. breached the requirements of impartiality under Article X:3(a), Korea refers to correspondence received by the USDOC from members of the U.S. Congress on behalf of U.S. industry.[342] The receipt of correspondence from members of the Legislative Branch is not, in and of itself, unusual or questionable, as any party is free to submit views, which USDOC will then include on the record. But Korea does not offer any "solid evidence" that the USDOC acted impartially in making its final determinations, despite Korea's serious allegations against the integrity of the United States legal system.

261. Instead, Korea merely concludes that "in the absence of any other reasonable explanation," these letters and meetings "suggest" that "political pressure" impacted the final

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[337] *Argentina – Hides and Leather*, para. 11.83.

[338] *New Shorter Oxford English Dictionary*, Volume 1, p. 1318 (Exhibit USA-16).

[339] For example, the panel in *US – Corrosion-Resistant Steel Sunset Review* rejected Japan's contention that requiring foreign exporters to provide more information that domestic producers in Commerce's sunset review resulted in the partial administration of U.S. sunset laws. *US – Corrosion-Resistant Steel Sunset Review (Panel)*, para. 7.306.

[340] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 217.

[341] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 217.

[342] *See* Korea FWS, paras. 268-272.

determination. However, as demonstrated at length, the USDOC provided a reasoned and adequate explanation for its calculation of CV profit, consistent the requirements of the AD Agreement. Therefore, Korea cannot succeed in its claim that USDOC failed to act in an impartial manner as required under Article X:3(a).

c. USDOC Administered its Antidumping Laws, Regulations, Decisions, and Rulings in a Reasonable Manner

262. The United States did not act inconsistently with Article X:3(a) because USDOC administered its antidumping laws, regulations, decisions, and rulings in a reasonable manner. Korea asserts that USDOC did not "administer" its "measures" in a "reasonable manner" because of how it treated the Tenaris financial statements in the Korea and Turkey investigations, and because it did not have a "rational basis to depart from its previous practice" in how it selected a CV profit source."[343]

263. The term "reasonable" means "[i]n accordance with reason; not irrational or absurd."[344] Prior panels have affirmed this interpretation.[345] In evaluating "reasonableness," panels will conduct a case by case analysis based on the factual circumstances in each dispute.[346]

264. The United States has already established that USDOC had a reasonable basis for its reliance on the Tenaris financial statements in calculating CV profit. Therefore, Korea has not satisfied the high burden of establishing that the United States' administration of its laws, regulations, decisions, and rulings with respect to the Tenaris financial statements was unreasonable.

J. The Panel Should Not Address Korea's Claims Under Article VI of the GATT 1994, Articles, 1, 9.3, and 18.4 of the AD Agreement, and Article XVI:4 of the WTO Agreement

265. Korea argues that, as a consequence of other alleged substantive and procedural violations, the United States has acted inconsistently with Article VI of the GATT 1994, Articles 1, 9.3, and 18.4 of the AD Agreement, and Article XVI:4 of the WTO Agreement.[347] Korea's claims are purely consequential in nature, such that they depend upon a finding by the Panel of inconsistency with other provisions of the AD Agreement.[348]

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[343] Korea FWS, para. 275.

[344] *New Shorter Oxford English Dictionary*, Volume 2, p. 2496 (Exhibit USA-16).

[345] *Dominican Republic – Import and Sale of Cigarettes (Panel)*, para. 7.385 (citing the same dictionary definition); *China – Raw Materials (Panel)*, para. 7.696 (internal citation omitted).

[346] *US – COOL (Panel)*, para. 7.851.

[347] Korea FWS, paras. 239-244.

[348] *See US – Anti-Dumping Measures on Oil Country Tubular Goods (Panel)*, para. 7.819; US - Section 129(c)(1) URAA, para. 6.133. The United States notes that Korea limits its claim with respect to Article 9.3 of the AD Agreement to the chapeau of that article, a violation of which depends upon a finding of inconsistency with Article 2 of the AD Agreement. Korea FWS, para. 240.

266. As demonstrated above, none of the antidumping measures challenged by Korea in this dispute is inconsistent with any other provisions of the AD Agreement. Korea's consequential claims under Article VI of the GATT 1994, Articles 1, 9.3, and 18.4 of the AD Agreement, and Article XVI:4 of the WTO Agreement must therefore fail for the same reasons its substantive claims under the AD Agreement fail. Moreover, because Korea raises no new arguments under Article VI of the GATT 1994, Articles 1, 9.3, and 18.4 of the AD Agreement, and Article XVI:4 of the WTO Agreement, the Panel need not address these consequential claims and should instead exercise judicial economy,[349] even were the Panel to make findings on any of Korea's substantive claims.

V. CONCLUSION

267. The United States respectfully requests that the Panel reject Korea's claims that the United States has acted inconsistently with the covered agreements.

[349] *See US – Stainless Steel (Korea)*, para. 6.138.