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

(WT/DS488)

SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

August 26, 2016

Public Version

TABLE OF CONTENTS

TABLE OF REPORTS

SHORT TITLE	FULL CASE TITLE AND CITATION
Argentina – Poultry Anti-Dumping Duties	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003
China – Broiler Products	Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R and Add.1, adopted 25 September 2013
China – Electronic Payment Services (Panel)	Panel Report, *China – Certain Measures Affecting Electronic Payment Services*, WT/DS413/R and Add.1, adopted 31 August 2012
China – GOES (AB)	Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012
China – GOES (Panel)	Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/R and Add.1, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R
China – X-Ray Equipment	Panel Report, *China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Unio*n, WT/DS425/R and Add.1, adopted 24 April 2013
EC – Fasteners (China) (AB)	Appellate Body Report, *European Communities – Definitive Anti- Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011
EC – Fasteners (Article 21.5 – China) (Panel)	Panel Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China – Recourse to Article 21.5 of the DSU by China*, WT/DS397/RW, adopted 12 February 2016, as modified by Appellate Body Report WT/DS397/AB/RW
EC – Salmon (Norway)	Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008
EU – Biodiesel	Panel Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/R (circulated 29 March 2016) (currently subject to appeal)

Mexico – Anti-Dumping Measures on Rice (AB)	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice*, Complaint with Respect to Rice, WT/DS295/AB/R, adopted 20 December 2005
Thailand – H-Beams (Panel)	Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, adopted 5 April 2001, as modified by Appellate Body Report WT/DS122/AB/R
US – Anti-Dumping and Countervailing Duties (China) (AB)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011
US – Countervailing and Anti-Dumping Measures (Panel)	Panel Report, *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/R and Add.1, adopted 22 July 2014, as modified by Appellate Body Report WT/DS449/AB/R
US – Countervailing Measures on Certain EC Products (AB)	Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, adopted 8 January 2003
US – Hot-Rolled Steel (AB)	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001
US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina) (Panel)	Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS268/RW, adopted 11 May 2007, as modified by Appellate Body Report WT/DS268/AB/RW
US – Stainless Steel (Korea)	Panel Report, *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R, adopted 1 February 2001
US – Zeroing (Japan) (AB)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007

TABLE OF EXHIBITS

EXHIBIT NUMBER	FULL CITATION
USA-40	Oxford Dictionaries (online - definition of profit)
USA-41	USDOC Respondent Selection Memorandum (**BCI**)
USA-42	Additional Dictionary Definitions
USA-43	USCIT Decision, *Husteel Co., Ltd., v. United States*, Slip Op. 16-76 (Aug. 2, 2016)

I. INTRODUCTION

1. Throughout this dispute, Korea's arguments have consistently failed to meaningfully address the specific rights and obligations provided in the covered agreements and ignored relevant facts. The United States will not repeat all of its arguments related to these matters in this submission, but rather will focus on the flaws in arguments Korea made in its oral statements at the first substantive Panel meeting and in its answers to the Panel's questions following that meeting.

II. 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

2. As already addressed extensively and with specific reference to the text, the United States has demonstrated that Article 2.2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") does not preclude Members from considering volume of sales in assessing the appropriateness of third-country sales.[1] Article 2.2 does not establish a hierarchy as between the two alternative methodologies – constructed normal value and third-country sales – for calculating normal value, and permits an authority to consider whether a third-country would be "appropriate" for the normal value calculation.[2] In this submission, the United States will address Korea's additional arguments on this issue, which are set forth in paragraphs 26-43 of Korea's Opening Statement and in responses to questions 1 and 3 of the Panel's first set of written questions. Korea's new arguments fail to bolster its claims.

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

3. 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.

4. First, Korea argues that a Member may not impose "additional criteria" in selecting one of the listed methodologies for calculating normal value.[3] But Korea's assertion is premised on the fallacy that an authority is required to consider both methodologies and that an interested

[1] U.S. FWS, paras. 40-52; U.S. Opening Statement, paras. 6-14.

[2] U.S. FWS, paras. 40-52.

[3] Korea Responses to Questions, para. 3. The United States notes that Korea refers to Article 18.4 of the AD Agreement in its response to Question 1 of the Panel's first set of written questions. Korea asserts that "even if the USDOC has a choice of methodologies, the United states is obligated to ensure that its laws . . . relating to each of these methodologies conform with the requirements set out in Article 2.2 of the Anti-Dumping Agreement." Korea Responses to Questions, para. 2. As Korea itself acknowledges that the issue before the Panel is the measure's compliance "with the requirements set out in Article 2.2," the United States does not provide here an interpretive analysis of Article 18.4.

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.[4] Under Korea's interpretation, it is unclear how an authority would be expected to choose between two WTO-consistent alternatives. As described in the U.S. First Written Submission, however, Article 2.2 permits an authority to determine what constitutes an "appropriate third-country." Relevant context supports an understanding that volume may be a relevant consideration, including in footnote 2 to Article 2.2, and – as highlighted in the Panel's Questions to the Parties[5] – in Article 2.2.1, which considers volume in the determination of sales made in the ordinary course of trade. Taken together, the text supports an understanding that volume of sales may be considered when evaluating whether third-country sales are "appropriate" within the meaning of Article 2.2.

5. Korea's citation to the Appellate Body report in *Mexico – Anti-Dumping Measures on Rice* for the proposition that "an investigating authority is not permitted to impose additional requirements that do not exist in the Anti-Dumping Agreement" is unpersuasive.[6] As described in the U.S. First Written Submission,[7] in that case, the Appellate Body observed 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."[8]

6. But, under Article 2.2, an interested party does not have a *right to* the use of third-country sales. Article 2.2 permits an authority to use either of two alternatives to calculate normal value without any preference to use one over the other. Moreover, 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, the Appellate Body's analysis in *Mexico – Anti-Dumping Measures on Rice* does not support Korea's interpretation of Article 2.2.

7. Korea's reference to the zeroing cases to support this interpretation is similarly misplaced.[9] Korea states that "Korea's 'as such' claim in this case is no different than earlier challenges to the use of zeroing under Article 2.4.2 of the Anti-Dumping Agreement."[10] Korea is mistaken. 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.[11] In contrast, Article 2.2 concerns the selection of the methodology to

[4] *See* Korea FWS, para. 54.

[5] Panel's Questions to the Parties, Question 2.

[6] Korea Responses to Questions, para. 3.

[7] U.S. FWS, paras. 50-51.

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

[9] Korea Opening Statement, para. 27; Korea Responses to Questions, para. 5.

[10] Korea Responses to Questions, para. 5.

[11] Korea Responses to Questions, para. 5, *citing* Appellate Body Report, *US – Zeroing (Japan)*, paras. 137-138 ("in establishing 'margins of dumping' under the T-T comparison methodology, an investigating authority must

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.

8. 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."[12] The United States has explained in detail that Article 2.2, when read in context, does not preclude consideration of the volume of sales to determine what constitutes an "appropriate third country."[13] 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.

9. 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."[14] 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,"[15] 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."[16] 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.

10. Moreover, as discussed in the following section, Korea's interpretive argument as applied to the U.S. regulation is further undermined by the plain text of the challenged measure. Section 351.404(b)(2) of USDOC's regulation on its face permits flexibility, as USDOC is free to consider the complete factual record in a given case when determining whether a third country is appropriate for the calculation of normal value.[17] Korea has not demonstrated the existence of a

---

aggregate the results of all transaction-specific comparisons and cannot disregard the results of comparisons in which export prices are above normal value").

[12] Korea Opening Statement, para. 30.

[13] U.S. FWS, paras. 47-49; U.S. Opening Statement, paras. 11-14.

[14] Korea Opening Statement, para. 31.

[15] *New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 1, p. 103 ("*New Shorter Oxford English Dictionary*") (Exhibit USA-42).

[16] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 552.

[17] 19 C.F.R. § 351.404(b)(2) (Exhibit KOR-57).

"mechanical bright line rule,"[18] as such a rigid rule would be contrary to the plain language of the applicable regulation. Thus, even under Korea's interpretation of Article 2.2, Korea has not established a breach of the United States' obligations.

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

11. 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. Korea has raised several additional arguments in an effort to support its claim that USDOC does not have the flexibility even to consider third-country sales that account for less than five percent of U.S. sales.

12. 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.[19] 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.[20] However, it is not the role of a panel to review the legality of a Member's law as within that legal system.[21] 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.[22] 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.[23] 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,[24] "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

[18] Korea Opening Statement, para. 31.

[19] Korea Responses to Questions, paras. 14-15.

[20] Korea Responses to Questions, paras. 14-15.

[21] *US – Countervailing and Anti-Dumping Measures (Panel)*, para. 7.164 (noting that, in accordance with GATT 1994 Article X:3(b), "it is the role of domestic 'judicial, arbitral or administrative tribunals,' and not WTO panels, to determine whether agency practices relating to customs matters are unlawful under domestic law"); *see also id.*, n. 258 (citing prior panel reports reaching same conclusion).

[22] See DSU Article 11 (directing a panel to make an objective assessment of the facts "and the applicability of and conformity with *the relevant covered agreements*," not conformity with municipal law).

[23] *See, e.g., PAM, S.P.A. & JCM, Ltd. v. United States*, Slip Op. 05-124, p. 12 (Exhibit USA-26). *See also US – Countervailing and Anti-Dumping Measures (Panel)*, para. 7.171.

[24] *US – Countervailing and Anti-Dumping Measures (Panel)*, para. 7.163 (quoting the U.S. Supreme Court, *United States v. Eurodif S.A.*, 555 U.S. 305 (2009) at 316).

States law."[25] Therefore, there is neither a factual nor a legal basis for the Panel to find otherwise in this dispute.

13. 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.'"[26] 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.

14. 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.[27] The regulation's use of "normally" then permits USDOC to depart from the general rule of a five percent threshold where appropriate.[28]

15. Korea also contends that the Korea OCTG respondents were "precluded…from submitting third-country market data that did not meet the strict five percent threshold," which Korea suggests demonstrates the rigid application of a bright-line test in the Korea OCTG investigation.[29] Contrary to Korea's statement, neither the questionnaire nor USDOC regulations precludes a respondent from submitting third-country sales data and requesting that such data be used to calculate normal value. Section 351.301(c)(2)(i) of USDOC's regulations expressly permits an interested party to submit factual information regarding "market viability and the basis for determining normal value…10 days after the respondent interested party files the response to the relevant section of the questionnaire, unless the Secretary alters this time limit."[30] Therefore, the Korean respondents had an opportunity – pursuant to section 351.301(c)(2)(i) and section 351.404(b)(2) – to request the use of third-country sales to calculate normal value, and the Korean respondents did not avail themselves of that opportunity.

16. 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."

---

[25] *US – Countervailing and Anti-Dumping Measures (Panel)*, para. 7.171.

[26] Korea Opening Statement, para. 43; Korea Responses to Questions, para. 17.

[27] 19 C.F.R. § 351.404(b)(2) (Exhibit KOR-57); U.S. FWS, para. 58.

[28] 19 C.F.R. § 351.404(b)(2) (Exhibit KOR-57).

[29] Korea Opening Statement, para. 47.

[30] 19 CFR § 351.301(c)(2)(i) (Exhibit KOR-47).

III. 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

17. 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.[31] 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.'"[32]

18. 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."[33] 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.[34]

19. Paragraphs 51-57 of the U.S. Responses to Questions demonstrate that the term "profit" as provided for in Article 2.2 and 2.2.2 refers to a financial gain, not a financial loss.[35] 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

20. 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

---

[31] Korea Responses to Questions, paras. 69-70. *See* Korea Responses to Questions, para. 47 (acknowledging that the profit rates for HYSCO and NEXTEEL in Korea were [[ ]]) and U.S. Responses to Questions, paras. 37-38.

[32] Korea Responses to Questions, para. 68, citing Oxford Dictionaries, Definition of *profit* in English (Exhibit KOR-88).

[33] Oxford Dictionaries, Definition of *profit* in English (Exhibit KOR-88) (emphasis added).

[34] The United States notes that Exhibit KOR-88 cropped the dictionary definition of "profit," while other exhibits of dictionary definitions submitted by Korea contain complete definitions. *See* Exhibits KOR-44, KOR-45, KOR-71, and KOR-72. The United States submits the complete definition of "profit" as it appears in the Oxford Dictionaries as Exhibit USA-40, http://www.oxforddictionaries.com/us/definition/american_english/profit (last visited Aug. 23, 2016).

[35] The European Union agrees with the United States that "[t]he term "profit" for the purposes of establishing normal value does not encompass a loss." EU Responses to Questions, para. 11.

permit a proper comparison for certain specified reasons, including 'low volume.'"[36] 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.

21. 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.[37] 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.

22. 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,[38] 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."[39] 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.

23. 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. Korea's suggestion to the contrary – that Article 2.2.2 requires an authority to revisit its decision under Article 2.2

[36] Korea Opening Statement, para. 56. Korea makes a similar assertion in its responses to the written questions from the Panel after the first substantive meeting. Korea Responses to Panel Questions, para. 46.

[37] U.S. Responses to Panel Questions, paras. 16, 18, 34.

[38] Korea Responses to Panel Questions, paras. 20-26.

[39] Korea Responses to Panel Questions, para. 10-11 (emphasis in original).

concerning whether a third-country market is appropriate for the determination of normal value – thus should be rejected because it attributes variable meanings to the chapeau of Article 2.2.2.

24. For these reasons, and for the reasons discussed in the U.S. Responses to Questions,[40] the Panel should reject Korea's interpretation and find that third country sales are not required for purposes of determining CV profit amounts under the chapeau of Article 2.2.2.

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

25. 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."[41] 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"[42]; and (2) fall within the same tariff headings.[43] In making these arguments, Korea essentially asks the Panel to review USDOC's determination *de novo* and come to a different conclusion based on the same set of evidence. The Panel should decline Korea's request to do so.

26. 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,"[44] as well as a reasoned and adequate explanation as to why it decided to exclude line pipe and standard pipe.[45] In this regard, USDOC specifically addressed and rejected the argument that its definition of the "same general category of products" should include pipe products that convey fluids and gases but do not otherwise share the fundamental characteristics for down hole applications:

> Regarding the differences, OCTG casing and tubing performance requirements differ significantly from those for the noted non-OCTG products [(i.e., line, structural, standard, and downgraded pipe products)], because OCTG pipes are subjected to external collapse pressures, internal pressures, and tension strength

[40] U.S. Responses to Questions, paras. 12-19.

[41] Korea Responses to Questions, para. 27; *see* Korea Responses to Questions, paras. 27-33, and Korea Opening Statement, paras. 60-76.

[42] Korea Opening Statement, para. 75.

[43] Korea Responses to Questions, paras. 28-31.

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

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

> requirements when used in oil or gas wells, whereas, standard pipe and line pipe products are primarily intended for the conveyance of fluids and gases.[46]

27. 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,[47] sometimes are manufactured in the same building, sometimes are handled by the same export department[48] or marketed like every other steel pipe,[49] and undergo "the same *basic* production processes."[50] 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:

> While we recognize that non-OCTG pipe products and OCTG oil casing and tubing are all tubular products of circular cross section that can be made by either the welded or seamless process and in many instances can be made in the same pipe making mill, the chemical, physical and mechanical characteristics of each product can differ significantly. Likewise, even though certain non-OCTG pipe (*i.e.*, line pipe), can be used in the oil and gas industry, line pipe is used to transport oil and gas from the point of production and to distribute to consumers, while OCTG is used in down hole applications for oil and gas exploration and extraction.[51]

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,[52] USDOC provided a reasoned and adequate explanation of how the information in the record supports its definition of the "same general category of products."

28. Korea's reliance on the overlap in HTSUS subheadings applicable for OCTG and those applicable for certain line or standard pipe products[53] 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

---

[46] Final Decision Memorandum, p. 17 (Exhibit KOR-21) (finding "that line, structural and standard and downgraded pipe products are not in the same general category of products as OCTG") (footnotes omitted).

[47] Korea Opening Statement, para. 65.

[48] Korea Responses to Questions, para. 32; Korea Opening Statement, paras. 67-68.

[49] Korea Responses to Questions, para. 33.

[50] Korea Responses to Questions, para. 32 (emphasis added).

[51] Final Decision Memorandum, p. 17. *See* Final Decision Memorandum, p. 18 (also finding 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").

[52] U.S. FWS, paras. 100-101, citing Final Decision Memorandum, pp. 17-19 (Exhibit KOR-21).

[53] Korea Responses to Questions, paras. 28-31.

dispositive."[54] 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,[55] 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."

29. Finally, contrary to Korea's claims,[56] USDOC did not define the "same general category of products" more narrowly than the definition of the scope of the Korea OCTG investigation. The determination of dumping involves a comparison of the export price of the product under consideration to the normal value of the like product when destined for consumption in the exporting country.[57] 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.[58] The Ukraine pipe product, at the point of sale,[59] 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,[60] and thus USDOC excluded this downgraded pipe product from its definition of "same general category of merchandise."[61] 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.

30. 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. Therefore, the United States respectfully requests that the Panel find USDOC's definition of the "same general category of products" in the Korea OCTG investigation was not inconsistent with Articles 2.2.2, subparagraphs (i) and (iii), of the AD Agreement.

---

[54] Final Determination Notice, p. 41985, Appendix I (Exhibit KOR-24); *see* Initiation Notice, p. 45505 (Exhibit KOR-02); OCTG AD Order, p. 53692 (Exhibit KOR-59) ("The written description of the scope of the [antidumping duty] orders is dispositive").

[55] As explained during the first substantive meeting of the Panel, USDOC's definition of the scope of an investigation is coextensive with its definition of the "like product."

[56] Korea Opening Statement, para. 72; *see* Korea Responses to Questions, para. 58.

[57] *E.g.*, Articles 2.1 and 2.4, AD Agreement.

[58] *OCTG from Ukraine*, Final Decision Memorandum, p. 8 (Exhibit KOR-75).

[59] The determination of dumping involves a comparison of the sales of the product under consideration to the sales of the like product (*see, e.g.*, Articles 2.1, 2.2., 2.2.1, 2.3, 2.4, 2.4.1, AD Agreement) or, where appropriate, the costs associated with the production and sale of the product under consideration (*see* Article 2.2.1.1, AD Agreement).

[60] U.S. Responses to Questions, paras. 21-24, 26.

[61] Final Decision Memorandum, p. 17 (Exhibit KOR-21) ("we find . . . downgraded pipe products are not in the same general category of products as OCTG").

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

31. 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."[62] 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."[63] 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."[64]

32. 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.

33. 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."[65]

34. 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.

35. 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

[62] Korea Responses to Questions, para. 61.

[63] Korea Responses to Questions, para. 63; *see* Korea Opening Statement, paras. 84-85.

[64] Korea Responses to Questions, para. 67.

[65] *EU – Biodiesel (Panel)*, para. 7.333 (this panel report has not yet been adopted and has been appealed).

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.

36. 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

37. 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."[66] 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. Korea's argument is contrary to the text of Article 2.2.2 – which does not limit the application of "any other reasonable method" to data from any particular market – and contrary to logic.

38. 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.[67]

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.

[66] Korea Responses to Questions, para. 60.

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

39. 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.

40. As discussed in the U.S. First Written Submission, USDOC provided a reasoned and adequate explanation for its findings on the definition of the "same general category of products." The arguments advanced by Korea do not demonstrate otherwise. Simply put, Korea has failed to make out its claim. Therefore, the United States respectfully requests that the Panel find USDOC's definition of "the same general category of products" in the Korea OCTG investigation was not inconsistent with Articles 2.2.2(i) and 2.2.2(iii) of the AD Agreement.

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

41. 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.[68] 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.[69]

42. 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.[70] Both HYSCO and NEXTEEL argued against the use of this information for purposes of the CV profit calculation.[71] But neither respondent argued that, if the data were used, due allowance should be made under Article 2.4 for differences between the products they sold in the U.S. market and products sold by Tenaris.[72]

43. 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.

---

[68] Korea Responses to Questions, paras. 71 and 81.

[69] Korea Responses to Questions, paras. 74-77.

[70] U.S. Steel CV Profit Submission, Exhibit J (Exhibit KOR-06).

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

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

Indeed, USDOC stated in the preliminary determination that it "intend[ed] to continue to explore other possible options for CV profit for both respondents,"[73] and 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.[74] 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 for these alleged differences.

44. 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,[75] or that USDOC should have recognized that they had done so,[76] 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."[77] 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.

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

45. 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. In its prior submissions, the United States has explained the proper legal interpretation of Article 2.3[78] and the factual basis for the USDOC's decision to utilize CEP in the Korea OCTG investigation.[79] In this submission, the United States will address the additional arguments advanced in Korea's opening statement and responses to the Panel's questions concerning the appropriate legal interpretation of Article 2.3 and USDOC's factual finding of affiliation.

46. 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."[80] 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.[81]

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

[74] NEXTEEL Rebuttal Brief, pp. 40-47 (Exhibit USA-23), and HYSCO Rebuttal Brief, pp. 45-50 (Exhibit USA-24).

[75] Korea Responses to Questions, para. 77.

[76] Korea Responses to Questions, para. 77.

[77] *EC – Fasteners (China) (AB)*, para. 488 (emphasis added).

[78] U.S. FWS, paras. 150-157; U.S. Opening Statement, 55-59; U.S. Responses to Questions, paras. 80-84.

[79] U.S. FWS, paras. 159-174.

[80] Article 2.3, AD Agreement.

[81] Korea Responses to Questions, paras. 94-96.

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."[82] 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.[83]

47. 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."[84] 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. As the Appellate Body observed in *US – Countervailing Measures on Certain EC Products*, legal distinctions "that may be recognized in a domestic legal context" are "not necessarily relevant, and certainly not conclusive," for the purpose of interpreting treaty provisions.[85] Moreover, the Appellate Body has expressed "reservations" over recourse to domestic legal definitions when interpreting terms within WTO agreements, even if legal provisions from multiple jurisdictions are surveyed.[86] Since the definitions within domestic legal provisions "emanate from, and reflect the particular objectives and needs of, the domestic legal systems…it would be inappropriate to draw, from these context-specific definitions, general conclusions as to the meaning and scope" of treaty terms.[87] Thus, 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.

48. 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."[88] 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. In fact, USDOC considered this information and determined that "POSCO accounted for [[ ]] percent of

[82] Korea Responses to Questions, paras. 94-96.

[83] *US – Hot-Rolled Steel (AB)*, para. 54 ("Article 17.6 is divided into two separate sub-paragraphs, each applying to different aspects of the panel's examination of the matter").

[84] Korea Responses to Questions, paras. 111-112.

[85] *US – Countervailing Measures on Certain EC Products (AB)*, para. 115.

[86] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 335.

[87] *China – Electronic Payment Services (Panel)*, para. 7.556.

[88] Korea Responses to Questions, para. 90.

NEXTEEL's POI consumption of hot-rolled coils used for OCTG production."[89] Thus, it is not, as Korea suggests, that USDOC "ignored" this information;[90] rather, Korea simply disagrees with the reasonable conclusion that was reached by USDOC based on this record evidence.

49. 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.[91] 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."[92] 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.

50. Furthermore, the information referenced by Korea does not undermine USDOC's conclusion of affiliation. As the document cited by Korea admits, "[[ ]]" subsequently referring to POSCO as [[ ]][93] Accordingly, and for the reasons discussed in paragraphs 163-174 of the U.S. First Written Submission, USDOC concluded the following:

> POSCO is involved in both the production and sales sides of NEXTEEL's operations involving subject merchandise. The combination of its involvement on both the production and sales sides creates a unique situation where POSCO is operationally in a position to exercise restraint or direction over NEXTEEL in a manner that affects the *pricing, production, and sale of OCTG*.[94]

51. Korea has therefore not pointed to any record evidence to show that USDOC's conclusion that NEXTEEL's prices were unreliable because of affiliation was not supported by a reasoned and adequate explanation, and the Panel should reject these arguments accordingly.

V. 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

52. 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

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

[90] Korea Responses to Questions, para. 91.

[91] Korea Responses to Questions, paras. 103-107.

[92] Panel's Questions to the Parties, Question 31.

[93] Exhibit KOR-89, p. A-7.

[94] Final Decision Memorandum, p. 73 (KOR-21) (emphasis added).

accuracy or reliability of NEXTEEL's records."[95] Korea's argument is not supported by the text of Article 2.2.1.1 or the factual record of the Korea OCTG investigation.

53. As an initial matter, the United States observes that Korea's argument has evolved over the course of this dispute. In the Request for the Establishment of a Panel, Korea claimed that the United States breached Article 2.2.1.1 "because, *due to its erroneous finding of affiliation* between NEXTEEL and its major input supplier, the USDOC failed to calculate costs 'on the basis of records kept by the exporter or producer under investigation.'"[96] Korea has since changed course, claiming now that even a *proper finding of affiliation* would not permit an authority to depart from an exporter's books and records under Article 2.2.1.1. Specifically, Korea stated in its Opening Statement that:

> Unlike Article 2.3, which permits an investigating authority to disregard export price based on a finding of association, no such conditions apply to Article 2.2.1.1. Therefore, even assuming that the USDOC's finding of association was proper, Article 2.2.1.1 does not simply permit an investigating authority to disregard an exporter's reported costs when these costs satisfy the requirements of Article 2.2.1.1.[97]

54. Korea's new interpretive argument also fails, however. As explained in paragraphs 67-70 of the U.S. Responses to Questions, USDOC departed from NEXTEEL's books and records to determine the cost of certain inputs because NEXTEEL's records did not reasonably reflect the costs associated with the production or sale of OCTG.[98] In its analysis, USDOC examined whether inputs had been purchased at arms-length prices by comparing affiliated party prices with prices from unaffiliated parties. To do so, USDOC first considered the existence of affiliation, and then compared sales prices. The United States has previously described the USDOC's basis for the affiliation determination.[99]

55. 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.[100] 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. For transfer prices that exceeded POSCO's cost of production and were consistent with the prices charged in POSCO's arms-length transaction, USDOC determined that the prices reasonably reflected the costs associated with the production of OCTG. 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

[95] Korea Responses to Questions, para. 86.

[96] Request for the Establishment of a Panel, p. 4 (emphasis added).

[97] Korea Opening Statement, para. 112.

[98] U.S. Responses to Questions, paras. 67-70.

[99] U.S. FWS, paras. 160-174.

[100] NEXTEEL CV Memo, p. 3 (Exhibit USA-39) (**BCI**).

purchasers. For the confidential details of USDOC's analysis, the United States refers the Panel to paragraph 70 of the U.S. Answers to Panel Questions. 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.

56. 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.[101] The Panel is confronted here with different facts, and a more straightforward and clearer factual circumstance than that at issue in *EU – Biodiesel*. 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.[102] 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.[103] The circumstances of this investigation are not similar, and these findings are thus of limited relevance.

57. 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.[104] 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."[105] 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.

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

58. Korea has not established that the United States acted inconsistently with Article 6.10 of the AD Agreement in limiting its examination to the two mandatory respondents that accounted for the largest percentage of the volume of exports. Contrary to Korea's statements,[106] USDOC clearly indicated that it limited its examination to the largest percentage of the volume of exports

[101] Korea Responses to Questions, para. 84.

[102] *EU – Biodiesel (Panel)*, para. 7.221.

[103] *EU – Biodiesel (Panel)*, para. 7.248.

[104] *EU – Biodiesel (Panel)*, para. 7.232.

[105] *EU – Biodiesel (Panel)*, para. 7.232.

[106] Korea Responses to Questions, para. 128 ("Korea is not aware of where on the record the USDOC indicated that it was limiting its examination to the 'largest percentage of the volume of exports from the country in question that can reasonably be examined.").

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.[107]

59. 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."[108] As discussed in the United States' First Written Submission, the term "impracticable" is employed to strike a balance between the general obligation to individually 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.[109]

60. 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."[110] This determination must be made on a "case-by-case basis," which takes into account "all relevant facts that are before the investigating authority," including "the investigating authority's own investigating capacity and resources."[111]

61. USDOC's determination that it "would not be practicable" to examine all possible respondents complied with Article 6.10.[112] Data indicated that more than ten Korean companies exported or produced OCTG that was imported into the United States during the period of investigation.[113] USDOC carefully considered "its resources, including its current and anticipated workload and deadlines coinciding with the proceeding in question."[114] 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.[115] The memorandum further explained that this office was also responsible for the investigations involving OCTG from Thailand and Vietnam, taking place concurrently with the

[107] The United States notes that, contrary to Korea's assertion that USDOC "simply rel[ied] on the same reasons for which it limited the number of mandatory respondents to justify its decision not to examine additional voluntary respondents" (Korea Responses to Questions, paras. 132-134), USDOC in fact issued a second memorandum titled, "Treatment of Voluntary Respondents" (Exhibit KOR-50). We refer the Panel to the U.S. FWS, which discusses that memo and USDOC's separate analysis of its resources available to investigate the voluntary responses (U.S. FWS, paras. 196-198).

[108] Article 6.10. AD Agreement.

[109] U.S. FWS, para. 184.

[110] Article 6.10, AD Agreement.

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

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

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

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

[115] Respondent Selection Memorandum, footnote 48 (Exhibit KOR-3).

subject proceeding.[116] Given the number of ongoing investigations, USDOC concluded that "it would not be practicable" to investigate all known exporters and producers.[117]

62. 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."[118] 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.[119] During that period, HYSCO accounted for approximately [[ ]] percent and NEXTEEL accounted for approximately [[ ]] percent of the volume of U.S. imports of OCTG from Korea.[120]

63. As explained in the determination, USDOC did not have the resources to investigate numerous respondents, and therefore reasonably limited the investigation to [[ ]] percent of total exports – the largest volume that could reasonably be examined. Korea has presented no evidence to argue that USDOC's actions were unreasonable, and the Panel should therefore reject Korea's claim that the United States breached Article 6.10 of the AD Agreement.

VII. CONCLUSION

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

[116] Respondent Selection Memorandum, footnote 48 (Exhibit KOR-3).

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

[118] Respondent Selection Memorandum, p. 7 (Exhibit KOR-3).

[119] Respondent Selection Memorandum, p. 8 (Exhibit USA-41 **(BCI)**).

[120] Respondent Selection Memorandum, Attachment 1 (Exhibit USA-41 **(BCI)**).

ANNEX I:

ADDITIONAL U.S. COMMENTS ON KOREA'S ANSWERS TO THE PANEL'S QUESTIONS FOLLOWING THE FIRST SUBSTANTIVE MEETING

The U.S. Second Written Submission comments on many of the arguments contained in Korea's answers to the Panel's questions following the first substantive meeting. In this Annex, the United States provides additional comments on Korea's answers. In particular, the United States addresses Korea's answers to Questions 9b, 10, 13, and 17 (Korea's claims under Article 2.2.2); Questions 34 and 35 (Korea's claim under Article 6.4); and Question 36 (Korea's claim under Article 6.9). The United States notes that the absence of a comment on any particular answer by Korea should not be construed as agreement with Korea's arguments.

KOREA'S CLAIMS UNDER ARTICLE 2.2.2 OF THE ANTI-DUMPING AGREEMENT

Question 9. To Korea and the United States. Can the parties please respond to the following questions pertaining to "prime OCTG" and "non-prime OCTG":

b. Did either of the Korean respondents, HYSCO or NEXTEEL, have sales of either "prime OCTG" or "non-prime OCTG" to the home market or to third country markets in the period of investigation?

1. Contrary to Korea's response to this question,[121] HYSCO did *not* sell non-prime OCTG in the home market during the period of investigation. The pipe product that Korea now claims that HYSCO sold as non-prime OCTG was "not marketed to the customer [in Korea] as OCTG"[122] and was purchased "for structural purposes."[123]

2. Also, contrary to Korea's response to this question,[124] NEXTEEL did *not* sell non-prime OCTG in the home market during the period of investigation. The pipe product that Korea now claims NEXTEEL sold as non-prime OCTG "were sold to customers as standard pipe."[125]

Question 10. To Korea and the United States. In paragraph 137 of its first written submission, Korea claims that Tenaris has no record of sales or production in the Korean market. The United States, on the other hand, states in paragraph 133 of its first written submission that Tenaris operates in many countries *including* Korea. Please clarify, by referring to the relevant parts of the USDOC's record, whether Tenaris produced or sold OCTG in Korea in the period of investigation.

[121] Korea Responses to Questions, para. 39.

[122] HYSCO Sales Verification Report, pp. 22, 25 (Exhibit USA-08).

[123] HYSCO Sales Verification Report, p. 25 (Exhibit USA-08).

[124] Korea Reponses to Questions, para. 40.

[125] NEXTEEL Sales Verification Report, p. 21 (Exhibit USA-09); *see* NEXTEEL Sales Verification Report, p. 16 (Exhibit USA-09).

3. Korea is incorrect in its understanding that statements[126] made by the United States during the first substantive meeting of the Panel "mean that the United States acknowledges that Tenaris did not have any relation to Korea."[127] The record in the investigation shows that Tenaris operates a commercial office in Seoul, Korea. Tenaris thus clearly does have a relation to Korea. That said, as the United States indicated during the first substantive meeting of the Panel, the record in this investigation does not indicate whether Tenaris produced or sold OCTG in Korea during the period of investigation.

Question 13. To Korea and the United States. What is the difference between "same general category of product" in Article 2.2.2 and "narrowest range of products" in Article 3.6? How would one determine the "same general category of product"?

4. As indicated in paragraph 40 of the U.S. Responses to Questions, the United States and Korea generally agree that there is a difference between the "same general category of products" in Article 2.2.2 and "narrowest range of products" in Article 3.6. However, for the reasons set forth in the U.S. Second Written Submission, *supra*, the United States disagrees with Korea's assertion[128] that this difference supports its claim in respect of the USDOC definition of the "same general category of products."

5. Also contrary to Korea's claims,[129] it is indisputable that USDOC defined the "same general category of products" in the Korea OCTG investigation more broadly than the "like product" so as to include not only OCTG subject to the investigation, but also drill pipes and OCTG not subject to the investigation, such as stainless steel tubular products.[130] That OCTG as defined in the scope of the Korea OCTG investigation may be occasionally used, after it has been sold, for purposes similar to those for which line, structural, standard, or downgraded pipe products are generally used does not alter the fact that these latter pipe products cannot be used in down hole applications.

Question 17. To Korea and the United States. What does "profit" mean as used in Articles 2.2 and 2.2.2? Would its meaning, in the parties' views, encompass situations in which a loss is recorded in a company's books?

6. The United States disagrees that the context of Articles 2.2.1 and 2.2.2 supports Korea's premise[131] that the term "profit" in Article 2.2.2 can mean a negative profit or loss. Article 2.2.1 is directed at the question of whether certain sales that are being considered for the purpose of

[126] Korea mischaracterizes the statements of the United States during the first panel hearing regarding Tenaris's operations in Korea as an "admission." Korea Responses to Questions, para. 44. The statements of the United States at the hearing did not constitute an "admission." The United States has nothing to admit or deny in respect of Tenaris. Rather, the United States, in response to a question from the Panel, simply stated its understanding of the facts that appear in the record of the Korea OCTG investigation.

[127] Korea Responses to Questions, para. 44.

[128] Korea Responses to Questions, para. 54.

[129] Korea Responses to Questions, para. 58.

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

[131] Korea Responses to Questions, para. 69.

normal value provide for the recovery of costs within a reasonable period of time, i.e., whether sales were made at a loss. Korea argues that "profit" in the context of Article 2.2.2 can mean "loss" because "Article 2.2.1 presupposes that below-cost sales that cause losses are not necessarily rejected or disregarded when calculating the normal value, unless they fail to pass the Article 2.2.1 test."[132] The "test" referred to in Article 2.2.1, however, ensures that normal value does *not* reflect a value that is below the cost of producing the product (i.e., a loss). It would thus be nonsensical to interpret the term "profit" in Article 2.2.2 to encompass loss given that an investigating authority specifically disregarded below-cost sales pursuant to Article 2.2.1 as "outside the ordinary course of trade" before it decided to construct normal value and calculate CV profit pursuant to Article 2.2.2.

7. In addition, Article 2.2 obligates an investigating authority to construct normal value based on cost of production "*plus*" a reasonable amount for SG&A costs and for profit.[133] The term "plus" is defined, in part, to mean "[m]ade more by, increased by, with the addition of."[134] It thus is also counter-intuitive to interpret the term "profit" in Article 2.2.2 to mean cost of production made less by a negative amount for SG&A and for profit. Therefore, to impose, as Korea suggests, a requirement to use a negative amount as a "profit" for purposes of Article 2.2.2 renders the definition of constructed normal value as provided for in Article 2.2 meaningless.

KOREA'S CLAIM UNDER ARTICLE 6.4 OF THE ANTI-DUMPING AGREEMENT

Question 34. To Korea. Article 6.4 provides, *inter alia*, that an investigating authority shall whenever practicable provide timely opportunities for all interested parties to see all information that is "used by the authorities in an anti-dumping investigation". In this regard, can Korea please explain, by referring to relevant parts of the USDOC's record, how the letters signed by the 57 Senators of the US senate and 155 Representatives of the US Congress were used by the USDOC in the underlying investigation.

8. Korea argues that as long as information placed on the record was "*considered* by the investigating authority, such information must be treated as having been 'used . . . in an anti-dumping investigation' [under Article 6.4]."[135]

9. The Panel should reject Korea's effort to replace the word "used" as it appears in Article 6.4 with the word "consider" given these words have different meanings. The term "use" is defined, in part, as "[t]he action of using something; the factor or state of being used; application or conversion to some purpose,"[136] and the term "used" is defined, in part, as "that is or has been made use of; utilized."[137] In contrast, the term "consider" is defined, in part, as "[l]ook at

[132] Korea Responses to Questions, para. 69.

[133] Article 2.2, AD Agreement (emphasis added).

[134] *New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 2259 (Exhibit USA-42).

[135] Korea Responses to Questions, para. 116 (emphasis in original).

[136] *New Shorter Oxford English Dictionary*, Volume 2, p. 3531 (Exhibit USA-42).

[137] *New Shorter Oxford English Dictionary*, Volume 2, p. 3532 (Exhibit USA-42).

attentively; survey; scrutinize."[138] Thus it is clear from the dictionary meaning of these two words that it is possible to look attentively at, scrutinize, "consider" a document that has been placed in the record of an antidumping investigation, but *never* "use" the document for purposes of a final determination in that investigation.

10. Korea has failed to demonstrate that USDOC used the congressional letter in question in the underlying investigation. The Korean respondents otherwise had an opportunity to address these letters and did so by submitting new information and argument on June 18, 2014,[139] the due date for case briefs, and again on June 26, 2014, after case and rebuttal briefs were filed in this investigation.[140] Therefore, Korea's claim in respect of Article 6.4 lacks merit.

Question 35. <u>To Korea</u>. Korea refers, at paragraphs 18 and 19 of its opening statement, to the decision of the US Court of International Trade (USCIT) in litigation concerning the USDOC determination at issue in this dispute. Could Korea please explain what, in its view, is the relevance of the USCIT's decision that the Tenaris financial statements should have been rejected as untimely under US law and regulation, and that Korean respondents had been prejudiced by the USDOC's untimely (under US law and regulation) acceptance of that data? The Panel notes, in this regard, that there are no provisions in the Anti-Dumping Agreement governing the timeliness of submissions to investigating authorities.

11. Korea acknowledges "that there are no provisions in the Anti-Dumping Agreement directly governing the timeliness of submissions to the investigating authorities."[141] Even so, Korea continues to assert that the submission of additional information regarding Tenaris after the USDOC preliminary determination constitutes "an 'essential fact' that was not disclosed to interested parties until the USDOC's final determination in violation of Article 6.9,"[142] and that "[t]he USCIT's assessment of the USDOC's actions supports Korea's position."[143]

12. First, the USCIT's decision regarding the Tenaris financial statements is not relevant to the Panel's decision in this dispute. U.S. courts review whether a USDOC determination is in accordance with U.S. antidumping law, while a WTO dispute settlement panel reviews whether a determination is not inconsistent with the AD Agreement. The WTO dispute settlement system is

> not . . . intended to function as a mechanism to test the consistency of a Member's particular decisions or rulings with the Member's own domestic law and practice; that is a function reserved for each Member's domestic judicial system, and a function WTO panels would be particularly ill-suited to perform. An incautious adoption of the approach advocated by Korea could . . . effectively convert every

[138] *New Shorter Oxford English Dictionary*, Volume 1, p. 485 (Exhibit USA-42).

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

[140] Respondents Factual Information to Rebut, Clarify, or Correct Information Placed on the Record by the Department (Exhibit USA-26).

[141] Korea Responses to Questions, para. 118.

[142] Korea Responses to Questions, para. 118.

[143] Korea Responses to Questions, para. 120; *see* Korea Responses to Questions, para. 117.

> claim that an action is inconsistent with domestic law or practice into a claim under the WTO Agreement.[144]

This is especially true given that the USCIT's decision in regard to the Korea OCTG investigation remains subject to appeal in U.S. courts.[145] Therefore, Korea's reliance on the USCIT's decision is misplaced, and the Panel should not consider this decision in respect of Korea's claims under Article 6.4 or Article 6.9 of the AD Agreement.

13. Korea's reliance on *EC – Fasteners (Article 21.5 – China) (Panel)*[146] is also misplaced, because the Korean respondents made multiple presentations before and after USDOC's preliminary determination, through written submissions and at the hearing, regarding whether and how USDOC should use the Tenaris financial data in its calculations.[147] In addition, the respondents were informed of the Tenaris financial data at the same time as USDOC (i.e., when the data was placed on the record[148]), and USDOC neither treated the data as confidential nor withheld them from respondents. And since the Korean respondents were able to respond to the Tenaris data placed on the record before the preliminary determination, as well as the Tenaris data placed on the record afterwards,[149] these data were not provided "too late" for respondents to challenge them and defend their interests.

14. Therefore, as Korea has failed to establish its claim, the Panel should find that the United States did not act inconsistently with Articles 6.4 and 6.9[150] of the AD Agreement with respect to its acceptance of the Tenaris financial data.

V. KOREA'S CLAIMS UNDER ARTICLE 6.9 OF THE ANTI-DUMPING AGREEMENT

Question 36. To Korea. The Appellate Body, in paragraph 240 of its report in *China – GOES*, observed that "essential facts" under Article 6.9 are "those facts that are significant in the process of reaching a decision as to whether or not to apply definitive measures. Such facts are those that are salient for a decision to apply definitive measures, as well as those that are salient for a contrary outcome."* (footnote citing Appellate Body Report, China – GOES, para. 240) Could Korea please explain how the "fact" of "accepting" a submission for the record is either "significant in the process of reaching a decision as to whether or not to apply definitive measures" or "salient for a decision to apply definitive measures" or

---

[144] *United States – Stainless Steel (Korea)*, para. 6.50 (footnote omitted).

[145] The USCIT issued its final judgment in this matter on August 2, 2016. A copy of the court's opinion sustaining USDOC's remand results in their entirety is attached as Exhibit USA-43. Interested parties have 60 days from the USCIT's decision to appeal it to the U.S. Court of Appeals for the Federal Circuit.

[146] Korea Responses to Questions, para. 119.

[147] U.S. Opening Statement, paras. 66-76.

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

[149] U.S. Opening Statement, paras. 66-76.

[150] The Panel's question is directed at Article 6.4 of the AD Agreement, but paragraphs 119-120 of Korea's response only argue that USDOC's action is not in accordance with its obligations under Article 6.9.

"salient for a contrary outcome"? The Panel notes in this regard that there is no reference in the Anti-Dumping Agreement to "accepting" a document for the record.

15. Korea acknowledges that "there is no reference in the Anti-Dumping Agreement to 'accepting' a document for the record."[151] Nonetheless, Korea continues to argue that the Panel should interpret Article 6.9 of the AD Agreement to obligate an investigating authority to notify interested parties as to whether it has decided to accept the placement of a document in the record of an investigation, because according to Korea the acceptance of such a document constitutes an "essential fact" for purposes of Article 6.9.[152]

16. As demonstrated in the U.S. First Written Submission, Korea continues to conflate an investigating authority's disclosure obligation under Article 6.9 in respect of "essential facts" with an authority's deliberations and conclusions, which are not subject to this disclosure obligation. Article 6.9 obligates an investigating authority, "before a final determination is made, [to] inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures."[153] This disclosure obligation 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.[154]

17. Given that the term "consideration" is defined as "the action of taking into account,"[155] an investigating authority's obligation under Article 6.9 is limited to disclosing the essential facts and does *not* extend to its reasoning or conclusions.[156] USDOC thus was not required under Article 6.9 to inform respondents of whether it would choose, or had chosen, to accept the Tenaris financial statements placed in the record of the investigation following its preliminary determination, nor was USDOC required to inform respondents that it would choose, or had chosen, to rely upon the information in those statements.

18. Further, as demonstrated in the U.S. Opening Statement,[157] the record in the Korea OCTG investigation confirms that the Korean respondents had full access to the Tenaris

---

[151] Korea Responses to Questions, para. 122.

[152] Korea Responses to Questions, paras. 122-127.

[153] Article 6.9, AD Agreement.

[154] *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*, para. 7.86 (internal citations omitted); *China – X-Ray Equipment*, paras. 7.399-7.400 (internal citations omitted).

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

[156] 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." *China – GOES (Panel)*, para. 7.407 (emphasis in original) (citing *Argentina – Poultry Anti-Dumping Duties*, para. 7.228); *see also 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)*, 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").

[157] U.S. Opening Statement, paras. 66-76.

financial data and were completely aware that USDOC was considering this data. First, the respondents were on notice that USDOC might rely on Tenaris's profit margin *before* USDOC's preliminary determination in this investigation. Both HYSCO and NEXTEEL had the opportunity to, and did, comment on the use of this information for purposes of USDOC's preliminary determination.[158] Both respondents also knew "that after the preliminary determination, [USDOC] intend[ed] to continue to explore other possible options for CV profit for both respondents."[159] Finally, both HYSCO and NEXTEEL had the opportunity to, and did, comment on the use of this information prior to and for purposes of USDOC's final determination.[160]

19. For these reasons, the Panel should reject Korea's effort to expand the disclosure obligation of Article 6.9 to require an investigating authority to provide a notice of acceptance every time an interested party places a document in the record of an investigation. The Panel should also reject Korea's claim that the information contained in the Tenaris financial statement was not disclosed in a manner consistent with the obligations provided for Article 6.9.

[158] Pre-Preliminary Comments of NEXTEEL, pp. 17-26 (Exhibit USA-10) (**BCI**); Pre-Preliminary Comments of HYSCO, pp. 16-25 (Exhibit USA-11) (**BCI**); Pre-Preliminary Rebuttal Comments of NEXTEEL, pp. 3-10 (Exhibit USA-13); Pre-Preliminary Rebuttal Comments of HYSCO, pp. 3-10 (Exhibit USA-14).

[159] Preliminary Decision Memorandum, p. 22 (Exhibit KOR-05).

[160] NEXTEEL Case Brief (Exhibit USA-22); NEXTEEL's Rebuttal Brief (Exhibit USA-23); HYSCO Case Brief, pp. 41-55 (Exhibit USA-24); HYSCO Rebuttal Brief, pp. 34-41 (Exhibit USA-25); OCTG Hearing Transcript (June 26, 2014), pp. 112-122 (Exhibit KOR-32).