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

(WT/DS488)

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

September 2, 2016

I. KOREA HAS FAILED TO ESTABLISH THAT THE U.S. VIABILITY REGULATION IS "AS SUCH" OR "AS APPLIED" INCONSISTENT WITH ARTICLE 2.2 OF THE AD AGREEMENT

A. Article 2.2 Does Not Preclude the Consideration of Volume When Determining an "Appropriate Third-Country"

1. Korea's Opening Statement and answers to questions highlight two additional arguments regarding the proper interpretation of Article 2.2: that Article 2.2 precludes an authority from imposing additional criteria when selecting the normal value calculation methodology; and that the United States' interpretation of "appropriate" is not consistent with the plain meaning read in the context of Article 2.2. We address each argument below.

2. First, Korea argues that a Member may not impose "additional criteria" in selecting one of the listed methodologies for calculating normal value. But Korea's assertion is premised on the fallacy that an authority is required to consider both methodologies and that an interested party is *entitled* to a particular methodology, an error that is exposed by the plain text of Article 2.2 and, indeed, Korea's own acknowledgment that Article 2.2 imposes no hierarchy. Under Korea's interpretation, it is unclear how an authority would be expected to choose between two WTO-consistent alternatives.

3. Korea's reference to the zeroing cases to support this interpretation is similarly misplaced. In the zeroing cases, the issue dealt with the *application* of the price comparison methodologies specified in Article 2.4.2, and not with the *selection* of the price comparison methodology chosen, as can be seen in the Appellate Body reports cited by Korea in its Responses to Questions. In contrast, Article 2.2 concerns the selection of the methodology to be used to calculate normal value. This being the case, the absence of a hierarchy – or even an obligation to consider the two methodologies – is critical to the analysis. The U.S. Department of Commerce ("USDOC") determined the appropriate methodology as between two WTO-consistent methodologies.

4. Second, Korea also contests the U.S. interpretation of "appropriate" within the meaning of Article 2.2. In doing so, Korea simply asserts without textual support that "the volume of sales to a third country does not determine whether the third country is 'appropriate' for purposes of serving as a comparison market." Korea provides no evidence or argumentation to support its interpretation, and its bald assertion does nothing to undermine the interpretation provided in the United States' submissions.

5. Perhaps recognizing the weakness of that interpretive argument, Korea also now argues that, even assuming that the volume of exports could be considered in determining whether a third country is appropriate, "the term 'appropriate' inherently implies a flexible test." But Korea misinterprets the meaning of "appropriate" and fails to consider the context in which the term appears in Article 2.2. Under Article 2.2, in each distinct antidumping proceeding, the authority may be required to determine whether a particular third country is "appropriate" for the calculation of normal value. The relevant dictionary definition of "appropriate" is "specially suitable (for, to); proper, fitting," and the Appellate Body has observed that the "dictionary definitions of the term 'appropriate'…suggest that what is appropriate must be assessed by reference or in relation to something else." As it is used in Article 2.2, the definition of

"appropriate" suggests that the appropriateness of a third country may be assessed by reference to indices – such as volume of sales – that are considered with the aim of identifying a "suitable" or "fitting" comparison market. Thus, "appropriate" within the context of Article 2.2 confers on an authority the ability to consider and determine what constitutes a suitable third country for the determination of normal value in a particular proceeding.

B. Even Under Korea's Interpretation of Article 2.2, Korea Has Not Demonstrated that the Challenged Measure Requires WTO-Inconsistent Action

6. Even under Korea's interpretation that Article 2.2 precludes an authority from rejecting third-country market sales below a specified volume, Korea nonetheless has failed to show that the U.S. regulation would necessarily lead to conduct that is inconsistent with that obligation.

7. First, Korea argues that the Panel should disregard the plain text of the U.S. regulation because it is allegedly in violation of U.S. law. That is, Korea suggests that the Panel may determine, in the context of a WTO dispute, whether 19 CFR § 351.404(b)(2) is legal or illegal under U.S. law. However, it is not the role of a panel to review the legality of a Member's law as within that legal system. Rather, a panel's role is to determine, as a matter of fact, the content and meaning of municipal law and to evaluate its consistency with WTO – not municipal – law. As explained in the U.S. Responses to Questions, USDOC's interpretation of the U.S. antidumping law in the form of an implementing regulation is the governing interpretation unless and until a U.S. court finds that USDOC's interpretation is unreasonable or contrary to the plain text of the statute in a final and binding decision. The United States recalls the panel's recognition in *US – Countervailing and Anti-Dumping Measures* that, in light of the fact that an administering agency is charged with interpreting law in order to administer it and the specific standard of review elaborated by the U.S. Supreme Court for review of agency interpretations of the law they administer, "in the absence of a United States court decision that would govern the practice of USDOC, it is the USDOC's own practice or interpretation that governs under United States law." Therefore, there is neither a factual nor a legal basis for the Panel to find otherwise in this dispute.

8. Korea also seeks to sidestep the plain language of the regulation by citing to past antidumping proceedings, arguing that "this evidence further confirms that the U.S. viability test constitutes a rule or norm of general and prospective application that can be challenged 'as such.'" Korea has not challenged U.S. practice separate from the U.S. statute and regulation as set out in its panel request. Therefore, to the extent that Korea argues that a USDOC practice itself breaches Article 2.2, the Panel should reject that claim as outside the terms of reference in this dispute.

9. Korea has challenged 19 U.S.C. § 1677b(a)(1)(B)(ii) and 19 C.F.R. § 351.404(b)(2), and as explained in this and prior U.S. submissions, the regulation provides a general rule that sales are not of a sufficient quantity to use for normal value if those sales constitute five percent or less of sales to the United States. The regulation's use of "normally" then permits USDOC to depart from the general rule of a five percent threshold where appropriate.

10. 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 so-called "viability test."

II. KOREA'S CLAIMS REGARDING THE CALCULATION OF CV PROFIT CONTINUE TO BE WITHOUT MERIT

A. Contrary to Korea's Arguments, the Term "Profit" Means a Financial Gain, *Not* a Financial Loss

11. In its responses to Panel Questions, Korea introduces the oxymoron "negative profit" in an effort to argue that a loss recorded in a company's books should be considered acceptable for the determination of CV profit under the chapeau of Article 2.2.2. In doing so, Korea argues that "the term 'profit' in this context can encompass situations in which a loss is recorded in the company's books" because, according to the online Oxford Dictionaries, "[t]he ordinary meaning of profit includes 'the difference between the amount earned and the amount spent in buying, operating, or producing something.'"

12. In actuality, the online dictionary from which Korea quotes defines the term "profit" in full as "[a] *financial gain*, especially the difference between the amount earned and the amount spent in buying, operating, or producing something." It is thus disingenuous for Korea to argue that the "difference between the amount earned and the amount spent" as provided for in this definition means anything other than a financial gain.

13. Paragraphs 51-57 of the U.S. Responses to Questions demonstrate that the term "profit" as provided for in Articles 2.2 and 2.2.2 refers to a financial gain, not a financial loss. The dictionary definition of "profit" put forward by Korea confirms that the term "profit," by definition, refers to a financial gain, not a financial loss. Therefore, for the reasons provided for in the U.S. Responses to Questions, the Panel should find that the term "profit" for purposes of Articles 2.2 and 2.2.2 encompasses just those situations in which there is a financial gain recorded in a company's books.

B. The Chapeau of Article 2.2.2 Does Not Require the Use of Third-Country Sales Data

14. In an attempt to explain why third-country market sales must be used under the preferred method, Korea argues in response to Panel Questions that "Article 2.2.2 only applies if the investigating authority has already found that sales in the domestic country of export do not permit a proper comparison for certain specified reasons, including 'low volume.'" Korea is not only wrong in arguing that third-country sales are required under the chapeau of Article 2.2.2, but Korea is wrong in arguing that Article 2.2.2 applies only when no domestic market sales are available under Article 2.2.

15. As explained in the U.S. Responses to Questions, Article 2.2.2 most commonly applies in the circumstance in which an investigating authority bases normal value on sales of the like product in the domestic market, but where certain of those sales cannot be used because they are outside the ordinary course of trade, or because the group of domestic sales does not include sales of products identical or similar to those sold in the relevant export market. In that situation, an investigating authority would compare the specific export price of the product under consideration to a constructed normal value based on the cost of production plus a reasonable amount for SG&A costs and for profits, which triggers the application of Article 2.2.2.

16. But again, in the situation just described, the information in the record nonetheless would include domestic sales for other like products, including data with respect to profit for those domestic sales. It thus would not make sense to interpret Article 2.2.2 as requiring an investigating authority to go out and collect, as Korea suggests, third-country sales data for purposes of a CV profit determination. As Korea acknowledges in its response to Panel Question 2, subparagraph 1 of Article 2.2 applies only "when the investigating authority has already decided to use the market in which those sales took place as the comparison market. . . . Article 2.2.1 does not address whether a third-country *market* is appropriate for the determination of normal value." The same is true for the chapeau of subparagraph 2 of Article 2.2, which also applies only after an investigating authority has decided which market shall be used as the comparison market.

17. In this way, Article 2.2.2 reflects the preference for domestic market sales set out in Article 2.2, and in fact assumes that the investigating authority may be using domestic market sales for normal value, constructing normal value only when domestic market sales do not exist for purposes of a comparison with specific export sales. Specifically, when an investigating authority has already decided under Article 2 to base normal value on domestic market sales, the chapeau of Article 2.2.2 directs that, if available, CV profit must be based on profit data from the remainder of domestic market sales (i.e., the preferred method), and if not available, may be based on an alternative method provided for under subparagraphs (i)-(iii). But when an investigating authority has already decided under Article 2 *not* to base normal value on domestic market sales, Article 2.2.2 permits the investigating authority to base CV profit on an alternative method. The chapeau of Article 2.2.2 does not require an investigating authority to reconsider whether the domestic market is appropriate, nor does it require an investigating authority to consider whether CV profit should be based on third-country market sales.

C. USDOC's Decision to Exclude Line, Structural, Standard, and Downgraded Pipe Products from its Definition of the "Same General Category of Products" Was Supported By a Reasoned and Adequate Explanation

18. In its responses to Panel questions, Korea raises several arguments regarding USDOC's determination of the "same general category of products." Specifically, Korea argues that the rebuttal briefs filed by HYSCO and NEXTEEL before USDOC demonstrate "the similarities between OCTG and line pipe/standard pipe." According to Korea, respondents demonstrated that "OCTG and non-OCTG products such as line and standard pipes are the same general category of products because they: (1) share the same general purpose of 'conveying fluids and gases' in addition to all other similarities in terms of raw materials, production processes and facilities, outward appearances, and physical characteristics"; and (2) fall within the same tariff headings.

19. USDOC in its final determination provided an extensive explanation of the reasons why it defined the "same general category of products" to include only those pipe products that exhibit the same fundamental characteristics for down hole applications, i.e., "subject OCTG, non-scope OCTG such as stainless steel tubular products, and drill pipes," as well as a reasoned and adequate explanation as to why it decided to exclude line pipe and standard pipe. Korea counters that USDOC should have included line pipe or standard pipe products as part of the "same general category of products" as OCTG because non-OCTG pipes look like OCTG pipes, sometimes are manufactured in the same building, sometimes are handled by the same export

department or marketed like every other steel pipe, and undergo "the same *basic* production processes." But USDOC considered all of these points and still found "that line, structural and standard and downgraded pipe products are not in the same general category of products as OCTG" because OCTG differs significantly from non-OCTG.

20. Therefore, even if Korea's statements are true, the Panel should reject Korea's invitation to conduct a *de novo* review because, as explained in the U.S. First Written Submission, USDOC provided a reasoned and adequate explanation of how the information in the record supports its definition of the "same general category of products."

21. Korea's reliance on the overlap in HTSUS subheadings applicable for OCTG and those applicable for certain line or standard pipe products is similarly unavailing. The overlap in HTSUS subheadings is inconsequential because USDOC's definition of the scope of the investigation stipulates that the HTSUS subheadings provided therein are "for convenience and customs purposes only. The written description of the scope of the investigation is dispositive." Thus that the HTSUS subheadings for line or standard pipe products overlap with those for OCTG does not mean that these products fall within USDOC's definition of the like product, nor does it mean that these products have the physical characteristics or functionality that require them to be incorporated into USDOC's definition of the "same general category of products."

22. Finally, contrary to Korea's claims, USDOC did not define the "same general category of products" more narrowly than the definition of the scope of the Korea OCTG investigation. As previously explained, the pipe products that were the subject of the USDOC determination in *OCTG from Ukraine* were sold to the U.S. market as OCTG. The Ukraine pipe product, at the point of sale, fell squarely within the scope of the investigation, because the respondent sold these pipe products as OCTG, and thus USDOC's determination in *OCTG from Ukraine* did not expand the definition of the like product to include products sold as non-OCTG pipe. In contrast, the downgraded Korea pipe product, at the point of sale, fell squarely *outside* the scope of the investigation, because the Korean respondents sold these pipe products in the Korean market as something other than OCTG, and thus USDOC excluded this downgraded pipe product from its definition of "same general category of merchandise." Therefore, Korea's reliance on *OCTG from Ukraine* to argue that USDOC's definition of the "same general category of products" is narrower than its definition of the like product is unavailing.

23. Korea has failed to show that USDOC's definition of "same general category of products" as including the "like product" plus other pipe products that share the same fundamental characteristics for down hole applications is inconsistent with Article 2.2.2.

D. Article 2.2.2 Does Not Require an Investigating Authority to Restrict its Selection of "Any Other Reasonable Method" to Domestic Market Data

24. Korea argues that the Panel should interpret the text of Article 2.2.2, specifically the terms "any other reasonable method," so that it is restricted to domestic market data, because "none of the options under the subparagraphs [of Article 2.2.2] allows the investigating authority to deviate from the domestic country of export." According to Korea, "[t]he obligation that the 'any other reasonable method' under Article 2.2.2(iii) must reflect the profit realized in the domestic market of the exporting country is embedded in the very structure of the subparagraphs of Article 2.2.2." Based on these statements, Korea concludes that since the information in the

record does not indicate that Tenaris produced or sold OCTG pipe in Korea during the period of investigation, "[n]o 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."

25. To the contrary, Article 2.2.2 specifically contemplates that there may *not* exist information in the record of an investigation that would allow an investigating authority to base CV profit on profits associated with sales in the domestic market of the exporting country and provides an alternative method on which to base CV profit when this situation occurs.

26. As discussed above, the chapeau of Article 2.2.2 sets out a preferred method that calculates CV profit narrowly based on actual domestic market data in respect of the like product, sold in the ordinary course of trade, as manufactured by the producer or exporter in question. If such data do not exist, subparagraphs (i) and (ii) of Article 2.2.2 provide for two alternatives that draw on broader domestic market data sets, either in respect of the same general category of products as manufactured by the producer or exporter in question, or in respect of the like product as manufactured by other producers or exporters subject to investigation. Subparagraph (iii) of Article 2.2.2 provides for a third alternative that is broader still, "any other reasonable method." As the panel in *EU – Biodiesel* noted, "[t]his context, together with absence of any additional guidance in Article 2.2.2(iii) on what the 'method' chosen should entail in terms of either the source or scope of the data or procedures, suggests . . . a broad and non-prescriptive understanding of the term."

27. It is not uncommon to find situations in which products are manufactured just for export. In such situations, it makes sense, both legally and factually under the third alternative in Article 2.2.2, for an investigating authority to be able to calculate CV profit based on "any other reasonable method." The Korea OCTG investigation is such a situation.

28. Further, the information in the record of this investigation indicates that the respondents did not sell OCTG in Korea during the period of investigation, not surprising since, as Korea notes in its First Written Submission, "there is limited oil and gas exploration in Korea." Thus an absence of conclusive evidence as to whether Tenaris may have sold OCTG in Korea during the period of investigation also should not be surprising, nor a sufficient reason to dismiss USDOC's reasoned and adequate explanation for why it decided to base CV profit on the Tenaris financial statement.

29. If an investigating authority selects pursuant to Article 2.2.2(iii) a CV profit margin that is 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 – as USDOC did here – the use of such a profit margin by an investigating authority is consistent with the obligations set out in Article 2.2.2 of the AD Agreement. Therefore, even though the record did not include information that Tenaris sold OCTG in Korea during the period of investigation, this fact does not render USDOC's decision to base CV profit on the Tenaris financial statement not "reasonable" within the meaning of Article 2.2.2 of the AD Agreement.

E. Article 2.2.2 Does Not Require an Investigating Authority to Broaden its Definition of the "Same General Category of Products" When Information in the Record Does Not Otherwise Allow for Calculation of a Profit Cap

30. Korea also argues "that the investigating authorities are not permitted to deviate from Article 2.2.2(iii), which unequivocally requires the calculation and application of a profit cap." According to Korea, "to the extent that an investigating authority is faced with practical difficulties in calculating a profit cap, it has flexibility to adjust the scope of products considered." In other words, Article 2.2.2 should be interpreted to obligate an investigating authority to disregard its reasoned and adequate explanation for the definition of "products of the same general category" and to artificially broaden that definition until it finds profit data for a *dis*similar product.

31. When an investigating authority constructs normal value, it is required by Article 2.2 to include "a reasonable amount for . . . profits." In this regard, the panel in *Thailand – H-Beams* understood that, under Article 2.2.2(i),

> [t]he broader the [same general] category [of products], 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.

Thus Korea's suggestion that an investigating authority should disregard its otherwise reasoned and adequate explanation for defining the "same general category of products" as it did, simply because there is no information in the record that would allow it to calculate a profit cap, inevitably will result in a contrived constructed normal value.

32. For example, in paragraph 33 of its Responses to Questions, Korea argues that USDOC should have broadened its definition of the same general category of products because HYSCO marketed OCTG "as part of its general 'Steel Pipes' that include other carbon steel pipes for ordinary piping, boiler and heat exchange, pressure service, and structural purposes, as well as line pipe, other casing and tubing products, offshore structural pipe, conduits, fencing tubing, and boiler tube." A broadening of the definition of "same general category of products" in the Korea OCTG investigation to include pipes for ordinary piping or for boiler and heat exchange, or even fencing tubing, would necessarily result in a constructed normal value unrepresentative of the price of the subject merchandise.

F. An Investigating Authority is Not Required to Make an Adjustment Under Article 2.4 of the AD Agreement When an Interested Party Fails to Request such an Adjustment

33. Korea argues that the Korean respondents should be excused for their failure to request USDOC to make an allowance within the meaning of Article 2.4 because they purportedly were limited in their ability to do so. Korea argues in the alternative that since the Korean respondents had pointed out differences between themselves and Tenaris for purposes of the CV profit determination, they had otherwise fulfilled their responsibilities regarding adjustments under Article 2.4.

34. Korea's argument distorts the record in the investigation. Information about Tenaris's profit margin, and other company-specific information, was placed in the record before USDOC published its preliminary determination. USDOC decided not to calculate CV profit based on Tenaris's profit rate for purposes of its preliminary determination, but this decision did not mean that USDOC could not decide to calculate CV profit based on Tenaris's profit rate for purposes of the final determination. Indeed, both HYSCO and NEXTEEL argued before the final determination that USDOC should not base CV profit on the Tenaris data for multiple reasons, including the alleged differences in products and operating structure. Thus the fact that respondents knew to make arguments about the Tenaris data before USDOC's final determination shows that they understood that USDOC could base CV profit on this data. But again, neither respondent argued that due allowance should be made under Article 2.4.

35. In addition, as HYSCO and NEXTEEL never asked USDOC to make due allowances under Article 2.4, the suggestion that they unwittingly fulfilled their responsibility for doing so, or that USDOC should have recognized that they had done so, does not follow. According to the Appellate Body, "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." The additional arguments advanced by Korea in its responses to questions do not change the fact that Korea has not established that the United States acted inconsistently with the obligations provided for in Article 2.4 in failing to make an adjustment that was never requested. Therefore, the Panel should find that Korea's claim with respect to Article 2.4 lacks merit.

III. USDOC'S USE OF CONSTRUCTED EXPORT PRICE WAS NOT INCONSISTENT WITH ARTICLE 2.3 OF THE AD AGREEMENT

36. Korea has failed to establish that USDOC improperly relied on constructed export price ("CEP") after making the factual determination that NEXTEEL is affiliated with the Customer. The United States recalls that Article 2.3 permits an authority to disregard a producer's export price "where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer." Korea argues that inclusion of the term "appears" in Article 2.3 does not affect the substantive obligation, and that an authority is to determine whether export prices are – in fact – unreliable. Korea now relies on Article 17.6(i) of the AD Agreement as additional support for this proposition, stating that Article 17.6(i) requires that "each of the USDOC's findings and determinations must be based on an unbiased and objective assessment of facts that are properly established." Korea's argument conflates two distinct issues. Article 17.6(i) concerns a panel's standard of review, and more specifically its "assessment of the facts," and does not alter the substantive obligations of Article 2.3 or any other provision of the AD Agreement.

37. Korea also continues to assert that the legal interpretation of "association" within the meaning of Article 2.3 should be informed by the definition of "related" in footnote 11 of the AD Agreement because the United States "incorporated the definitions contained in footnote 11 in its domestic legislation corresponding to the application of Article 2.3." Despite Korea's claims, however, USDOC's definition of "affiliation" in U.S. domestic law does not alter the United States' legal obligations under Article 2.3, such that a finding of "affiliation" and not "association" would be required. Under the customary rules of treaty interpretation, and consistent with the findings of WTO panels and the Appellate Body, the U.S. domestic legal provisions are not relevant to the legal interpretation of Article 2.3.

38. With respect to the facts underlying USDOC's finding of affiliation, Korea highlighted two arguments in its answers to the Panel's questions. First, Korea contends that "USDOC disregarded the fact that…a larger portion of [hot-rolled coil] actually *used* in producing OCTG during the period of investigation was purchased from other sources prior to the period of investigation." Korea's statement implies that a substantial percentage of the HRC that NEXTEEL consumed to produce OCTG during the period was from a source other than NEXTEEL. However, Korea's assertion does not demonstrate that USDOC's finding was not based on positive evidence, and is, in any event, contradicted by the record.

39. Second, Korea now argues that NEXTEEL's relationship with both POSCO and Customer predated the relationship between POSCO and Customer, thus undermining USDOC's conclusion that export prices appeared unreliable. As an initial matter, it is important to recognize that the information referenced in Korea's response was not, as the Panel's question asks, "provided by the interested parties to the USDOC in support of an argument that NEXTEEL's export price was not unreliable *despite* the USDOC's finding of affiliation." Rather, the information was provided by NEXTEEL in response to a standard question from USDOC regarding corporate structure, and was not included as part of any argument to USDOC regarding affiliation or price reliability. Furthermore, the information referenced by Korea does not undermine USDOC's conclusion of affiliation.

IV. USDOC'S DECISION TO DEPART FROM NEXTEEL'S BOOKS AND RECORDS TO CALCULATE COSTS WAS NOT INCONSISTENT WITH ARTICLE 2.2.1.1 OF THE AD AGREEMENT

40. Korea has failed to demonstrate that USDOC's decision to depart from NEXTEEL's books and records to calculate certain of NEXTEEL's input costs was inconsistent with Article 2.2.1.1. In this submission, the United States will address Korea's argument in response to Panel question 26 that "USDOC disregarded NEXTEEL's own records…without examining the accuracy or reliability of NEXTEEL's records." Korea's argument is not supported by the text of Article 2.2.1.1 or the factual record of the Korea OCTG investigation.

41. The United States recalls that, in the NEXTEEL CV Memo, USDOC analyzed NEXTEEL's transaction prices for HRC from POSCO to evaluate whether the prices were reflective of market prices, or transactions made at an arms-length. For each grade of HRC – the input at issue here – USDOC compared POSCO's transfer prices to NEXTEEL with (1) POSCO's cost of production and (2) POSCO's arms-length transaction prices. If the transfer prices were lower than the cost of production or not consistent with an arms-length transaction price, then USDOC departed from NEXTEEL's books and records, and instead used POSCO's sales prices to unaffiliated purchasers. Based on its analysis of the record data, USDOC properly concluded that certain transaction prices did not reasonably reflect the costs associated with the production of OCTG.

42. Korea also now cites to the panel report in *EU – Biodiesel* to suggest that Article 2.2.1.1 is concerned only with whether the records reflect the *actual costs* incurred by the producer under investigation. In that case, the panel considered the European Union's treatment of certain distortions it determined to exist in Argentina's economy that had the effect of reducing the exporter's costs of certain inputs. Under that circumstance, the panel concluded that the European Union did not have a basis under Article 2.2.1.1 to depart from the producer's books

and records because the books and records did reflect the *actual* costs incurred by the producer. The circumstances of this investigation are not similar, and these findings are thus of limited relevance.

43. Moreover, the panel in *EU – Biodiesel* went on to expressly recognize that transactions between companies that are not at arms-length would provide a basis to depart from the producer's books and records. The panel observed that, where a producer and supplier are affiliated, "the actual costs of production of particular inputs is spread across different companies' records, or [] transactions between such companies are not at arms-length or indicative of the actual costs involved in the production of the product under consideration." It is this finding that is relevant to the circumstances of this case. Here, based on the record evidence, USDOC determined an affiliation relationship to exist between NEXTEEL and its supplier of HRC, POSCO. Having made that determination, USDOC then analyzed the prices charged by POSCO to NEXTEEL against the prices charged by POSCO to unaffiliated purchasers. Based on that analysis, USDOC determined the appropriate costs to use for the constructed normal value. Therefore, contrary to Korea's argument, *EU – Biodiesel* supports the U.S. argument that USDOC properly rejected respondents' data under Article 2.2.1.1.

V. USDOC'S DECISION TO LIMIT THE EXAMINATION WAS NOT INCONSISTENT WITH ARTICLE 6.10 OF THE AD AGREEMENT

44. Contrary to Korea's statements, USDOC clearly indicated that it limited its examination to the largest percentage of the volume of exports that could reasonably be examined, and provided a reasoned explanation for its decision to limit the number of respondents individually examined, consistent with the obligations of Article 6.10 of the AD Agreement.

45. 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." Once the authority determines that it would be "impracticable" to examine all exporters or producers, and determines to limit its examination under the second methodology, the authority must determine "the largest percentage of the volume of the exports from the country in question which can reasonably be investigated."

46. USDOC's determination that it "would not be practicable" to examine all possible respondents complied with Article 6.10. Data indicated that more than ten Korean companies exported or produced OCTG that was imported into the United States during the period of investigation. USDOC carefully considered "its resources, including its current and anticipated workload and deadlines coinciding with the proceeding in question."

47. USDOC accordingly limited its examination to a certain number of respondents. Specifically, USDOC's Respondent Selection Memorandum states that USDOC determined it "most appropriate to select the exporters or producers accounting for the largest volume of the subject merchandise that can reasonably be examined." In addition to USDOC's consideration of its available resources, USDOC determined that HYSCO and NEXTEEL accounted for the largest volume of U.S. imports of subject merchandise during the period of investigation. Korea has presented no evidence to argue that USDOC's actions were unreasonable, and the Panel should therefore reject Korea's claim.