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

REPORT OF THE PANEL

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US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
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US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697
US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, p. 4051
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US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)	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, DSR 2007:IX, p. 3609
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US – Washing Machines	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/R and Add.1, adopted 26 September 2016, as modified by Appellate Body Report WT/DS464/AB/R
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
US – Zeroing (Japan) (Article 21.5 – Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/AB/RW, adopted 31 August 2009, DSR 2009:VIII, p. 3441

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the GATT 1994
BCI	Business Confidential Information
CV	Constructed value
CV profit	The amount for profit used in constructed normal value
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
OCTG	Oil country tubular goods
POI	Period of investigation
SG&A	Sales, general, and administrative expenses
USCIT	United States Court of International Trade
USDOC	United States Department of Commerce
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

1 INTRODUCTION

1.1 Complaint by Korea

1.1. On 22 December 2014, Korea requested consultations with the United States pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Article 17 of the Agreement on Implementation of Article VI of the GATT 1994 (Anti-Dumping Agreement) with respect to the measures and claims set out below.[1]

1.2. Consultations were held on 21 January 2015, but failed to resolve the dispute.

1.2 Panel establishment and composition

1.3. On 23 February 2015, Korea requested the establishment of a panel pursuant to Articles 4.7 and 6 of the DSU, Article XXIII of the GATT 1994, and Article 17.4 of the Anti-Dumping Agreement with standard terms of reference.[2] At its meeting on 25 March 2015, the Dispute Settlement Body (DSB) established a panel pursuant to the request of Korea, in accordance with Article 6 of the DSU.[3]

1.4. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Korea in document WT/DS488/5 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[4]

1.5. Following the agreement of the parties, the Panel was composed on 13 July 2015 as follows[5]:

Chairperson: Mr John Adank

Members: Mr Abd El Rahman Ezz El Din Fawzy
Mr Gustav Brink

1.6. On 5 September 2016, the Chairperson informed the Chairman of the DSB that, in light of his appointment as Director of the Legal Affairs Division of the WTO Secretariat, he had decided to resign forthwith from the Panel. Following the resignation of the Chairperson, the parties on 15 September 2016 agreed on the appointment of a new Chairperson. Accordingly, the composition of the Panel is as follows[6]:

Chairperson: Mr Crawford Falconer

Members: Mr Abd El Rahman Ezz El Din Fawzy
Mr Gustav Brink

1.7. Canada, China, the European Union, India, Mexico, the Russian Federation, and Turkey notified their interest in participating in the Panel proceedings as third parties.[7]

[1] Korea's request for consultations, WT/DS488/1 (Korea's consultations request).
[2] Korea's request for the establishment of a panel, WT/DS488/5 (Korea's panel request).
[3] DSB, Minutes of meeting held on 25 March 2015, circulated on 1 May 2015, WT/DSB/M/359.
[4] Constitution note of the Panel, WT/DS488/6.
[5] Constitution note of the Panel, WT/DS488/6.
[6] Note by the Secretariat, WT/DS488/8.
[7] Constitution note of the Panel, WT/DS488/6.

1.3 Panel proceedings

1.3.1 General

1.8. After consultation with the parties, the Panel adopted its Working Procedures[8] and timetable on 30 October 2015. The timetable was revised during the course of the panel proceeding in light of subsequent developments.[9]

1.9. The Panel began its work on this dispute later than it would have wished due to staff constraints in the WTO Secretariat. The Panel held a first substantive meeting with the parties on 20-21 July 2016. A session with the third parties took place on 21 July 2016. Following a delay as a result of the need to appoint a new Chairperson, the Panel held a second substantive meeting with the parties on 2-3 November 2016. On 16 December 2016, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 5 April 2017. The Panel issued its Final Report to the parties on 10 May 2017.

1.3.2 Additional working procedures on Business Confidential Information (BCI)

1.10. After consultation with the parties, the Panel adopted, on 30 October 2015, additional working procedures for the protection of BCI.[10]

2 FACTUAL ASPECTS

2.1 The measures at issue

2.1. Korea challenges the "laws, regulations, administrative procedures and other measures"[11] through which the United States maintains a "viability test" in anti-dumping investigations, administrative reviews, and other segments of anti-dumping proceedings as such, and as applied in the investigation initiated on 29 July 2013 which is at issue in this dispute (underlying investigation).[12]

2.2. Further, Korea challenges certain aspects of the final anti-dumping measure imposed by the United States on imports of oil country tubular goods (OCTG) from Korea following a final determination of dumping by the United States Department of Commerce (USDOC) in the underlying investigation.[13] Korea also challenges certain conduct of the USDOC during the course of the underlying investigation.

2.3. In addition, Korea challenges the USDOC's determination dated 22 February 2016 in a remand proceeding (remand determination), which was issued while this dispute was pending before the Panel.[14] The remand proceeding was undertaken by the USDOC following a decision by

[8] Working Procedures, Annex A-1.
[9] The timetable was revised on 12 November 2015, 8 April 2016, 16 September 2016, 13 October 2016, and 15 December 2016.
[10] Additional Working Procedures Concerning Business Confidential Information, Annex A-2.
[11] Korea asserts that these "other measures" include any other related or subsequent measures that enable or implement the so-called "viability test" in anti-dumping investigations, administrative reviews, and other segments of anti-dumping proceedings. (Korea's first written submission, para. 33 and fn 58).
[12] Korea's first written submission, paras. 33-40.
[13] Korea's first written submission, para. 42. In particular, Korea challenges the imposition of anti-dumping duties on OCTG pursuant to the following instruments: (a) USDOC, Certain oil country tubular goods from the Republic of Korea, Final Determination of sales at less than fair value and negative final determination of critical circumstances, *United States Federal Register*, Vol. 79, No. 138 (18 July 2014), p. 41983 (Final Determination), (Exhibit KOR-24); (b) USDOC, Issues and Final Decision Memorandum for the Final Affirmative Determination in the less than fair value investigation of certain oil country tubular goods from the Republic of Korea, 10 July 2014 (Final Decision Memorandum), (Exhibit KOR-21); and (c) USDOC, Certain Oil Country Tubular Goods from certain countries: Antidumping Duty Orders; and Certain Oil Country Tubular Goods From the Socialist Republic of Vietnam: Amended Final Determination of sales at less than fair value, *United States Federal Register*, Vol. 79, No. 175 (10 September 2014), p. 53691 (Anti-Dumping Duty Order), (Exhibit KOR-59).
[14] Korea's second written submission, para. 357; opening statement at the second meeting of the Panel, para. 89.

the United States Court of International Trade (USCIT) on review of the same USDOC final determination of dumping challenged by Korea in this dispute. The USCIT found certain aspects of that determination to be contrary to US laws and regulations, and remanded that determination to the USDOC, directing it to reconsider those aspects of the determination that were found to be contrary to US laws and regulations.

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. Korea requests the Panel to find as follows[15]:

a. With respect to the "viability test":

i. the "viability test" is inconsistent with Article 2.2 of the Anti-Dumping Agreement as such because it imposes a rigid quantitative test under which a third-country market is automatically disqualified as a comparison market for determining normal value if the respondents' sales to that market are less than 5% of its export sales volume to the United States; and

ii. the USDOC acted inconsistently with Article 2.2 of the Anti-Dumping Agreement by applying the "viability test" in the underlying investigation and disqualifying the respondents' sales to third-country markets in determining the normal value only because the volume of these sales constituted less than 5% of the volume of respondents' export sales to the United States.

b. With respect to the USDOC's determination of dumping in the underlying investigation:

i. the USDOC acted inconsistently with the *chapeau* of Article 2.2.2 of the Anti-Dumping Agreement because it did not use actual data of the respondents to calculate the respondents' constructed value (CV) profit rate[16], although the respondents' actual home market and third-country market profit data was available on the record of the investigation;

ii. the USDOC acted inconsistently with Articles 2.2.2(i) and (iii) of the Anti-Dumping Agreement because it interpreted and applied "same general category of products" in an impermissibly narrow manner such that it was not broader than its definition of "like products";

iii. the USDOC acted inconsistently with Article 2.2.2(iii) of the Anti-Dumping Agreement because it failed to calculate a "profit cap" as required by that Article. By failing to calculate a profit cap, the USDOC also failed to ensure that the CV profit was "reasonable" as required under Article 2.2;

iv. the USDOC acted inconsistently with Article 2.2.2(iii) of the Anti-Dumping Agreement because the use of Tenaris as a source of CV profit data did not constitute a "reasonable method" and did not reflect the profit normally realized by other exporters or producers on sales of products in the domestic market of the country of origin;

v. the USDOC acted inconsistently with Article 2.4 of the Anti-Dumping Agreement because it did not make a fair comparison between the export price and the normal value as a result of the failure to make due allowances for significant differences between the Korean respondents and Tenaris that affected price comparability;

vi. the USDOC acted inconsistently with Article 2.3 of the Anti-Dumping Agreement by improperly disregarding NEXTEEL's export prices to the Customer[17] without a proper

[15] Korea's first written submission, paras. 277-280; response to Panel question No. 40, para. 13.
[16] Article 2.2.2 refers to the methodologies that an investigating authority shall use in determining the amount for profit in constructed normal value. We refer to this profit amount as "CV profit" in this Report.
[17] The parties refer to **[[***]]** and/or **[[***]]** as the "Customer". As indicated in paragraph 7.135 we refer to them as Company A and Company B.

finding of "association" or "compensatory agreement", and without conducting any assessment of whether those prices were "unreliable";

vii. the USDOC acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement because it did not calculate NEXTEEL's costs on the basis of the records kept by NEXTEEL, based on an erroneous determination that NEXTEEL was associated with its supplier, when NEXTEEL's cost records satisfied the requirements of this provision; and

viii. the USDOC acted inconsistently with Article 12.2.2 of the Anti-Dumping Agreement because the final determination in the underlying investigation did not contain all relevant information on the reasons that led to the imposition of anti-dumping duties. In particular, the final determination did not provide sufficient or reasoned explanations regarding the USDOC's improperly narrow definition of "same general category", its selection of the Tenaris financial statements as a CV profit data source, and its finding of affiliation between NEXTEEL and its supplier and customer, especially in light of opposing evidence presented by the Korean respondents.

c. With respect to the proceedings in the underlying investigation:

i. the USDOC acted inconsistently with Articles 6.2, 6.4, and 6.9 of the Anti-Dumping Agreement by failing to make a determination regarding the placement of the Tenaris financial data on the record until its final determination, when it was too late for the Korean respondents to prepare presentations based on that data and to defend their interests regarding an issue that was relevant to the USDOC's dumping margin determinations for the Korean respondents;

ii. the USDOC acted inconsistently with Articles 6.4 and 6.9 of the Anti-Dumping Agreement by failing to disclose several letters that it had received from various government and industry representatives until immediately before the deadline for interested parties to submit their final presentations to the USDOC, depriving the Korean respondents of sufficient opportunity to defend their interests; and

iii. the USDOC acted inconsistently with Articles 6.10 and 6.10.2 of the Anti-Dumping Agreement because the USDOC provided no reasonable basis to conclude that it only had resources to examine two mandatory respondents and provided no reasoned explanation for why it was unable to examine any voluntary respondents.

d. In addition, Korea requests the Panel to find that the United States failed to comply with its obligations under Article I of the GATT 1994 because the USDOC's treatment of Korean respondents *vis-à-vis* respondents in other parallel OCTG investigations resulted in an advantage to OCTG products from other countries that was not extended immediately and unconditionally to OCTG produced in Korea. Furthermore, Korea requests the Panel to find that the USDOC's conduct was inconsistent with Article X:3(a) of the GATT 1994 because the USDOC's administration of laws, regulations, decisions, and rulings was not uniform, impartial, or reasonable.

e. Korea requests that, as a consequence of the findings requested above, the Panel find that the United States has acted inconsistently with Articles 1, 9.3, and 18.4 of the Anti-Dumping Agreement, Article VI of the GATT 1994, and Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement).

f. With respect to the USDOC's remand determination, Korea requests the Panel to find that:

i. the USDOC acted inconsistently with the *chapeau* of Article 2.2.2 of the Anti-Dumping Agreement because it did not use actual data pertaining to the sales of the like product in the ordinary course of trade;

ii. the USDOC acted inconsistently with Article 2.2.2(i) and (iii) of the Anti-Dumping Agreement because it relied on an impermissibly narrow definition of the "same general category of products";

iii. the USDOC acted inconsistently with Article 2.2.2(iii) of the Anti-Dumping Agreement because by determining the profit rates of the Korean respondents on the basis of the profits earned by Tenaris and OAO TMK, which had no production or sales of OCTG in Korea, it failed to use a "reasonable" method to calculate the profit rates of the Korean respondents;

iv. the USDOC acted inconsistently with Article 2.2.2(iii) of the Anti-Dumping Agreement because it calculated a profit cap based on the average of the profit rates in the 2012 financial statement of Tenaris and the profit rates of OAO TMK; and

v. the USDOC acted inconsistently with Article 2.4 of the Anti-Dumping Agreement because instead of rejecting the Tenaris financial data or accounting for the differences between Tenaris and the Korean respondents, the USDOC averaged the Tenaris profit rate with that of another foreign producer that suffered from the same flaws as Tenaris.

3.2. Korea further requests, pursuant to Article 19.1 of the DSU that the Panel recommend that the United States bring its measures into conformity with the Anti-Dumping Agreement, the GATT 1994, and the WTO Agreement.

3.3. The United States asserts that the USDOC remand determination challenged by Korea is outside the Panel's terms of reference. The United States requests the Panel to reject Korea's claims in this dispute in their entirety.

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 19 of the Working Procedures adopted by the Panel (see Annexes B-1 to B-4 and C-1 to C-4).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of China, the European Union, and Turkey are reflected in their executive summaries, provided in accordance with paragraph 20 of the Working Procedures adopted by the Panel (see Annexes D-1 to D-3). Canada, India, Mexico, and the Russian Federation did not submit written or oral arguments to the Panel.

6 INTERIM REVIEW

6.1. On 5 April 2017, the Panel issued its Interim Report to the parties. On 19 April 2017, Korea and the United States each submitted written requests for the Panel to review precise aspects of the Interim Report. Neither party requested an interim review meeting. On 27 April 2017, both parties submitted comments on the other party's requests for review.

6.2. The parties' requests made at the interim review stage as well as the Panel's discussion and disposition of those requests are set out in Annex F-1.

7 FINDINGS

7.1 General principles regarding treaty interpretation, the standard of review, and burden of proof

7.1.1 Treaty interpretation

7.1. Article 3.2 of the DSU provides that the WTO dispute settlement system serves to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". Article 17.6(ii) of the Anti-Dumping Agreement similarly

requires panels to interpret that Agreement's provisions in accordance with the customary rules of interpretation of public international law.[18] It is generally accepted that the principles codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties are such customary rules.

7.1.2 Standard of review

7.2. Article 11 of the DSU provides, in relevant part, that:

> [A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.

In addition, Article 17.6 of the Anti-Dumping Agreement sets forth the special standard of review applicable to disputes under the Anti-Dumping Agreement:

> (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
>
> (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

Thus, Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement together establish the standard of review we will apply with respect to both the factual and the legal aspects of the present dispute.

7.3. The Appellate Body has explained that where a panel is reviewing an investigating authority's determination, the "objective assessment" standard in Article 11 of the DSU requires a panel to review whether the authority has provided a reasoned and adequate explanation as to: (a) how the evidence on the record supported their factual findings; and (b) how those factual findings support the overall determination.[19] In the context of Article 17.6(i) of the Anti-Dumping Agreement, the Appellate Body has explained that while the text of this provision is couched in terms of an obligation on a panel, in effect it defines when an investigating authority can be considered to have acted inconsistently with the Anti-Dumping Agreement in the course of its "establishment" and "evaluation" of the relevant facts.[20] Therefore, a panel must assess if the establishment of the facts by the investigating authority was proper and if the evaluation of those facts by that authority was unbiased and objective.[21] If these broad standards have not been met, a panel must hold the investigating authority's establishment or evaluation of the facts to be inconsistent with the Anti-Dumping Agreement.[22]

7.4. In reviewing an investigating authority's determination, a panel should not conduct a *de novo* review of the evidence, nor substitute its judgment for that of the investigating authority. A panel must limit its examination to the evidence that was before the investigating authority during the course of the investigation[23] and must take into account all such evidence submitted by the parties to the dispute.[24] At the same time, a panel must not simply defer to the conclusions of the

[18] Article 17.6(ii) of the Anti-Dumping Agreement also provides that if a panel finds that a provision of the Anti-Dumping Agreement admits of more than one permissible interpretation, it shall uphold a measure that rests upon one of those interpretations.
[19] Appellate Body Reports, *US – Countervailing Duty Investigation on DRAMS*, para. 186; and *US – Lamb*, para. 103.
[20] Appellate Body Report, *US – Hot-Rolled Steel*, para. 56.
[21] Appellate Body Report, *US – Hot-Rolled Steel*, para. 56.
[22] Appellate Body Report, *US – Hot-Rolled Steel*, para. 56.
[23] Article 17.5(ii) requires a panel to examine the matter based on the facts made available to the authorities.
[24] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 187 and 188.

investigating authority; a panel's examination of those conclusions must be "in-depth" and "critical and searching".[25]

7.5. The Appellate Body has clarified a panel's standard of review of the facts pursuant to the above provisions in the following terms:

> It is well established that a panel must neither conduct a *de novo* review nor simply defer to the conclusions of the national authority. A panel's examination of those conclusions must be critical and searching, and be based on the information contained in the record and the explanations given by the authority in its published report. A panel must examine whether, in the light of the evidence on the record, the conclusions reached by the investigating authority are reasoned and adequate. What is "adequate" will inevitably depend on the facts and circumstances of the case and the particular claims made, but several general lines of inquiry are likely to be relevant. The panel's scrutiny should test whether the reasoning of the authority is coherent and internally consistent. The panel must undertake an in-depth examination of whether the explanations given disclose how the investigating authority treated the facts and evidence in the record and whether there was positive evidence before it to support the inferences made and conclusions reached by it. The panel must examine whether the explanations provided demonstrate that the investigating authority took proper account of the complexities of the data before it, and that it explained why it rejected or discounted alternative explanations and interpretations of the record evidence. A panel must be open to the possibility that the explanations given by the authority are not reasoned or adequate in the light of other plausible alternative explanations, and must take care not to assume itself the role of initial trier of facts, nor to be passive by "simply *accept[ing]* the conclusions of the competent authorities".[26]

7.1.3 Burden of proof

7.6. The general principles applicable to the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO Agreement must assert and prove its claim.[27] Therefore, as the complaining party in this proceeding, Korea bears the burden of demonstrating that the challenged aspects of the measures at issue are inconsistent with the Anti-Dumping Agreement. The Appellate Body has stated that a complaining party will satisfy its burden when it establishes a *prima facie* case, namely a case which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party.[28] Finally, it is generally for each party asserting a fact to provide proof thereof.[29]

7.2 Whether the "viability test" is inconsistent with Article 2.2 of the Anti-Dumping Agreement

7.7. US law provides that where domestic market sales cannot be used to determine normal value, third-country export sales of the foreign like product can be used for this purpose, subject to certain conditions.[30] One of these conditions, which we refer to as the "viability test", is set out in 19 U.S.C. §1677b(a)(1)(B)(ii), and provides that third-country export sales of the foreign like product can be used for determining normal value if such sales are 5% or more of the quantity or

[25] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.
[26] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93 (quoting Appellate Body Report, *US – Lamb*, para. 106). (emphasis from the original quote; fn omitted)
[27] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16.
[28] Appellate Body Report, *EC – Hormones*, paras. 98 and 104.
[29] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16.
[30] Under 19 U.S.C. § 1677b(a)(1)(B)(ii), the USDOC is permitted to use third-country sales for normal value determination where three conditions are fulfilled: (a) the third-country sales price is representative; (b) the aggregate quantity (or, if quantity is not appropriate, value) of the foreign like product sold by the exporter or producer in such third country is 5% or more of the aggregate quantity (or value) of the subject merchandise sold in the United States or for export to the United States; and (c) the USDOC does not determine that the particular market situation in such other third country prevents a proper comparison with the export price or constructed export price.

value of sales of the subject merchandise to or in the United States.[31] Korea refers to this requirement under the "viability test" as the "minimum quantitative threshold".

7.8. Korea brings two claims regarding the "viability test" under Article 2.2 of the Anti-Dumping Agreement. First, it contends that Article 2.2 of the Anti-Dumping Agreement, unlike the "viability test" provided for under US law, does not stipulate that an investigating authority may use third-country export sales to determine the normal value only when such a minimum quantitative threshold is met. Korea claims that the existence of such a threshold in US law under the "viability test", which is not found in the Anti-Dumping Agreement, renders the "viability test" "as such" inconsistent with Article 2.2. Second, Korea claims that the "viability test" was inconsistent with Article 2.2 "as applied" in the underlying investigation.

7.9. In the underlying investigation, the USDOC, after concluding that neither HYSCO nor NEXTEEL had a viable home market[32], found in its final determination, on the basis of application of the "viability test", that neither HYSCO nor NEXTEEL had a viable third-country market during the period of investigation (POI), and therefore proceeded to determine normal value on the basis of constructed normal value.[33]

7.2.1 Provision at issue

7.10. Article 2.2 reads:

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

7.2.2 Whether the "viability test" is as such inconsistent with Article 2.2 of the Anti-Dumping Agreement

7.2.2.1 Main arguments of the parties

7.11. Korea argues that the minimum quantitative threshold for use of third-country sales in determining normal value in US law is an additional requirement not contemplated in the Anti-Dumping Agreement and is therefore inconsistent with Article 2.2.[34] According to Korea, the existence of a choice between the use of constructed normal value and third-country sales to

[31] The USDOC regulations implementing the statute provide that:

> *In general*. The Secretary [of the USDOC] will consider the exporting country or a third country as constituting a viable market if the Secretary is satisfied that the sales of the foreign like product in that country are of sufficient quantity to form the basis of normal value.

(19 C.F.R. § 351.404(b)(1) (emphasis original))

The regulations further explain that sufficient quantity "normally" means that the aggregate quantity (or if quantity is not appropriate, value) of the foreign like product sold by an exporter or producer in a country is 5% or more of the aggregate quantity (or value) of its sales of the subject merchandise to the United States. (19 C.F.R. § 351.404(b)(2)).

[32] This conclusion is not at issue in this dispute.

[33] Final Decision Memorandum, (Exhibit KOR-21), p. 14.

[34] Korea's first written submission, paras. 57-59 (referring to Appellate Body Reports, *India – Patents (US)*, para. 45; and *Mexico – Anti-Dumping Measures on Rice*, para. 315).

determine normal value does not absolve the United States of its obligation to ensure that its laws, regulations, and administrative procedures relating to each of these methods are consistent with Article 2.2.[35]

7.12. The United States contends that because the use of third-country sales as a method to determine normal value is itself optional, Article 2.2 permits Members to use their own internal criteria to decide whether to use that method or not.[36] The United States submits that even if Article 2.2 did not permit an investigating authority to set its own criteria, the term "appropriate third country" in the provision allows the authority to select a suitable third country for purposes of normal value determination by reference to indices such as volume of sales.[37]

7.2.2.2 Main arguments of third parties

7.13. The European Union submits that an investigating authority's discretion to opt for either third-country sales prices or constructed normal value in determining normal value under Article 2.2 is contextually informed by footnote 2. Further, the absence of a sufficient volume of exports of the like product to an appropriate third country could justify a finding that the price of those exports was not "representative".[38]

7.2.2.3 Evaluation by the Panel

7.14. The main issue before us is whether the fulfilment of a minimum quantitative threshold as a condition for use of third-country sales to determine normal value is inconsistent with Article 2.2 of the Anti-Dumping Agreement.

7.15. We begin our analysis by considering the requirements of Article 2.2. The text of Article 2.2 makes it clear that a choice exists between the use of third-country sales and constructed normal value for the determination of normal value. Article 2.2 provides that where certain circumstances set out in the provision preclude the use of home market sales in determining normal value, "the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative *or* with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits".[39] The use of the word "or", in the relevant part of Article 2.2, implies that Members have a choice between third-country export prices and the constructed normal value for purposes of normal value determination. The dictionary meaning of "or" is "introducing the second of two, or all but the first or only the last of several, alternatives".[40] Article 2.2 is therefore clearly intended to provide Members with alternatives to home market sales prices for normal value determination to ensure that an anti-dumping investigation can be completed. In this regard, the Appellate Body has stated that where normal value cannot be determined on the basis of home market sales, Article 2.2 specifies two "alternative bases" for calculation of normal value.[41]

7.16. That there is a free choice between the two methods is confirmed by the language of Article VI:1(b) of the GATT 1994, which provides an option between "either" the highest comparable price for the like product for export to any third country in the ordinary course of trade "or" the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit. We note that the parties agree that Article 2.2 allows Members a choice between the two alternate methods and that there is no hierarchy between the two options.[42]

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[35] Korea's opening statement at the first meeting of the Panel, paras. 25-27.
[36] United States' first written submission, para. 45.
[37] United States' second written submission, para. 9 (referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 552).
[38] European Union's third-party submission, para. 9.
[39] Emphasis added.
[40] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 2016.
[41] Appellate Body Report, *EC – Tube or Pipe Fittings*, paras. 93-95.
[42] Korea's first written submission, para. 54; response to Panel question No. 42, para. 21; and United States' first written submission, paras. 44 and 45.

7.17. While Korea agrees that Members have a choice between the two methods and that no hierarchy exists between them, it contends that the criteria for making that choice are already set out in Article 2.2 and cannot be altered or added to.[43] The United States argues, on the other hand, that even if Article 2.2 did not permit a Member to set its own criteria, the term "appropriate third country" in the provision allows it to select a suitable third country for purposes of normal value determination.[44]

7.18. We disagree with Korea that the criteria for choosing between the two methods are set out in Article 2.2. Article 2.2 sets out the criteria for *use* of either of the two methods. However, criteria for the *use* of the two methods are not the same as criteria for *choosing between* those two methods. In the process of arriving at a *choice between* the two methods, an investigating authority will assess the criteria for use of the methods to see if they can be satisfied. That will show whether either or both of the two methods can be used, but will not necessarily determine which to use. In providing for a choice, Article 2.2 neither expressly limits nor directs how the authority should reach that choice. Thus, the authority is free to choose which method to use based on its own criteria, should it choose to have them. Therefore, we consider that Article 2.2 does not preclude an investigating authority from establishing its own criteria for choosing which method to use.

7.19. Should a Member decide to use third-country export prices as normal value, the *criteria for use* of third-country sales in Article 2.2, requiring use of a "comparable" price of the like product exported to an "appropriate" third country, which price must be "representative", must be satisfied. However, this does not affect an investigating authority's freedom to choose *whether or not* to use third-country sales as a basis for determining normal value. Moreover, Article 2.2 does not require that Members explain the basis of their choice between the two methods.

7.20. We therefore find that Article 2.2 does not impose any limitation on criteria that a Member may establish for deciding whether to use one or the other of the alternative methods and that the imposition of the 5% threshold as a criterion for use of third-country sales in US law is thus not inconsistent "as such" with Article 2.2 of the Anti-Dumping Agreement.[45]

7.2.3 Whether the "viability test" as applied in the underlying investigation is inconsistent with Article 2.2 of the Anti-Dumping Agreement

7.2.3.1 Main arguments of the parties

7.21. Korea's principal arguments are set out below:

a. The USDOC automatically excluded from consideration the Korean respondents' third-country market sales that did not meet the 5% threshold without any regard to whether the prices of these sales were representative in accordance with Article 2.2 of the Anti-Dumping Agreement.[46]

b. Moreover, the USDOC's questionnaire deprived Korean respondents of the opportunity to submit third-country sales data or describe its third-country market sales based on a rigid application of the "viability test".[47]

7.22. The United States contends that Article 2.2 does not require the use of third-country sales where the conditions for use of constructed normal value as a method for determining normal value are satisfied. It further argues that Article 2.2 does not require that an investigating authority use or seek third-country sales data. In any event, the USDOC did not prohibit

[43] Korea's response to Panel question No. 1, paras. 2 and 3.
[44] United States' second written submission, para. 9 (referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 552).
[45] We do not consider it necessary to assess whether there are grounds to maintain an "as such" claim because the measure at issue does not appear, in any instance, to be inconsistent with Article 2.2.
[46] Korea's first written submission, para. 66.
[47] Korea's first written submission, para. 66.

respondents from submitting data and no evidence exists that the USDOC would have refused third-country sales data had it been submitted.[48]

7.2.3.2 Evaluation by the Panel

7.23. Article 2.2 does not impose any obligation on a Member to examine whether a respondent's third-country export prices are representative if it has opted to use constructed normal value to determine normal value. If a Member has decided not to use third-country exports to determine normal value for a particular reason, including because it does not consider that market to be viable, nothing in Article 2.2 requires it to nonetheless assess whether all the conditions for use of that method set out in the provision are fulfilled.

7.24. As discussed under paragraphs 7.15-7.19 above, the use of third-country sales as a method to determine normal value is optional and a Member may choose, for its own reasons, to not use it. We have found that the "viability test" is not, as such, inconsistent with Article 2.2. Therefore, we find that the USDOC in applying that test in the underlying investigation and concluding on the basis of that application that it would not use third-country sales for determining normal value, did not act inconsistently with Article 2.2.

7.2.4 Conclusion

7.25. For the foregoing reasons, we find that Korea has not established that the "viability test" is inconsistent with Article 2.2 of the Anti-Dumping Agreement, either as such, or as applied in the underlying investigation.

7.3 Whether the USDOC's determination of profit rates for the Korean respondents in the final and remand determinations is inconsistent with Articles 2.2.2 and 2.4 of the Anti-Dumping Agreement

7.26. In its first written submission, Korea claimed that the USDOC's profit rate determination in the final determination in the underlying investigation was inconsistent with the *chapeau* of Articles 2.2.2, 2.2.2(i), and 2.2.2(iii) of the Anti-Dumping Agreement. Korea also claimed that the USDOC's failure to make adjustments to the profit rates of the Korean respondents in this determination resulted in a violation of Article 2.4 of the Anti-Dumping Agreement.

7.27. This final determination was challenged before the US Court of International Trade (USCIT), which issued a remand order directing the USDOC to, *inter alia*, reconsider certain aspects of its profit rate determination in the underlying investigation.[49] The USDOC initiated a remand investigation pursuant to this order, and on 22 February 2016 (that is, after Korea had already filed its panel request and its first written submission in these proceedings) issued its remand determination.[50] This determination was affirmed by the USCIT in August 2016. The profit rate for the Korean respondents was reduced from 26.11% in the final determination to 16.24% in the remand determination due to revisions in the methodology used to determine this profit rate.[51]

7.28. Korea considers this remand determination to be within our terms of reference, and the USDOC's profit rate determination therein to be inconsistent with the *chapeau* of Articles 2.2.2, 2.2.2(i), 2.2.2(iii), and 2.4 of the Anti-Dumping Agreement. The United States argues, for the reasons set out below, that the remand determination is outside our terms of reference, and asks us to make no rulings in this regard.

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[48] United States' first written submission, para. 61.

[49] US Court of International Trade, Husteel Co. Ltd., Nexteel Co. Ltd., and Hyundai Hysco v. United States, Commerce's final determination in antidumping investigation sustained in part and remanded in part to reconsider selection of mandatory respondents and constructed value profit margin, Slip Op. 15-100, (Exhibit KOR-25), p. 84.

[50] USDOC, Final Determination pursuant to court remand, Husteel Co. Ltd., et al., v. United States, Ct. No. 14-215, Slip Op. 15-100 (USDOC's Remand Determination), (Exhibit KOR-69), p. 85.

[51] USDOC's Remand Determination, (Exhibit KOR-69), p. 85. The United States confirmed during the second substantive meeting that a new anti-dumping order specifying new anti-dumping duty rates, which had changed as result of the remand determination, has been published in the US Federal Register.

7.29. In our evaluation of Korea's claims regarding the USDOC's final and remand determinations of profit rates, we will first address Korea's claims with respect to the final determination. Then, we will examine whether the remand determination falls within our terms of reference. Only if we find that it does will we proceed to address Korea's claims regarding this determination.

7.3.1 Provisions at issue

7.30. Article 2.2.2 of the Anti-Dumping Agreement provides:

> For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:
>
> > (i) the actual amounts incurred and realized by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products;
> >
> > (ii) the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;
> >
> > (iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.

7.31. Article 2.4 of the Anti-Dumping Agreement provides:

> A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.[*] In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.
>
> [*fn original] It is understood that some of the above factors may overlap, and authorities shall ensure that they do not duplicate adjustments that have been already made under this provision.

7.3.2 USDOC's profit rate determination in the underlying investigation

7.32. In the underlying investigation, the USDOC constructed the normal value of the Korean respondents based on their cost of production. In doing so, it determined the profit rate for these respondents using the profit data of a surrogate company, Tenaris, rather than the profit data of the Korean respondents whose normal value was being constructed. Korea claims that the USDOC's rejection of the profit data of the Korean respondents and its use of the profit data of Tenaris were inconsistent with Article 2.2.2 of the Anti-Dumping Agreement, and specifically that the USDOC acted inconsistently with the following requirements set out in that provision:

a. The *chapeau* of Article 2.2.2 because:

   i. the USDOC had actual data on record pertaining to profits realized by the Korean respondents on home market sales of the like product but failed to use it; and

   ii. the USDOC had actual data on record pertaining to profits realized by the Korean respondents on third-country sales of the like product but again failed to use it.

b. Articles 2.2.2(i) and 2.2.2(iii) because the USDOC applied an impermissibly narrow interpretation of the term "same general category of products" which affected its ability to determine profits on the basis of these provisions.

c. Article 2.2.2(iii) because the USDOC failed to calculate a profit cap and also because its use of the Tenaris profit data to determine the profit for the Korean respondents was not a "reasonable method" within the meaning of that provision.

d. Article 2.2 because as a consequence of its failure to determine profits consistently with Article 2.2.2(iii), the USDOC failed to ensure that the profit amount used in constructing normal value was a "reasonable amount".

e. Article 2.4 because the USDOC, having decided to use the Tenaris profit rate for constructing the Korean respondents' normal value, failed to make due allowance for the difference between that constructed normal value, which reflected the Tenaris profit rate, and the export price, which reflected the Korean respondents' own profit rates, and make appropriate adjustment.

7.33. The United States rejects Korea's claims.

7.3.2.1 Whether the USDOC's failure to use "actual data" as a CV profit source is inconsistent with Article 2.2.2

7.3.2.1.1 Main arguments of the parties

7.34. Korea's main arguments are set out below:

a. Low volume of sales is not a valid reason under the *chapeau* of Article 2.2.2 for an investigating authority to refuse to use the respondents' actual data to determine CV profit.[52] Therefore, the USDOC applied an improper basis for disregarding the Korean respondents' actual data.

b. Moreover, the USDOC had access to actual profit data pertaining to the like product from both the respondents' home market and third-country market sales. Only when this actual data is not available would the USDOC be able to use one of the alternative methods provided under the subparagraphs of Article 2.2.2 to determine the CV profit.[53]

7.35. The main arguments of the United States are as follows:

a. Neither of the two Korean respondents had a viable home or third-country market during the period of investigation, as a result of which their home and third-country market

[52] Korea's first written submission, para. 76 (referring to Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 101).

[53] Korea's first written submission, para. 77 (referring to Response of Hyundai HYSCO to Section A of the Department's 27 August 2013 Questionnaire, 17 September 2013, (Exhibit KOR-60) (BCI), p. A-2, Response of NEXTEEL to the Department's 27 August 2013 Questionnaire, 17 September 2013, (Exhibit KOR-61) (BCI), p. A-2; HYSCO Cost Verification Exhibit, CVE 15 March 2014, (Exhibit KOR-27) (BCI); and NEXTEEL Cost Verification Exhibit, CVE 8 March 2014, (Exhibit KOR-28) (BCI)).

sales could not serve as a basis for normal value determination, including with respect to the CV profit.[54]

b. In addition, actual profit data pertaining to sales in the ordinary course of trade of the like product in the domestic market required to determine the CV profit did not exist in the record of the investigation at issue.[55]

c. The *chapeau* of Article 2.2.2 does not obligate an investigating authority to consider third-country sales for purposes of determining CV profit.[56]

7.3.2.1.2 Main arguments of third parties

7.36. The European Union submits that the USDOC was entitled to use one of the three alternative methods provided in subparagraphs (i)-(iii) of Article 2.2.2 to the extent that it first ascertained that actual sales, general, and administrative expenses (SG&A) and profit data for sales in the ordinary course of trade did not exist for the exporters and the like products under investigation.[57]

7.3.2.1.3 Evaluation by the Panel

7.37. The *chapeau* of Article 2.2.2 of the Anti-Dumping Agreement requires that, in constructing normal value, the amounts for profits determined for an exporter or producer be based on "actual data pertaining to production and sales in the ordinary course of trade of the like product". Only when the profit amounts "cannot be determined on this basis" is an investigating authority permitted to determine profit amounts on the basis of the alternative methods set out in Articles 2.2.2(i)-(iii) of the Agreement. In the underlying investigation, the USDOC concluded that it could not establish the CV profit amounts for the Korean respondents on the basis of their "actual data pertaining to production and sales in the ordinary course of trade of the like product", i.e. OCTG. The USDOC reached this conclusion based on its determination that the Korean respondents had no viable home market sales of the like product. Korea claims that the USDOC's failure to use the Korean respondents' "actual data" as the basis for determining CV profit is inconsistent with the *chapeau* of Article 2.2.2. The United States disagrees with Korea, and contends that the USDOC had a proper basis for not using the respondents' actual data for determining CV profit amounts. The issue before us is whether the USDOC acted inconsistently with the *chapeau* of Article 2.2.2 because it did not use the Korean respondents' "actual data" pertaining to production and sales of the like product in the ordinary course of trade in either their domestic or third-country markets, as the basis for determining their CV profit.

7.38. In addressing this issue, we will consider the following:

a. whether the USDOC was permitted to reject the actual data pertaining to the Korean respondents' domestic market sales of the like product during the period of investigation, because these sales were made in "low volumes";

b. whether there was, in the USDOC's record in the underlying investigation, actual profit data pertaining to the respondents' domestic market sales of the *like product*; and

c. whether the use of the word "profits" in the *chapeau* of Article 2.2.2 suggests that when an exporter makes a *loss* rather than a *profit* on domestic sales of the like product, the data pertaining to such losses, even if "actual", need not be considered by the investigating authority.

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[54] United States' first written submission, para. 73 (referring to Final Decision Memorandum, (Exhibit KOR-21), p. 14).

[55] United States' first written submission, para. 89 (referring to USDOC, NEXTEEL Sales Verification Report, 29 May 2014, (Exhibit USA-9) pp. 16 and 17; USDOC HYSCO Sales Verification Report, 5 June 2014, (Exhibit USA-8) pp. 22 and 23; HYSCO's section A questionnaire responses, 17 September 2013, (Exhibit USA-6) (BCI), p. A-2 and exhibit A-1; and NEXTEEL's section A questionnaire responses, 17 September 2013, (Exhibit USA-7) (BCI), p. A-2 and exhibit A-1).

[56] United States' response to Panel question No. 7, para. 11.

[57] European Union's third-party submission, para. 15.

7.3.2.1.3.1 The USDOC's rejection of actual data pertaining to the Korean respondents' domestic market sales of the like product during the period of investigation because these sales were made in "low volumes"

7.39. The *chapeau* of Article 2.2.2 does not contain any explicit textual limitation on the use of actual data pertaining to sales made in low volumes as a basis for CV profit determination. The *chapeau* reads as follows:

> For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation.

It is clear from the use of the word "shall" that the investigating authority is required to base the CV profit on actual data pertaining to production and sales in the ordinary course of trade of the like product, assuming such data exists. There is nothing in the text to the effect that if those sales were made in low volumes, an investigating authority is permitted to disregard them as a basis for CV profit, provided such sales were made in the ordinary course of trade.

7.40. The Appellate Body in *EC – Tube or Pipe Fittings* reached a similar conclusion. The issue before the Appellate Body in that case was whether an investigating authority *must* exclude data from low-volume sales when determining the amounts for SG&A and profits under the *chapeau* of Article 2.2.2, having disregarded such low-volume sales for normal value determination under Article 2.2. The Appellate Body found that:

> [I]t is meaningful for the interpretation of Article 2.2.2 that Article 2.2 specifically identifies low-volume sales *in addition to* sales outside the ordinary course of trade. In contrast to Article 2.2, the chapeau of Article 2.2.2 explicitly excludes only sales outside the ordinary course of trade. The absence of any qualifying language related to low volumes in Article 2.2.2 implies that an exception for low-volume sales should not be read into Article 2.2.2.[58]

Thus, the Appellate Body concluded that a requirement that low-volume sales be disregarded as a basis for determining SG&A and profits cannot be read into the text of Article 2.2.2.[59]

7.41. The United States contends that the findings in *EC – Tube or Pipe Fittings* are inapplicable to this dispute because the issue before the Appellate Body in that case was whether an investigating authority *must exclude* data pertaining to low-volume sales when determining the amounts for SG&A and profits under the *chapeau* of Article 2.2.2. We understand the United States to argue that the issue in this dispute, in contrast, is whether an investigating authority *must include*, or perhaps *may exclude*, data pertaining to low-volume sales when determining the amounts for profit under the *chapeau* of Article 2.2.2. However, the United States' argument in this regard is contrary to the Appellate Body's clear statement in *EC – Tube or Pipe Fittings* that if actual profit data for sales in the ordinary course of trade exist for the exporter and the like product under investigation, an investigating authority *must* use that data in constructing normal value, and it *may not* construct normal value by reference to different data or by using an alternative method.[60] We therefore disagree with the United States, and consider the Appellate Body's findings in *EC – Tube or Pipe Fittings* clearly relevant to the issue before us.

7.42. We note that the panel in *EC – Salmon (Norway)* also addressed the question of whether an investigating authority *must include* data pertaining to low-volume sales when determining the amounts for profit under the *chapeau* of Article 2.2.2. The facts in *EC – Salmon (Norway)* are similar to those in the instant dispute. In that case, the European Community had excluded data pertaining to domestic sales made in low volumes when determining the profit for constructed normal value. The issue before the panel was whether that exclusion was consistent with the

[58] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 98. (emphasis original; fn omitted)
[59] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 98.
[60] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 97.

chapeau of Article 2.2.2.[61] The panel in that case, agreeing with the views of the Appellate Body in *EC – Tube or Pipe Fittings*, concluded that it was not.[62]

7.43. The United States also argues that the Appellate Body in *EC – Tube or Pipe Fittings* did not explain why low-volume sales in the domestic market are rejected as a basis for normal value determination because they do not permit proper comparison, but data derived from the same sales should be accepted for purposes of CV profit determination under Article 2.2.2.[63] It further argues that the Appellate Body did not address why data from low-volume sales, found not to permit a proper comparison in the context of Article 2.2, could nonetheless achieve the objective of permitting a proper comparison in the context of Article 2.2.2.[64]

7.44. We recognize the logic behind the United States' argument. We understand the United States to argue that the price pertaining to sales made in low-volumes in the domestic market is discarded for purposes of normal value determination under Article 2.2 because it is considered to not permit a proper comparison with the export price. To require that data from the same sales be used to determine CV profit and SG&A under Article 2.2.2 for purposes of constructing normal value would seem to reintroduce the same improper comparison through the constructed normal value. This is, in terms of overall coherence of Article 2, somewhat perplexing. But this does not allow an interpretation that does not fully comport with the express language of Article 2.2.2.

7.45. Under Article 2.2, upon the identification of low-volume sales, an investigating authority is required to either construct normal value or use third-country export prices as normal value. Therefore, the identification of low-volume sales serves as a trigger for an investigating authority to use an alternative to the *price* of those sales for normal value determination but not necessarily to exclude the *components of the price* pertaining to those sales from that determination. If an investigating authority opts to construct normal value, nothing in Article 2.2 suggests that it is required to, or may, exclude data derived from the rejected low-volume sales from that construction. Further, Article 2.2.2 requires that only *sales that are in the ordinary course of trade* be used as a basis for CV profit determination. Thus, only data from such sales, even if in low volumes, can be used in constructing normal value. Therefore, what is discarded for normal value determination under Article 2.2 is the price of *low-volume sales* but what is accepted for purposes of normal value construction under Article 2.2.2 is the amount for profit and SG&A on those *low-volume sales that are in the ordinary course of trade*.

7.46. To the extent that low-volume sales might be considered to generate a normal value that will not permit proper comparison with the export price, excluding data from such sales that are not in the ordinary course of trade as a basis for CV profit and SG&A determination under the *chapeau* of Article 2.2.2 addresses, at least in part, the overall coherence issue referred to above.

7.47. Thus, while we see the general logic behind the United States' argument, we cannot, in light of prior Appellate Body and panel findings read out of the text of the *chapeau* that the CV profit has to be based on the respondents' actual data for sales of the like product in the ordinary course of trade, even if those sales were made in low volumes. We thus conclude that the *chapeau* of Article 2.2.2 did not permit the USDOC to reject the actual data pertaining to the Korean respondents' domestic market sales of the like product in the period of investigation because these sales were made in low volumes.

7.3.2.1.3.2 Alleged lack of actual profit data pertaining to the respondents' domestic market sales of the like product, in the USDOC's record in the underlying investigation

7.48. The United States argues that the USDOC was unable to use the preferred method set out in the *chapeau* of Article 2.2.2 to determine CV profit, as actual data pertaining to the Korean respondents' sales in the ordinary course of trade of the like product was not in the record of the investigation at issue. In particular, the United States maintains that the actual profit data

[61] Panel Report, *EC – Salmon (Norway)*, para. 7.297.
[62] Panel Report, *EC – Salmon (Norway)*, para. 7.304 (referring to Appellate Body Report, *EC – Tube or Pipe Fittings*, paras. 93-102 and fn 99).
[63] United States' first written submission, para. 80.
[64] United States' first written submission, para. 85.

pertaining to the respondents' domestic market sales that was on the record did not relate to the like product, OCTG.[65]

7.49. As a threshold matter, we note that neither in the USDOC's final determination nor in its preliminary determination is there any reference to this alleged lack of relevant data as a reason for its inability to use the preferred method for CV profit determination. The USDOC attributed its inability to determine CV profit using the preferred method exclusively to the absence of a "viable home or third-country market".[66]

7.50. The USDOC's findings on the absence of a viable domestic or third-country market in its final determination cite the Korean respondents' questionnaire responses.[67] In these questionnaire responses, the respondents, HYSCO and NEXTEEL, acknowledge that they do not have viable markets, but also clearly state that they have made "some sales of the foreign like product in the home market during the POI".[68]

7.51. In support of its assertion regarding the unavailability of actual profit data for the like product, the United States refers to certain sales verification reports in which the respondents are reported to have stated that the products they sold in the home market were not sold as OCTG.[69] However, neither the preliminary nor final determinations contain any conclusions drawn by the USDOC regarding availability of data for the like product on the basis of those reported statements. On the contrary, in its preliminary determination, the USDOC states that:

> In order to determine whether there was a sufficient volume of sales in the home market to serve as a viable basis for calculating NV, we compared *HYSCO's and NEXTEEL's volume of home market sales of the foreign like product* to the volume of U.S. sales of the subject merchandise, in accordance with section 773(a)(1)(B) of the Act. For both HYSCO and NEXTEEL, we found that the aggregate volume of U.S. sales, and, thus, HYSCO's and NEXTEEL's sales in the home market were not viable.[70]

7.52. This finding also formed the basis of the USDOC's decision, in its final determination, to not use the preferred method to determine CV profit.[71] The United States has not identified any finding in the USDOC's preliminary or final determinations that HYSCO and NEXTEEL made *no* sales of the like product in the home market, and further that it was because of the absence of data pertaining to sales of the like product in the home market that the USDOC had rejected the preferred method as a basis for determining CV profit.[72] We therefore dismiss, as *ex post rationalization*, the United States' argument that the USDOC could not use the preferred method to determine CV profit because the record did not contain any data pertaining to sales of the like product in the home market.[73]

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[65] United States' first written submission, para. 89 (referring to USDOC, NEXTEEL Sales Verification Report, 29 May 2014, (Exhibit USA-9) pp. 16 and 17; USDOC, HYSCO Sales Verification Report, 5 June 2014, (Exhibit USA-8) pp. 22 and 23; HYSCO's section A questionnaire responses, 17 September 2013, (Exhibit USA-6) (BCI), p. A-2 and exhibit A-1; and NEXTEEL's section A questionnaire responses, 17 September 2013, (Exhibit USA-7) (BCI), p. A-2 and exhibit A-1).

[66] Final Decision Memorandum, (Exhibit KOR-21), p. 14.

[67] Final Decision Memorandum, (Exhibit KOR-21), pp. 20 and 21 and fns 68 and 72 (referring to HYSCO's section A questionnaire responses, 17 September 2013, (Exhibit USA-6) (BCI), p. A-2; and NEXTEEL's section A questionnaire responses, 17 September 2013, (Exhibit USA-7) (BCI), p. A-2, among others).

[68] HYSCO's section A questionnaire responses, 17 September 2013, (Exhibit USA-6) (BCI), p. A-2; and NEXTEEL's section A questionnaire responses, 17 September 2013, (Exhibit USA-7) (BCI), p. A-2.

[69] United States' first written submission, para. 89 (referring to USDOC, NEXTEEL Sales Verification Report, 29 May 2014, (Exhibit USA-9) pp. 16 and 17; and USDOC, HYSCO Sales Verification Report, 5 June 2014, (Exhibit USA-8) pp. 22 and 23);

[70] USDOC, Decision Memorandum for the Negative Preliminary Determination of sales at less than fair value, negative Preliminary Determination of critical circumstances, and postponement of Final Determination in the less-than-fair-value investigation of certain oil country tubular goods from the Republic of Korea, 14 February 2014 (Preliminary Decision Memorandum), (Exhibit KOR-5), p. 20. (emphasis added)

[71] Final Decision Memorandum, (Exhibit KOR-21), p. 14.

[72] United States' response to Panel question No. 43, paras. 8-10.

[73] In this regard, the Appellate Body has clarified that a Member is precluded from providing an *ex post* rationale during the panel proceedings to justify the investigating authority's determination, and that an investigating authority's determinations must be evaluated in light of the rationale provided

7.53. In light of this and given the mandatory nature of the obligation in the *chapeau* of Article 2.2.2 to use actual data as a basis for CV profit, we conclude that if unavailability of the data for the like product was a reason for the USDOC's inability to use that method, it should have set out that reason in its determination.

7.3.2.1.3.3 Rejection of data showing [[***]] in determining the amounts for "profits" for constructed normal value

7.54. The United States argues that the USDOC was unable to use the respondents' actual data as a basis for CV profit because their sales of "non-prime OCTG" in the domestic market were made at a **[[***]]** and **[[***]]** cannot form the basis for CV profit under the *chapeau* of Article 2.2.2.[74]

7.55. As noted in paragraph 7.49, in its final determination the USDOC attributed its inability to determine CV profit using the preferred method exclusively to the absence of a "viable home or third-country market".[75] We find no mention in the USDOC's findings of the **[[***]]**-making nature of the respondents' domestic sales as a reason for its inability to use the preferred method. The record also does not reflect a determination by the USDOC that the Korean respondents' sales of "non-prime OCTG" in the domestic market were made at a **[[***]]**. We understand the United States to argue, in response to our specific question[76] in this regard, that having already rejected the Korean respondents' actual data pertaining to their home market sales as a basis for CV profit determination because those sales were not viable, the USDOC was not required to determine whether that data could not be used for CV profit determination on other grounds.[77] However, as noted above, the United States has argued in these proceedings that it did not determine CV profit based on the Korean respondents' actual data pertaining to home market sales because these sales were made at a **[[***]]**. We therefore must determine if this reasoning was used by the USDOC in the underlying investigation or is *ex post rationalization* by the United States in these proceedings. The United States has not identified where in its determination the USDOC relied on this conclusion as a reason for not using the preferred method to calculate CV profit. We therefore reject this justification offered by the United States as *ex post* rationalization.

7.56. Based on the foregoing reasons, we find that the United States has not offered any valid justification for the USDOC's failure to use the respondents' actual data pertaining to the respondents' domestic market sales as a basis for CV profit. We therefore conclude that in failing to use the preferred method as basis for CV profit calculation, the United States acted inconsistently with its obligations under the *chapeau* of Article 2.2.2.

7.57. Having already concluded that the USDOC had no basis to reject the "actual data" pertaining to domestic sales of the like product in the ordinary course of trade, we do not find it necessary to resolve the question whether the USDOC should have determined CV profit on the basis of the profit derived by the Korean respondents from third-country markets in order to comply with the *chapeau* of Article 2.2.2. We, therefore, exercise judicial economy on this claim.

7.3.2.1.4 Conclusion

7.58. For the foregoing reasons, we find that the United States acted inconsistently with its obligations under the *chapeau* of Article 2.2.2 because:

a. The lack of viable home market sales is not a permissible ground for rejecting the Korean respondents' actual data as a basis for determination of CV profit;

b. Nothing in the USDOC's determinations indicates that it rejected the Korean respondents' actual data because there were no domestic sales of the like product; and

contemporaneously by that investigating authority. (Appellate Body Report, *US – Carbon Steel (India)*, para. 4.273 (referring to Panel Report, *US – Carbon Steel (India)*, para. 7.154)).

[74] United States' response to Panel question No. 12, paras. 37-39.
[75] Final Decision Memorandum, (Exhibit KOR-21), p. 14.
[76] United States' response to Panel question No. 45, paras. 13 and 14.
[77] United States' response to Panel question No. 45, paras. 13 and 14.

c. Nothing in the USDOC's determinations indicates that it rejected the Korean respondents' actual data because the respondents made a **[[***]]** rather than a profit.

7.59. We exercise judicial economy of Korea's claim that the USDOC acted inconsistently with the *chapeau* of Article 2.2.2 because it did not use actual data of the respondents to determine its CV profit rate although the respondents' third-country market profit data was available on the record of the underlying investigation.

7.3.2.2 Whether the USDOC's interpretation and application of "same general category of products" was inconsistent with Articles 2.2.2(i) and 2.2.2(iii)

7.3.2.2.1 Main arguments of the parties

7.60. Korea argues that the USDOC erroneously interpreted and applied the term "same general category of products" so narrowly that it did not consider non-OCTG products, such as line pipe and standard pipe, as falling within the "same general category" as OCTG.[78] Based on this narrow interpretation, the USDOC rejected Article 2.2.2(i) as a basis to calculate CV profit and also determined that it could not calculate a profit cap under Article 2.2.2(iii).[79]

7.61. In response, the United States contends that the USDOC defined "same general category of products" more broadly than "like product" so as to include drill pipe and OCTG that fell outside the scope of the investigation such as stainless steel tubular products.[80]

7.3.2.2.2 Main arguments of third parties

7.62. The European Union submits that while Article 2.2.2 does not provide any elaboration as to the definition of "the same general category of products", its *chapeau* and overall structure provide guidance in this regard.[81] It notes that the panel in *Thailand – H-Beams* found that where the preferred method in the *chapeau* cannot be used for purposes of determining an amount for profit in the constructed normal value on the basis of actual data of the exporter or producer under investigation for the like product, subparagraphs (i) and (ii) respectively provide for the database to be broadened, either as to the product (i.e. the same general category of products produced by the producer or exporter in question) or as to the producer (i.e. other producers or exporters subject to investigation in respect of the like product), but not both. The European Union maintains that the *Thailand – H-Beams* panel confirmed that the intention of these provisions is to obtain results that approximate, as closely as possible, the price of the like product in the ordinary course of trade in the domestic market of the exporting country.

7.3.2.2.3 Evaluation by the Panel

7.63. Article 2.2.2(i) of the Anti-Dumping Agreement provides for profit rate determination on the basis of the actual amounts incurred and realized by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the "*same general category of products*". Article 2.2.2(iii) provides for profit rate determination on the basis of any other reasonable method, provided that the amount for profit so established shall not exceed the "profit cap", which is the profit normally realized by other exporters or producers on sales of "*products of the same general category*" in the domestic market of the country of origin. Therefore, in order to make a profit determination under Article 2.2.2(i) or to calculate a profit cap under Article 2.2.2(iii), an investigating authority must determine which products fall within the same general category of products.

7.64. In the underlying investigation, the USDOC found that non-OCTG pipe products manufactured by the Korean producers, such as line pipe and standard pipe, were not in the same general category of products as the product under consideration, OCTG. The USDOC stated that it could therefore not determine the CV profit rate for the Korean respondent HYSCO using actual

[78] Korea's first written submission, para. 79.
[79] Korea's first written submission, para. 88.
[80] United States' first written submission, para. 91.
[81] European Union's third-party submission, para. 18 (referring to Panel Report, *Thailand – H-Beams*, para. 7.112).

amounts incurred by that producer in respect of production and sales in the domestic market of the country of origin of the same general category of products, as provided for in Article 2.2.2(i).[82] In addition, the USDOC determined that it could not calculate the profit cap called for in Article 2.2.2(iii) because it did not have domestic market profit data for other exporters and producers of products of the same general category in Korea.[83]

7.65. Korea challenges the USDOC's definition of the same general category of products in the underlying investigation, asserting that the USDOC's focus on down hole applications as the defining factor of products constituting the same general category of products as OCTG resulted in a definition that is narrower than the USDOC's definition of the foreign like product.[84] Therefore, a product that is a like product, based on the USDOC's definition of the foreign like product, could be excluded from the same general category of products. The United States disagrees with Korea, and asserts that the USDOC defined the same general category of products more broadly, rather than more narrowly, than the like product. The issue before us therefore is whether the USDOC properly determined the scope of the relevant "same general category of products", and thus whether its conclusions were consistent with its obligations under Articles 2.2.2(i) and (iii).

7.66. We note that there is no definition of the term "same general category of products" in Article 2.2.2(i) or (iii) of the Anti-Dumping Agreement. However, as previous panels have noted, and as both parties agree, the scope of the same general category of products must be understood to be broader, not narrower than that of the like product, as defined by the investigating authority.[85] We agree with this conclusion, which is consistent with our own views in this regard.

7.67. Bearing in mind this understanding, we turn to examine how the USDOC defined the same general category of products in the underlying investigation. We note that the USDOC defined the same general category of products by reference to the functionality of the foreign like product. In particular, in its final determination, the USDOC stated that:

> While we do not consider line pipe and standard pipe to be in the same general category of products as OCTG, we do find that the general category of products that encompass the subject casing and tubing would not be limited to just the *foreign like product*. Rather it would include other tubular products that go into the exploration and production of oil and gas. *These would be products that would exhibit the same fundamental characteristics for down hole applications*, and they would include subject OCTG, non-scope OCTG such as stainless steel tubular products, and drill pipes.[86]

7.68. The USDOC thus defined products in the same general category as the like product as those exhibiting "the same fundamental characteristics for down hole applications" as the foreign like product i.e. tubular products that are used in the exploration and production of oil and gas. However, as the United States has confirmed in these proceedings, the USDOC's definition of the foreign like product is co-extensive with the definition of the product under consideration in the underlying investigation, and the product under consideration definition itself is not limited to pipe products that can be used for down hole applications.[87] The USDOC defined the product under consideration as follows:

> The merchandise covered by the investigations is certain oil country tubular goods ("OCTG"), which are hollow steel products of circular cross-section, including oil well casing and tubing, of iron (other than cast iron) or steel (both carbon and alloy), whether seamless or welded, regardless of end finish (e.g., whether or not plain end, threaded, or threaded and coupled) whether or not conforming to American Petroleum Institute ("API") or non-API specifications, whether finished (including limited service OCTG products) or unfinished (including green tubes and limited service OCTG

[82] Final Decision Memorandum, (Exhibit KOR-21), p. 19.
[83] Final Decision Memorandum, (Exhibit KOR-21), p. 21.
[84] Korea's second written submission, paragraph 158.
[85] Panel Reports, *EC – Bed Linen*, para. 6.60; and *Thailand – H-Beams*, para. 7.112. See also United States' first written submission, para. 95; and Korea's first written submission, para. 83.
[86] Final Decision Memorandum, (Exhibit KOR-21), p. 19. (emphasis added)
[87] United States' second written submission, para. 28 and fn 55.

> products), whether or not thread protectors are attached. The scope of the investigations also covers OCTG coupling stock.
>
> Excluded from the scope of the investigations are: casing or tubing containing 10.5 percent or more by weight of chromium; drill pipe; unattached couplings; and unattached thread protectors.[88]

7.69. Thus, the product under consideration as defined by the USDOC, and by implication, the foreign like product which is co-extensive with that definition, do not incorporate any express limitation based on whether the pipe products in question can be used for down hole applications. Based on the foregoing, we conclude that the USDOC's record shows that the foreign like product was not limited to pipe products that could be used for down hole applications. However, the same general category of products, as defined by the USDOC, does incorporate such a limitation.[89]

7.70. Our conclusion is confirmed by the clarification provided by the USDOC itself in a parallel investigation of OCTG from Ukraine, which was initiated based on the same petition as the underlying investigation.[90] The definition of the product under consideration in that investigation was identical to that in the underlying investigation, and included "reject" products that cannot be used in oil and gas well applications. The USDOC clarified the scope of the product under consideration in the Ukraine investigation as follows:

> [T]he plain language of the scope of the investigation indicates that a *failure to meet the requirements for OCTG applications* does not render merchandise outside the scope, provided that merchandise meets the physical characteristics described in the scope. The scope specifically states that certain OCTG is included "whether or not conforming to…API or non-API specifications …". We also note that the scope of the investigation includes unfinished OCTG (including green tubes) which is "prime" merchandise which cannot be used in OCTG applications until it undergoes additional processing. Taken together, the *scope language clearly covers a variety of goods produced as OCTG which may not currently meet established OCTG specifications for use in OCTG-specific applications.* On this basis, we find that, whether or not Interpipe's merchandise failed inspection and therefore did not meet API specifications, it was still produced as OCTG, entered the United States as OCTG and is still OCTG, even if identified as damaged or otherwise unusable as prime merchandise.[91]

The USDOC further stated that:

> While it is reasonable to assume that use of OCTG in oil and gas well applications is the primary intended purpose of OCTG, *the scope does not limit or otherwise require*

[88] USDOC, Notice of Initiation in OCTG Investigation, *United States Federal Register*, Vol. 78, No. 145 (29 July 2013), p. 45505 (Initiation Notice), (Exhibit KOR-2), p. 45512.

[89] According to the United States, the USDOC determined that "[the foreign like product as well as] the same general category of products in the investigation should exhibit characteristics for [down hole] applications". (United States' response to Panel question no. 49, para. 22).

[90] We consider that the clarification provided by the USDOC in the context of the Ukraine investigation can properly be considered in understanding the scope of the product under consideration, and consequently the like product, in the underlying investigation. Both investigations were initiated based on the same petition and covered the same scope of imported products. (Petitions for the imposition of anti-dumping and countervailing duties on OCTG from certain countries, 2 July 2013, (Exhibit KOR-1)). Further, the Initiation Notification sets out the scope language for both the underlying investigation and the Ukraine investigation, among others, under a single heading entitled "Scope of the Investigations", which also supports this understanding. (Initiation Notice, (Exhibit KOR-2), p. 45506).

[91] USDOC, Certain oil country tubular goods from Ukraine, Final Determination of sales at less than fair value and negative final determination of critical circumstances, *United States Federal Register*, Vol. 79, No. 138 (18 July 2014), p. 41969, (Exhibit KOR-75), p. 9 (emphasis added). In US practice, the "scope of the investigation" refers to the product under consideration.

> *that goods manufactured as OCTG be used in that capacity* in order to be considered subject merchandise.[92]

There is no dispute between the parties that pipe products that fail to meet the "requirements for OCTG applications" or products which do not "currently meet established OCTG specifications for use in OCTG-specific applications" cannot be used for down hole applications.

7.71. As noted, in our view, the foreign like product was not limited to pipe products that could be used for down hole applications, which understanding is confirmed by the clarification from the Ukraine investigation which shows that pipe products that *could not be used* for down hole applications were within the definition of the product under consideration, and by implication, the foreign like product.

7.72. We recall our view that the same general category of products includes the like product, and, as both parties also agree, is broader than the like product.[93] Therefore, if the like product is not limited to pipe products used for down hole applications, the same general category of products, which is broader than and includes the like product, cannot be limited to pipe products used for down hole applications. In other words, the same general category of products cannot exclude pipe products that do not exhibit the same fundamental characteristics for down hole applications and are not used for down hole applications. Yet, the USDOC excluded such products from the same general category of products in the underlying investigation. We therefore conclude that the USDOC defined the same general category of products more narrowly than it defined the like product by excluding from the definition of the same general category those pipe products not used for down hole applications that fell within the definition of the like product.

7.73. The United States attempts to distinguish the USDOC's clarification in the Ukraine OCTG investigation by noting that the pipe products that were the subject of that clarification were sold to the US market as OCTG and therefore came within the scope of the investigation. In contrast, the pipe products sold by the Korean respondents in Korea were "not sold as OCTG" and for that reason were not within the scope of the investigation. Therefore, the USDOC did not define the same general category of products more narrowly than the like product.[94] We consider it irrelevant that the pipe products sold by the Korean respondents in Korea were not sold as OCTG, given that the USDOC's definition of the product under consideration (which we recall was the same for both investigations) is not limited to products that are "sold as OCTG". We therefore reject this argument from the United States.

7.74. Based on the definition of the product under consideration in the underlying investigation, as well as the USDOC's clarification of that same definition in the parallel investigation of OCTG from Ukraine, and the fact that the United States has acknowledged that the product under consideration is co-extensive with the like product, we find that the USDOC defined the same general category of products more narrowly than the like product.

7.75. For the foregoing reasons, we conclude that having relied on an impermissibly narrow definition of the "same general category of products" as the basis for not calculating CV profit under Article 2.2.2(i) and for not calculating the profit cap under Article 2.2.2(iii), the USDOC acted inconsistently with its obligations under those provisions. In particular, we find that the United States acted inconsistently with its obligations under Articles 2.2.2(i) and (iii) because the USDOC defined the same general category of products more narrowly than the like product by excluding OCTG not used for down hole applications, which was part of the like product as defined by the USDOC. Thus, the USDOC had no proper basis for its conclusions that the methods under Article 2.2.2(i) could not be used, and that the profit cap called for in Article 2.2.2(iii) could not be calculated.

[92] USDOC, Certain oil country tubular goods from Ukraine, Final Determination of sales at less than fair value and negative final determination of critical circumstances, *United States Federal Register*, Vol. 79, No. 138 (18 July 2014), p. 41969, (Exhibit KOR-75), pp. 9 and 10. (emphasis added)

[93] Panel Reports, *EC – Bed Linen*, para. 6.60; and *Thailand – H-Beams*, para. 7.112. See also United States' first written submission, para. 95; and Korea's first written submission, para. 83.

[94] United States' second written submission, para. 29.

7.3.2.3 Whether the USDOC's use of profit data from the Tenaris financial statements in constructing normal value was a "reasonable method" within the meaning of Article 2.2.2(iii)

7.3.2.3.1 Main arguments of the parties

7.76. Korea maintains that:

a. It is impermissible to calculate a dumping margin by comparing an export price to a normal value which predominantly represents the profit of enterprises, such as Tenaris, that do not operate in the exporting country.[95]

b. Further, subparagraphs (i)-(iii) of Article 2.2.2 are intended to approximate the price of the like product in the ordinary course of trade in the domestic market of the exporting country.[96]

c. The USDOC relied on the profit rate of Tenaris despite the existence on the record of various CV profit sources that originated from the exporting country, Korea.[97]

d. The profit of Tenaris is fundamentally not comparable with profits realized by the Korean respondents.[98]

7.77. The United States contends that:

a. The USDOC's use of the Tenaris financial statements to calculate CV profit resulted from a reasoned consideration of the evidence before it. The CV profit it calculated was "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".[99]

b. The average profit experience of Tenaris is representative of OCTG sales across a broad range of different geographic markets as it sells OCTG in significant quantities and in virtually every market in which OCTG is sold.[100]

c. In any case, Article 2.2 expressly permits the use of sales that are destined for consumption in markets other than the exporting country in determining normal value. In addition, Article 2.2.2(iii) does not limit the use of "any reasonable method" to a particular country or market.[101]

d. Moreover, Article 2.2.2 recognizes that where data specific to the product under consideration and the exporting country is unavailable, an investigating authority needs to find a reasonable proxy from data available in the record.[102]

e. Korea's request for establishment of a panel does not include a claim that the USDOC's use of the Tenaris profit data as a basis for CV profit determination does not constitute a reasonable method within the meaning of Article 2.2.2(iii).[103]

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[95] Korea's first written submission, para. 130.
[96] Korea's first written submission, para. 131 (referring to Panel Report, *Thailand – H-Beams*, para. 7.113).
[97] Korea's first written submission, para. 135 (referring to Final Decision Memorandum, (Exhibit KOR-21), p. 20).
[98] Korea's second written submission, paras. 185-192.
[99] United States' first written submission, para. 123 (referring to Panel Report, *EU – Biodiesel (Argentina)*, para.7.337).
[100] United States' first written submission, para. 126 (referring to Final Decision Memorandum, (Exhibit KOR-21), p. 20).
[101] United States' first written submission, para. 130.
[102] United States' first written submission, para. 131.
[103] United States' comments on Korea's response to Panel question No. 53, paras. 41-48.

7.3.2.3.2 Main arguments of third parties

7.78. The European Union submits that while the Anti-Dumping Agreement does not define the exact scope of what constitutes a "reasonable method" under Article 2.2.2, the intention of the subparagraphs under Article 2.2.2 is to obtain results that approximate as closely as possible the price of the like product in the ordinary course of trade in the domestic market of the exporting country.[104]

7.79. Turkey doubts whether the use of the profit data of a non-Korean corporation, that had neither production nor sales in the Korean market, is consistent with Article 2.2.2(iii).[105] Further, it considers that the profit cap is a means to test the reasonability of the method employed under Article 2.2.2(iii).[106]

7.3.2.3.3 Evaluation by the Panel

7.80. Before we can examine the merits of Korea's claim that the USDOC's determination of CV profit based on the Tenaris profit data does not constitute a "reasonable method" under Article 2.2.2(iii), we will ascertain whether Korea's panel request includes that claim, and that it therefore falls within our terms of reference and the scope of this dispute.[107] On its face, Korea's panel request does not set out any *express* reference to a claim that the USDOC's determination of CV profit based on the Tenaris profit data does not constitute a "reasonable method" under Article 2.2.2(iii). Korea's considers that this claim nevertheless falls within our terms of reference.

7.81. Article 6.2 of the DSU requires, in relevant part, that the panel request "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". The panel request must therefore identify, by way of a brief summary, the "legal basis of the complaint" and that summary must be "sufficient to present the problem clearly".

7.82. The question before us is whether Korea's panel request sets out the requisite "legal basis of the complaint" with respect to the claim at issue. We consider it clearly established that a panel request contains "a brief summary of the legal basis of the complaint" if it: (a) identifies the legal provision which allegedly has been violated; and (b) clearly specifies how or why that provision has been violated in terms of the obligations set out in therein.[108] If the provision allegedly violated contains multiple obligations, the specific obligation that has allegedly been violated must be clear on the face of the panel request.[109] Further, the compliance of a panel request with

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[104] European Union's third-party submission, paras. 21 and 22 (referring to Panel Report, *Thailand – H-Beams*, para. 7.114).

[105] Turkey's third-party submission, para. 12.

[106] Turkey's third-party submission, para. 9.

[107] Panels are not permitted to address legal claims falling outside their terms of reference. The terms of reference of a panel define the scope of the dispute. (Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 152). Pursuant to Article 7.1 of the DSU, a panel's terms of reference are governed by the request for the establishment of a panel. Article 6.2 of the DSU sets forth the requirements applicable to such requests.

[108] The Appellate Body in *EC – Selected Customs Matters* found that:

> [T]he legal basis of the complaint, namely, the "claim" pertains to the specific provision of the covered agreement that contains the obligation alleged to be violated. A brief summary of the legal basis of the complaint required by Article 6.2 of the DSU aims to explain succinctly *how* or *why* the measure at issue is considered by the complaining Member to be violating the WTO obligation in question.

(Appellate Body Report, *EC – Selected Customs Matters*, para. 130 (emphasis original))

[109] In *Korea – Dairy*, the Appellate Body observed that while the identification of treaty provisions claimed to have been violated by the respondent is a minimum prerequisite for the presentation of the legal basis of the complaint, such identification may not always be enough. In certain circumstances, such as, where the treaty provisions identified establish not one single, distinct obligation but rather multiple obligations, the listing of articles of an agreement, in and of itself, may fall short of the standard of clarity in Article 6.2. (Appellate Body Report, *Korea – Dairy*, para. 124). In *China – Raw Materials*, the Appellate Body found that "to the extent that a provision contains not one single, distinct obligation, but rather multiple obligations, a panel request might need to specify which of the obligations contained in the provision is being challenged". (Appellate Body Report, *China – Raw Materials*, para. 220).

Article 6.2 must be determined on the merits of each case, considering the panel request as a whole, and in the light of attendant circumstances.[110]

7.83. Bearing these principles in mind, we turn to examine whether Korea's panel request satisfies the requirements of Article 6.2 with respect to the claim at issue. The panel request states, in relevant part:

> II. USDOC'S CALCULATION OF CONSTRUCTED VALUE ("CV") PROFIT
>
> Korea considers the USDOC's calculation of constructed value ("CV") profit in its anti-dumping investigation of Oil Country Tubular Goods from Korea, which was based on information contained in the financial statements of Tenaris SA (a global producer incorporated under the laws of Luxembourg with no record of sales or production in the Korean home market), to be inconsistent with the following provisions of the Anti-Dumping Agreement:
>
> > 3. Articles 2.2.2(i) and 2.2.2(iii) because the USDOC applied an impermissibly narrow interpretation of the term "same general category of products." The USDOC's application of the term "same general category of products" resulted in a scope of products that was essentially identical to the scope of the term "like product."
> >
> > 4. Article 2.2.2(iii) because the USDOC declined to examine whether the profit rate that it calculated exceeded "the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin," and it did not provide any legal basis for disregarding this requirement.
> >
> > 5. Article 2.2 because the USDOC did not take any steps to ensure that its calculated CV profit was "reasonable." In fact, the CV profit that the USDOC calculated far exceeded all other potential CV profit rates on the record, including the profit margins that U.S. producers earned on their sales of OCTG in the United States.[111]

7.84. We find that Korea's request for establishment of a panel does not set out a claim that the USDOC's determination of CV profit based on the Tenaris profit data does not constitute a "reasonable method" under Article 2.2.2(iii). We reach this conclusion based on the following considerations:

a. Korea's panel request does not expressly state that the USDOC acted inconsistently with Article 2.2.2(iii) because it did not determine the CV profit on the basis of any other "reasonable method", within the meaning of that provision. The requirements of due process and orderly procedure dictate that claims must be stated explicitly and clearly in WTO dispute settlement. This is the only way that the panel, other parties, and third parties will understand that a specific claim has been made, be aware of its dimensions, and have an adequate opportunity to address and respond to it.[112]

b. Korea's panel request does expressly state claims on the violation of the profit cap requirement in Article 2.2.2(iii) and the "reasonable amount for profit" requirement in Article 2.2, but does not refer to the "reasonable method" obligation in Article 2.2.2(iii). We consider that, as previous panels have found, the requirement that the CV profit be determined on the basis of a "reasonable method" is a separate and distinct obligation in

[110] Appellate Body Report, *US – Carbon Steel*, para. 127.
[111] Emphasis original.
[112] Appellate Body Reports, *Chile – Price Band System*, para. 164; and *India – Patents (US)*, para. 94.

Article 2.2.2(iii).[113] We are of the view that a claim alleging violation of that independent obligation should therefore have been separately set out in Korea's panel request.[114]

7.85. Korea maintains that the panel request contains the claim at issue, and makes two main arguments in this regard. First, Korea contends that paragraphs II.3 and II.4 of its panel request, read together with the *chapeau* of paragraph II, set out that claim consistent with the requirements of Article 6.2 of the DSU. Korea asserts that paragraphs II.3 and II.4 identify Article 2.2.2(iii) as the relevant provision against which it alleges a violation. In particular, it contends that paragraph II.4 explains that the USDOC's manner of determining profit is inconsistent with Article 2.2.2(iii), while the *chapeau* of paragraph II further indicates that the profit so determined is inconsistent with Article 2.2.2(iii) because it was based on information in the Tenaris financial statements.[115] Korea cites findings by the Appellate Body and prior panels, in support of its argument that a panel request must be construed "as a whole" and not in isolation.[116] It notes, in particular, that the panel in *Mexico – Anti-Dumping Measures on Rice* found that the "accompanying narrative" and the provisions of the Anti-Dumping Agreement identified in the panel request made it clear what the claim being raised was.[117]

7.86. We disagree with Korea that the claim at issue can be inferred from its panel request, even when read as a whole. We do not agree that it can be inferred from paragraphs II.3 and II.4 of Korea's panel request read together with the *chapeau* of paragraph II that it is the "reasonable method" obligation under Article 2.2.2(iii) that has allegedly been violated.

7.87. Korea argues that paragraph II.3 of its panel request, read together with the chapeau of section II, sets forth a claim that the USDOC's calculation of CV profit, based on the Tenaris financial statements, was inconsistent with Articles 2.2.2(i) and (iii) *because the USDOC interpreted and applied an impermissibly narrow definition of the same general category of products*. Korea also argues that paragraph II.4, read together with the *chapeau* of Section II, sets forth a claim that the USDOC's calculation of CV profit, based on the Tenaris financial statements, was inconsistent with Article 2.2.2(iii) *because the USDOC did not examine whether the profit rate it had calculated exceeded "the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin"*.

7.88. The legal basis for the alleged inconsistency of the USDOC's CV profit determination with Article 2.2.2(iii), set out in the panel request, is two-fold. In paragraph II.3, Korea identifies the USDOC's narrow interpretation and application of the definition of the "same general category of products", and in paragraph II.4, it identifies the USDOC's failure to examine whether the profit calculated exceeded the profit cap. Nowhere in its panel request does Korea identify the legal basis for an alleged inconsistency with Article 2.2.2(iii) as the USDOC's failure to determine the CV profit on the basis of a "reasonable method" within the meaning of that provision. As noted above[118], the obligation that the CV profit be determined using a "reasonable method" is a separate obligation under Article 2.2.2(iii). Thus, if an inconsistency with that obligation is alleged, it must be clearly, if not expressly, set out in the panel request.[119] As Korea failed to clearly or expressly set out the alleged violation in its panel request, we conclude that Korea's panel request does not set out a claim alleging that the USDOC acted inconsistently with the "reasonable method" obligation in Article 2.2.2(iii).

[113] Panel Reports, *EU – Footwear (China)*, para. 6.52; and *Thailand – H-Beams*, para. 7.125.

[114] This consideration is consistent with the Appellate Body's findings that a mere identification of the legal provision in the panel request where that provision sets out multiple obligations, is not sufficient to meet the standard of Article 6.2 and in such a case a panel request might need to specify which of the obligations contained in the provision is being challenged. (Appellate Body Reports, *China – Raw Materials*, para. 220; and *Korea – Dairy*, para. 124).

[115] Korea's response to Panel question No. 53, paras. 41 and 42.

[116] Korea's response to Panel question No. 53, para. 43 (referring to Appellate Body Report, *EC – Selected Customs Matters*, para. 168; and Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.31).

[117] Korea's response to Panel question No. 53, para. 43 (referring to Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.31).

[118] See para. 7.84b above.

[119] We recall in this regard that paragraph II.5 of the panel request, which is the only appearance of the word "reasonable" refers to whether the calculated profit rate was, itself, reasonable, and not to whether the method by which that profit rate was calculated was reasonable.

7.89. Second, Korea argues that its claim under the "reasonable method" obligation of Article 2.2.2(iii) is covered by the claim under Article 2.2 set out in paragraph II.5 of its panel request.[120] In paragraph II.5, Korea contends that the USDOC's determination of CV profit was inconsistent with Article 2.2 because the USDOC did not take any steps to ensure that the CV profit it determined was "reasonable". We understand Korea to argue that this claim under Article 2.2 covers its asserted claim under the "reasonable method" obligation of Article 2.2.2(iii), because use of a "reasonable method" is one of the "steps" under Article 2.2.2 to ensure the reasonableness of the CV profit determined for purposes of Article 2.2.[121]

7.90. We are not persuaded that Korea's claim under Article 2.2 can be understood to cover a claim alleging inconsistency with the "reasonable method" obligation of Article 2.2.2(iii). In our view, a failure to comply with the "reasonable method" obligation is not the only error that could lead to the determination of an amount of profit that is not "reasonable" under Article 2.2. For instance, failure to act consistently with the *chapeau* of Article 2.2.2, Articles 2.2.2(i) and 2.2.2(ii), as well as with the profit cap obligation in Article 2.2.2(iii), could equally have led to the same result. Thus, a claim under Article 2.2 does not imply a claim under the "reasonable method" obligation of Article 2.2.2(iii), and nothing in Korea's panel request gives rise to such an implication. Korea's panel request does not state, in connection with the claim under Article 2.2, that the CV profit determined by the USDOC was not "reasonable" because the method used by the USDOC to determine that profit did not constitute a "reasonable method".[122] Indeed, it does not mention the method by which that profit was determined at all.

7.91. Korea's panel request also does not suggest that the claim under Article 2.2 covered claims pertaining to inappropriate application of *all* methods for CV profit determination set out under Article 2.2.2, such that a claim pertaining to the "reasonable method" under Article 2.2.2(iii) was necessarily covered as one among those methods. Indeed, the fact that Korea's panel request enumerated claims pertaining to the inappropriate application of certain methods for CV profit determination under Article 2.2.2, separately from its claim under Article 2.2, but omitted any reference to the "reasonable method" obligation of Article 2.2.2(iii), supports our view that its claim under Article 2.2 does not cover claims pertaining to inappropriate application of *all* methods for CV profit determination set out under Article 2.2.2 and, in particular, does not cover a claim pertaining to the "reasonable method" obligation of Article 2.2.2(iii).[123]

7.92. We therefore conclude that the reference to "reasonable amount of profit" in Article 2.2 does not suffice to persuade us that a claim challenging the reasonableness of the amount of profit determined covers a purported claim concerning the *reasonable method* requirement in Article 2.2.2(iii). We find that this claim is simply not specified in Korea's panel request, and therefore, Korea's allegation of inconsistency with the "reasonable method" obligation under Article 2.2.2(iii) is not properly before us.

7.93. Korea further argues that the United States has not demonstrated any prejudice arising from Korea's panel request and would likely not have objected to the claim at issue had the Panel not raised a question in this regard during the second substantive meeting.[124]

7.94. We recall that we have an obligation to decide on issues concerning our jurisdiction, even if the parties to the dispute remain silent on those issues and if necessary, on our own motion, in order to satisfy ourselves that we have authority to proceed.[125] We consider that even if the

[120] Korea's response to Panel question No. 53, paras. 50-53.
[121] Korea's response to Panel question No. 53, para. 52 (referring to Panel Report, *EC – Bed Linen*, para. 6.96).
[122] Indeed, in its written submissions, Korea argues that it was the USDOC's failure to comply with the profit cap obligation in Article 2.2.2(iii) that led to the determination of a CV profit which was not "reasonable" under Article 2.2. (Korea's first written submission, paras. 119 and 277(b)(iii)).
[123] In particular, in paragraphs II.I and II.2, Korea makes claims pertaining to inappropriate application of the method provided for in the *chapeau* of Article 2.2.2. In paragraph II.3, it brings a claim under Articles 2.2.2(i) and 2.2.2(iii) regarding the erroneous interpretation and application of the term "same general category of products", and in paragraph II.4, it raises a claim regarding failure to comply with the profit cap obligation in Article 2.2.2(iii). Korea does not bring any separate and distinct claim under the "reasonable method" obligation of Article 2.2.2(iii). Korea has also not brought any claim under Article 2.2.2(ii).
[124] Korea's response to Panel question No. 53, paras. 54-56.
[125] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36.

United States had not objected to Korea's claim, it would still have been appropriate for us to determine whether we had jurisdiction to address and dispose of the claim at issue, regardless of whether or not there was any evidence of prejudice to the United States. We therefore reject Korea's argument in this regard.

7.95. Considering that the "reasonable method" obligation in Article 2.2.2(iii) is a separate and distinct obligation in that provision and that Korea has failed to properly allege a violation of that obligation in its panel request, we find that Korea's panel request does not include a claim that the USDOC acted inconsistently with that obligation. We therefore, reject as falling outside our jurisdiction, Korea's claim that the USDOC's use of profit data from the Tenaris financial statements in constructing normal value is not a "reasonable method" within the meaning of Article 2.2.2(iii).

7.3.2.4 Whether the USDOC acted inconsistently with Article 2.2.2(iii) and Article 2.2 by failing to calculate and apply a profit cap

7.3.2.4.1 Main arguments of the parties

7.96. Korea's principal arguments are set out below:

a. The USDOC's failure to calculate and apply a profit cap constitutes a *per se* violation of Article 2.2.2(iii).[126] That failure also contravenes Article 2.2 of the Anti-Dumping Agreement as that provision imposes an obligation to calculate a "reasonable amount for profits".[127]

b. Assuming that unavailability of data constitutes a valid justification for failing to calculate and apply a profit cap, the USDOC's determination that it was unable to calculate a profit cap would still be inconsistent with Article 2.2.2(iii) because it is premised on an impermissibly narrow definition of the "same general category of products".[128]

7.97. The United States contends that:

a. The data required for calculation of the profit cap under Article 2.2.2(iii) was not available as there were no sales of products of the same general category in Korea.[129]

b. Further, Article 2.2.2(iii) does not always require the calculation of a profit cap.[130]

7.3.2.4.2 Main arguments of third parties

7.98. The European Union submits that the application of a "profit cap" is a mandatory requirement whenever an investigating authority determines to use "any other reasonable method" under Article 2.2.2(iii). The presence of the profit cap in subparagraph (iii) and the absence of any cap in subparagraphs (i) and (ii) demonstrate that there is an additional element in subparagraph (iii) that needs to be satisfied.[131]

7.99. Turkey submits that an investigating authority is expected under Article 2.2.2 to determine the "reasonable amount" for profit as required under Article 2.2.[132]

[126] Korea's first written submission, paras. 110 and 114.
[127] Korea's first written submission, paras. 111, 112, and 119 (referring to Panel Reports, *EC – Bed Linen*, paras. 6.96-6.98 and *Thailand – H-Beams*, para. 7.125).
[128] Korea's first written submission, para. 120.
[129] United States' first written submission, para. 88.
[130] United States' first written submission, para. 115 (referring to Panel Report, *US – Upland Cotton*, paras. 7.1377 and 7.1378).
[131] European Union's third-party submission, paras. 21 and 22 (referring to Panel Report, *Thailand – H-Beams*, para. 7.124).
[132] Turkey's third-party submission, para. 8.

7.3.2.4.3 Evaluation by the Panel

7.100. In its final determination, the USDOC found that it could not calculate the profit cap called for in Article 2.2.2(iii) because it did not have domestic market profit data for other exporters and producers of the same general category of products in Korea.[133] The principal legal issue before us is whether the USDOC's failure to calculate and apply a profit cap is inconsistent with Article 2.2.2(iii) and Article 2.2 of the Anti-Dumping Agreement.

7.101. The text of Article 2.2.2(iii) makes it clear that the determination of the profit cap is mandatory. When the CV profit cannot be determined using the preferred method set out in the *chapeau* of Article 2.2.2, subparagraph (iii) allows the use of "any other reasonable method" for determining the amount of profit, provided that the amount determined does not exceed the profit cap, which is "the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin".

7.102. The mandatory nature of the obligation to determine and apply a profit cap flows from the use of the imperative "shall not" in Article 2.2.2(iii). In addition, previous panels have found that both conditions, "any other reasonable method" and the profit cap, must be fulfilled in order for the determination of an amount for profit to be consistent with Article 2.2.2(iii).[134]

7.103. The United States contends that the USDOC examined whether there were producers who sold products of the same general category in the domestic market whose data might have been used to calculate the profit cap.[135] However, no such data existed in the record, and it was therefore unable to calculate the profit cap.[136]

7.104. We understand the situation that the United States presents as one in which the USDOC attempted to calculate the profit cap but was unable to do so because it lacked data pertaining to sales of products of the same general category in the domestic market. We recall, however, that we have concluded[137] in this dispute that the USDOC wrongly defined the "same general category of products" more narrowly than the like product in the underlying investigation. Based on that same conclusion, we consider that the USDOC's finding that it did not have profit data pertaining to sales of the same general category of products was similarly erroneous. This was because the USDOC's conclusion that it lacked data was premised on an erroneous definition of the same general category of products. Therefore, even assuming that a lack of data might otherwise justify failure to calculate and apply a profit cap, the USDOC's failure to do so in the underlying investigation is not justified. We therefore find that by failing to calculate and apply a profit cap, which is mandatory under Article 2.2.2(iii), in the underlying investigation, the USDOC acted inconsistently with its obligations under that provision.

7.105. Korea also argues that the USDOC's failure to calculate a profit cap is inconsistent with Article 2.2 of the Anti-Dumping Agreement, which imposes an obligation to calculate a "reasonable amount" for profits.[138]

7.106. The text of Article 2.2.2 indicates that the preferred and alternative methods set out in its *chapeau* and subparagraphs (i)-(iii), respectively, are used for purposes of determining "a reasonable amount" for SG&A and for profits within the meaning of Article 2.2 of the Anti-Dumping Agreement. This is clear from the use of the phrase "[f]or the purpose of paragraph 2" in the *chapeau* of Article 2.2.2. Previous panels have found that the methods set out in Article 2.2.2, including the use of "any other reasonable method" subject to a profit cap under subparagraph (iii)

[133] Final Decision Memorandum, (Exhibit KOR-21), p. 21.
[134] Panel Reports, *EU – Footwear (China)*, paras. 6.52, 6.55, and 7.300; *Thailand – H-Beams*, para. 7.125; and *EC – Bed Linen*, paras. 6.97 and 6.98.
[135] United States' first written submission, para. 120.
[136] United States' first written submission, para. 88.
[137] In para. 7.75 above.
[138] Korea's first written submission, paras. 111, 112, and 119 (referring to Panel Reports, *EC – Bed Linen*, paras. 6.96-6.98 and *Thailand – H-Beams*, para. 7.125).

of that provision, are outlined for purposes of fulfilling this obligation under Article 2.2.[139] We agree with that conclusion.

7.107. In light of the foregoing, we conclude that if the methods under Article 2.2.2 are not properly applied, the resulting profit amount would no longer be reasonable under Article 2.2. We therefore find that in the absence of a profit cap, the profit that the USDOC determined was not a "reasonable amount" within the meaning of Article 2.2 of the Anti-Dumping Agreement.

7.108. We find that the United States acted inconsistently with its obligations under Article 2.2.2(iii) because:

a. It failed to calculate and apply a profit cap, which is mandatory under that provision.

b. The USDOC's determination that no profit data pertaining to the same general category of products was available cannot justify its failure to calculate and apply the profit cap, as it erroneously defined the same general category of products.

7.109. We also conclude that the USDOC's failure to calculate a profit cap led it to act inconsistently with its obligation under Article 2.2 of the Anti-Dumping Agreement to use a "reasonable amount for profits" in the construction of normal value for the Korean respondents in the underlying investigation.

7.3.2.5 Whether the USDOC acted inconsistently with Article 2.4 of the Anti-Dumping Agreement by failing to make due allowance for differences in the profit rates reflected in the constructed normal value and the export price

7.110. Korea contends that because the USDOC used the profit rate of Tenaris in constructing the normal value of the Korean respondents, their constructed normal value reflected the Tenaris profit rate, while their export price reflected their own profit rate. In Korea's view, this difference in the constructed normal value and the export price of the Korean respondents affected price comparability, and the USDOC should have made due allowance, by making appropriate adjustments. Korea asserts that by failing to do, the USDOC acted inconsistently with Article 2.4 of the Anti-Dumping Agreement.

7.3.2.5.1 Main arguments of the parties

7.111. Korea argues that the profit rate of Tenaris was not comparable to that of the two Korean respondents because: first, Tenaris focused on the premium segment of the OCTG market, whereas the Korean respondents participated in the low-grade end of the market; second, Tenaris's scale of operations was far bigger than that of the Korean respondents; and third, Tenaris and the two Korean respondents operated at different levels of trade. Therefore, in Korea's view, the USDOC should have attempted to make adjustments to the 26.11% profit rate of Tenaris, which was used in the constructed normal value determined for the Korean respondents.[140]

7.112. Korea acknowledges that the Korean respondents did not make a specific request to the USDOC seeking adjustments to the normal value or export price based on this difference in profit rates.[141] However, Korea notes that because the USDOC did not make an affirmative determination that it would use the Tenaris profit rate until it issued its final determination, the Korean respondents did not know that the USDOC would use this profit rate.[142] Thus, they could not request such an adjustment.

7.113. The United States contends that the profit component of a constructed normal value is not a difference that affects price comparability, and hence is not relevant to the fair comparison obligation under Article 2.4.[143] The United States also disputes the three grounds advanced by

[139] Panel Reports, *EC – Bed Linen*, para. 6.96; and *Thailand – H-Beams*, para. 7.121.
[140] Korea's first written submission, para. 153.
[141] Korea's response to Panel question No. 20, para. 71.
[142] Korea's response to Panel question No. 20, para. 72.
[143] United States' first written submission, para. 141.

Korea as to why the profit rate of Tenaris was not comparable to that of the Korean respondents.[144] Finally, the United States submits that the respondents in the underlying investigation never requested the USDOC to make any adjustments between the constructed normal value and the export price, and notes that an investigating authority does not have an obligation to accept unsubstantiated requests for adjustments between the normal value and the export price.[145]

7.3.2.5.2 Evaluation by the Panel

7.114. Korea asserts that there was a "massive disparity" in the profit rate recorded by Tenaris and that recorded by the Korean respondents, with the Tenaris profit rate being much higher than that of these respondents.[146] Korea alleges that this disparity was attributable to the inherent differences between Tenaris and these respondents, which are noted in paragraph 7.111 above.[147] Thus, in Korea's view, having decided to use the Tenaris profit rate in constructing the normal value, the USDOC should have made due allowance for this difference between the constructed normal value, which reflected Tenaris's high profit rate, and the export price, which reflected the Korean respondents' own, lower profit rates. In particular, Korea argues that the USDOC should have attempted to adjust the 26.11% profit rate of Tenaris used in the constructed normal value.[148]

7.115. In this regard, we have already found that the USDOC acted inconsistently with:

a. the *chapeau* of Article 2.2.2 of the Anti-Dumping Agreement by failing to determine the Korean respondents' profit rate on the basis of their actual data pertaining to production and sales of the like product in the ordinary course of trade;

b. Article 2.2.2(i) and (iii) of the Anti-Dumping Agreement by incorrectly defining the "same general category of products"; and

c. Article 2.2.2(iii) of the Anti-Dumping Agreement by failing to calculate a profit cap.

7.116. It follows, from these findings, that the USDOC did not determine the profit rate of the Korean respondents in a manner consistent with its obligations under the Anti-Dumping Agreement in constructing normal value. We do not find it necessary to decide whether the USDOC should have made adjustments to a CV profit rate that was itself determined in a manner inconsistent with US obligations under the Anti-Dumping Agreement. Hence, we exercise judicial economy with respect to Korea's Article 2.4 claim.[149]

7.3.2.6 Conclusions

7.117. For the foregoing reasons, we find that the USDOC acted inconsistently with the *chapeau* and subparagraphs (i) and (iii) of Article 2.2.2 and with Article 2.2 of the Anti-Dumping Agreement in constructing normal value in the underlying investigation. We exercise judicial economy with respect to Korea's claim under Article 2.4 of the Anti-Dumping Agreement.

7.3.3 The USDOC's profit rate determination in the remand investigation

7.118. Korea expressed its intent to challenge the USDOC's remand determination at the first substantive meeting and particularly in its closing statement at that meeting, but it did not identify the claims that it intended to make with respect to the remand determination.[150] Korea identified

[144] United States' first written submission, paras. 142-145; and response to Panel question No. 22, para. 66.
[145] United States' first written submission, para. 147.
[146] Korea's first written submission, para. 154.
[147] Korea's first written submission, paras. 146-152 and 154.
[148] Korea's first written submission, para. 153.
[149] It is well settled in WTO jurisprudence that a panel is not required to address each and every claim. Instead, a panel is only required to address those claims that are necessary to resolve a dispute. (Appellate Body Report, *Argentina – Import Measures*, para. 5.190).
[150] Korea's closing statement at the first meeting of the Panel, para. 10.

some of these claims in its second written submission and the others in its opening statement at the second substantive meeting.

7.119. In its second written submission, Korea claimed that the USDOC's profit rate determination in the remand investigation (new profit rate determination) was inconsistent with:

a. the *chapeau* of Article 2.2.2 of the Anti-Dumping Agreement because the USDOC refused to use actual data pertaining to the sales of the like product in the ordinary course of trade;

b. Articles 2.2.2(i) and (iii) of the Anti-Dumping Agreement because the USDOC relied on an impermissibly narrow definition of the "same general category of products"; and

c. Article 2.2.2(iii) of the Anti-Dumping Agreement because the USDOC calculated a profit cap based on the average of the profit rates in the 2012 financial statement of Tenaris and the profit rates of a Russian producer/exporter of OCTG, namely, OAO TMK.

7.120. In its opening statement at the second substantive meeting, Korea claimed that the USDOC's new profit rate determination was also inconsistent with Article 2.2.2(iii) of the Anti-Dumping Agreement because the USDOC did not determine the CV profit rate on the basis of a reasonable method, as required by this provision.[151] In addition, Korea claimed that the USDOC acted inconsistently with Article 2.4 of the Anti-Dumping Agreement in the remand investigation by failing to make adjustments to this CV profit rate.[152] As indicated above, we will address these claims only if we find the remand determination, and Korea's claims with respect to it, to be within our terms of reference. We therefore turn first to the parties' arguments on this fundamental question of our jurisdiction.

7.3.3.1 Main arguments of the parties with respect to the Panel's jurisdiction

7.121. Korea notes that measures enacted subsequent to panel establishment may, in certain circumstances, fall within a panel's terms of reference, and states that considering the close nexus between this remand determination and the final determination expressly identified in its panel request, the USDOC's remand determination, which was issued after this Panel was established, is within our terms of reference.[153] Further, Korea asserts that the remand determination is covered by its panel request because that request challenges "[a]ny related measure" in the proceeding entitled Oil Country Tubular Goods from the Republic of Korea, including the anti-dumping investigation itself as well as "all administrative reviews, new shipper reviews, changed circumstances reviews, sunset reviews, and other segments of the proceeding". These references, in Korea's view, are broad enough to cover the remand determination.

7.122. The United States submits that we cannot rule on the remand determination because it was not in existence at the time this Panel was established, and was not subject to consultations between the parties.[154] In addition, the United States asserts that Korea's claims with respect to the remand determination are wholly new claims, considering the differences in the methodologies used by the USDOC to determine the CV profit rate in the final determination and in the remand determination.[155]

[151] Korea's opening statement at the second meeting of the Panel, para. 81. In its response to our questions following the second substantive meeting, Korea clarified that it was making this claim, and cited to its second written submission and its opening statement at the second substantive meeting to assert that it had already presented this claim in these prior submissions. (Korea's response to Panel question No. 40, para. 13). We do not find any reference to this claim in Korea's second written submission but do find such a reference in its opening statement at the second substantive meeting.
[152] Korea's opening statement at the second meeting of the Panel, para. 89.
[153] Korea's response to Panel question No. 39, para. 1.
[154] United States' response to Panel question No. 40, para. 4.
[155] United States' response to Panel question No. 40, para. 5.

7.3.3.2 Evaluation by the Panel

7.123. In accordance with Article 7.1 of the DSU, and as set out in paragraph 1.4 above, our terms of reference require us to examine the "matter referred to the DSB" by Korea in its panel request. Article 6.2 of the DSU, which sets out the requirements applicable to panel requests, states that such a request shall:

> [I]ndicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

Thus, Article 6.2 imposes two distinct requirements: first, to identify the specific measures at issue, and second, to provide a brief summary of the legal basis of the complaint, or the claims.[156] It is well-established that these two elements, the measure(s) and the claim(s) together, comprise the "matter referred to the DSB".[157] Therefore, if we conclude either that the USDOC's remand determination falls outside the scope of the specific measures identified in Korea's panel request, or that Korea's claims with respect to the remand determination differ from the legal basis of the complaint set out in that request, we will find that Korea's claims regarding this determination fall outside the "matter referred to the DSB" and thus, outside our terms of reference. In addressing these issues, we are mindful that fulfilment of the two requirements set out in Article 6.2 is not a mere formality.[158] Instead, these requirements serve a two-fold purpose of forming the basis of a panel's terms of reference and of ensuring due process by informing the respondent and third parties of the matter brought before a panel.[159]

7.124. We commence our analysis by considering whether the remand determination is covered as a specific measure at issue in Korea's panel request. If we find that it is not, then we will have no jurisdiction to examine the USDOC's remand determination, and it will be unnecessary to examine whether we also lack jurisdiction because Korea's claims with respect to this determination differ from the legal basis of the complaint that it set out in its panel request.[160]

7.125. In deciding whether the remand determination is covered as a specific measure at issue by Korea's panel request we have to resolve two issues. First, whether the remand determination can be challenged in these panel proceedings even though it did not exist at the time this Panel was established. Second, whether the following italicised text in Korea's panel request is broad enough to cover the remand determination as a specific measure at issue even though the request makes no express reference to it[161]:

> *Any related measure* in the proceeding entitled Oil Country Tubular Goods from the Republic of Korea, including the anti-dumping investigation itself as well as all administrative reviews, new shipper reviews, changed circumstances reviews, sunset reviews, and *other segments of the proceeding*.[162]

7.126. We recall that the use of the term "specific measures at issue" in Article 6.2 of the DSU suggests that, as a general rule, the measures falling within a panel's terms of reference must be measures that were in existence at the time of panel establishment.[163] However, there are

[156] See, e.g. Appellate Body Reports, *Argentina – Import Measures*, para. 5.39; and *US – Carbon Steel*, para. 125.
[157] See, e.g. Appellate Body Reports, *Guatemala – Cement I*, paras. 69-76; *US – Carbon Steel*, para. 125; *US – Continued Zeroing*, para. 160; and *EC and certain member States – Large Civil Aircraft*, para. 639.
[158] Appellate Body Report, *Australia – Apples*, para. 416.
[159] Appellate Body Reports, *Australia – Apples*, para. 416; and *US – Carbon Steel*, para. 126.
[160] In addition, the United States contends that considering that the remand determination was not subject to any consultations between the parties, it falls outside our jurisdiction. It will be unnecessary to examine whether the remand determination falls outside our terms of reference for this reason if we are to conclude that the remand determination is not covered as a specific measure at issue in Korea's panel request.
[161] See, e.g. Appellate Body Report, *Chile – Price Band System*, para. 144.
[162] Underlining original; italics added.
[163] Appellate Body Report, *EC – Chicken Cuts*, para. 156.

exceptions to this general rule.[164] In particular, the Appellate Body recognized in *EC – Chicken Cuts*, that in certain limited circumstances, measures that were not in existence at panel establishment may be found to fall within a panel's terms of reference.[165] One such circumstance is when a measure that comes into existence after panel establishment amends the original measure, but does not change its essence.[166] In that case, the amended measure will fall within the panel's terms of reference, provided the panel request is broad enough to cover that determination.

7.127. Korea argues that the remand determination is within our terms of reference because it supplemented and reaffirmed the final determination of the USDOC and did not change its essence.[167] Korea considers the situation here to be analogous to that in *US – Washing Machines*, where the panel found a remand determination issued after panel establishment to be within its terms of reference because it supplemented and reaffirmed the original determination.[168]

7.128. We will examine the relation between the remand determination and the final determination to determine whether the remand determination changes the essence of the final determination.[169] If we find that it does, we will conclude that the remand determination falls outside our terms of reference.

7.129. We recall that in the final determination the USDOC determined CV profit of 26.11% based on the Tenaris financial statements. Further, the USDOC concluded that it could not calculate a profit cap, consistent with Article 2.2.2(iii) of the Anti-Dumping Agreement, because the Korean exporters or producers made no sales of products of the same general category in the domestic market. The USCIT, in its remand order, directed the USDOC to reconsider certain aspects of the CV profit rate calculation used in the dumping margin analysis in the final determination.[170]

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[164] Appellate Body Reports, *EC – Selected Customs Matters*, para. 184; and *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 125. These reports of the Appellate Body discuss the type of exceptions that may apply to this general rule.

[165] Appellate Body Report, *EC – Chicken Cuts*, para. 156.

[166] Appellate Body Report, *EC – Chicken Cuts*, para. 156 (referring to Appellate Body Report, *Chile – Price Band System*, paras. 126-144). Following this Appellate Body report, a number of WTO panels have sought to examine whether a measure not in existence during panel establishment is within its terms of reference by examining whether such a measure changes the essence of the measure that was expressly identified in the panel request. (See, e.g. Panel Reports, *EC – IT Products*, paras. 7.139 and 7.142; and *China – Raw Materials*, para. 7.15).

[167] Korea's response to Panel question No. 39, para. 1; and comments on United States' response to Panel question No. 39, para. 8. Korea does not argue that we should find the remand determination to be within our terms of reference even if it changes the essence of the final determination.

[168] Korea's response to Panel question No. 39, para. 1 (citing Panel Report, *US – Washing Machines*, para. 7.249).

[169] In this regard, we note that in its report in *US – Zeroing (Japan) (Article 21.5 – Japan)*, the Appellate Body found a measure not in existence at the time of panel establishment to be within the panel's terms of reference without specifically examining whether that measure changed the essence of the original measure. However, that case, unlike the one before us, concerned a compliance proceeding under Article 21.5 of the DSU. The Appellate Body's finding in that case was informed by its view that in a compliance proceeding, Article 6.2 of the DSU must be read in light of the specific function of Article 21.5 proceedings and that the "specific measures at issue" to be identified in such proceedings are measures that have a bearing on compliance with the recommendations and rulings of the DSB. (Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 122). As this is not an Article 21.5 proceeding, the question of compliance with DSB recommendations and rulings does not arise. Hence, we consider that whether the remand determination changed the essence of the final determination is the principal question to be resolved in determining whether it is within our terms of reference. Korea does not argue otherwise.

[170] USDOC's Remand Determination, (Exhibit KOR-69), p. 1. The USCIT instructed the USDOC to: (a) either remove the financial statements of Tenaris from the record and not use them in the CV profit calculation, or, alternatively, rectify the alleged prejudice from acceptance of such statements; (b) either exclude from consideration or, alternatively, explain the relevance of market conditions and testing and certification requirements to the determination of which products are in the same general category of merchandise as oil country tubular goods; and (c) either calculate and apply a profit cap or, alternatively, explain why the data on the record could not be used to calculate a "facts available" profit cap under 19 U.S.C. 1677b(e)(2)(B)(iii).

While the USCIT also directed the USDOC to reconsider the issue of whether the two selected mandatory respondents, were representative of the Korean industry, this aspect of the remand determination is not challenged by Korea in these proceedings.

7.130. The USDOC initiated a remand investigation pursuant to that order, where it re-opened the record to allow all interested parties to submit new factual information and comments on the issue of CV profit, and interested parties did submit such information and comments.[171] In its evaluation of the evidence, the USDOC[172]:

a. using a different methodology, determined a CV profit rate of 16.24% based on an average of profit rates in the 2012 financial statements of Tenaris and a Russian company OAO TMK;

b. unlike the final determination, the USDOC calculated a profit cap on the basis of "facts available", taking into account the profits earned by Tenaris and OAO TMK in the global market and calculating the profit cap as the average of those profit rates; and

c. provided further explanation regarding the factors that the USDOC considered in reaching its determination regarding the scope of the products that were in the same general category of products as OCTG.

7.131. Based on the above, it is clear that:

a. the factual evidence on the USDOC's record in the remand investigation insofar as the issue of CV profit rate is concerned is not the same as that in the underlying investigation, as it includes additional evidence and comments provided by interested parties[173];

b. the USDOC's evaluation of that evidence in the remand investigation, and in particular, the methodology used to determine the CV profit rate and the calculation of a profit cap, differed from the underlying investigation[174]; and

c. the USDOC's explanation regarding the factors that it considered in reaching its determination regarding the scope of the same general category of products is not the same as in the underlying investigation as it provides additional explanation beyond that in the underlying investigation.[175]

7.132. These changes in the evidentiary record and in the USDOC's evaluation of that record and consequent determinations in our view show that the remand determination changed the essence of the USDOC's final determination. We do not consider that the remand determination can be said to retain the essence of the final determination simply because the USDOC reached the same ultimate conclusions, albeit at different rates, as to the existence of dumping as it did in the final determination.[176] We recall that a determination of the existence of dumping requires a calculation which must be based on the evidence before the investigating authority, and carried out consistently with the requirements of the Anti-Dumping Agreement. Where, as here, the underlying facts and the methodology used in the determination of normal value are different, resulting in different margins of dumping, we do not agree that the essence of the original determination is unchanged.

7.133. Therefore, we do not consider that the references in Korea's panel request, including that to "[a]ny related measure" or "other segments of the proceeding" permit it to challenge the USDOC's remand determination, because that determination changes the essence of the final determination expressly identified in Korea's panel request. Hence, we consider it unnecessary to

[171] USDOC's Remand Determination, (Exhibit KOR-69), p. 2; and USDOC, Remand Notice, 18 September 2015, (Exhibit KOR-53), p. 1.
[172] USDOC's Remand Determination, (Exhibit KOR-69), pp. 3, 11-14, and 61.
[173] USDOC's Remand Determination, (Exhibit KOR-69), p. 9.
[174] USDOC's Remand Determination, (Exhibit KOR-69), pp. 14-24; Final Decision Memorandum, (Exhibit KOR-21), pp. 19-23
[175] USDOC's Remand Determination, (Exhibit KOR-69), pp. 11-14; Final Decision Memorandum, (Exhibit KOR-21), pp. 16-19.
[176] We find support for this view in the Appellate Body report in *EC – Chicken Cuts*, where the Appellate Body considered that a subsequent measure, not identified in the panel request, could not be said to be covered by the panel's terms of reference simply because it had the same effect as the original measure and brought about the same result. (Appellate Body Report, *EC – Chicken Cuts*, para. 160).

decide whether these phrases were broad yet sufficiently precise to cover the remand determination as a specific measure at issue.[177] In sum, we conclude that the remand determination falls outside the specific measures at issue covered by Korea's panel request, and thus outside our terms of reference.

7.134. For the foregoing reasons, we conclude that we have no jurisdiction to examine Korea's claims with respect to the remand determination. Moreover, we do not find it necessary to decide whether we also lack jurisdiction to address Korea's claims regarding this determination because: (a) Korea brings new claims that are different from the legal basis of the complaint that it set out in its panel request[178]; and (b) the remand determination was not subject to consultations between the parties.

7.4 Whether the USDOC's decision to construct NEXTEEL's export price was inconsistent with Article 2.3 of the Anti-Dumping Agreement

7.135. Under US law, the USDOC is permitted to reject the transaction export price and instead construct the export price where the exporter or foreign producer's export sales are to an *affiliated* purchaser.[179] In the underlying investigation, the USDOC concluded that NEXTEEL was affiliated with the following three entities, which we refer to collectively, together with NEXTEEL, as the "concerned entities":

a. POSCO, which supplied NEXTEEL with steel coils used in the production of OCTG[180];

b. **[[***]]**, a **[[***]]** that purchased OCTG from NEXTEEL, and in which **[[***]]** (Company A)[181]; and

c. **[[***]]**, the **[[***]]** US affiliate of **[[***]]**, through which Company A exported OCTG produced by NEXTEEL to US customers (Company B[182]).[183]

[177] We note Korea's view that a ruling on the remand determination will contribute to the prompt settlement of this dispute, consistent with the objectives set out in Article 3.3 of the DSU. (Korea's response to Panel question No. 39, paras. 9 and 12). However, the goal of prompt settlement of disputes does not take precedence over the clear definition of our jurisdiction in accordance with the DSU. In any event, we do not agree with Korea's view. We have found certain aspects of the USDOC's final determination to be inconsistent with the United States obligations, and as a consequence, the United States may ultimately be recommended to bring its measures into conformity with its obligations. The remand determination may or may not be an element of any implementation of that recommendation. In any event, Korea will have the opportunity to initiate appropriate action under Article 21.5 of the DSU if it considers that the measures taken by the United States to comply with that recommendation are insufficient or themselves inconsistent with the United States' obligations. Therefore, we do not consider that our decision to not examine the remand determination affects the prompt settlement of this dispute.

[178] In this regard, while we do not make a separate ruling on whether Korea's claims with respect to the remand determination differ from the legal basis of the complaint set out in its panel request, we do have some concerns about Korea's decision to not identify the claims that it was seeking to make with respect to the remand determination till a very late stage in the proceedings, despite having an opportunity to do so earlier. We recall that in its closing statement at the first substantive meeting, Korea asked us to rule on the remand determination, which had been issued by the USDOC by that time, as it considered it to be inconsistent with the United States' obligations under the Anti-Dumping Agreement. (Korea's closing statement at the first meeting of the Panel, para. 10). However, as mentioned above, Korea waited till its opening statement at the second substantive meeting to present all of its claims. We consider that the due process objectives, intrinsic in Article 6.2 of the DSU, could be better served if Korea identified the claims that it was seeking to make with respect to the remand determination at the earliest possible opportunity, rather than wait till the second substantive meeting to identify all of its claims in this regard.

[179] Korea's first written submission, para. 6; and USDOC, Affiliation Memorandum for the Final Affirmative Determination in the less than fair value investigation of certain oil country tubular goods from the Republic of Korea, 10 July 2014 (USDOC's Affiliation Memorandum), (Exhibit KOR-43) (BCI), p. 5.

[180] USDOC's Affiliation Memorandum, (Exhibit KOR-43) (BCI), p. 3.

[181] USDOC's Affiliation Memorandum, (Exhibit KOR-43) (BCI), p. 4.

[182] In order to ensure, to the extent feasible, that this Report is comprehensible to those without access to BCI, and to ensure consistency, we refer to **[[***]]** as Company A and **[[***]]** as Company B in this Report.

[183] USDOC's Affiliation Memorandum, (Exhibit KOR-43) (BCI), p. 4.

7.136. Both parties agree that through this conclusion of affiliation under US law, the USDOC in effect sought to find "association … between the exporter and the importer or a third party", within the meaning of Article 2.3 of the Anti-Dumping Agreement.[184] Having found association between the concerned entities, the USDOC rejected the transaction export price of NEXTEEL to Company A and constructed the export price instead.[185]

7.137. Korea argues that in doing so, the USDOC acted inconsistently with Article 2.3 because, first, the USDOC's association determination was not one that an unbiased and objective investigating authority could have reached on the basis of the record evidence, and thus, the USDOC constructed the export price without making a proper determination of association between the concerned entities.[186] Second, in Korea's view, even where association exists, an investigating authority is in addition required to determine whether the export price is actually unreliable because of such association, as the export price may be reliable even in such cases.[187] But the USDOC failed to make such a determination.

7.4.1 Provision at issue

7.138. Article 2.3 of the Anti-Dumping Agreement reads:

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

7.4.2 Factual background

7.139. The USDOC addressed whether there was association between the concerned entities through an examination of affiliation under US law, which specifies that affiliation exists between "[a]ny person who controls any other person and such other person".[188] In turn, a person shall be considered to control another person "if the person is legally or operationally in a position to exercise restraint or direction over the other person".[189] The USDOC first examined whether NEXTEEL was affiliated with POSCO under US law, by examining whether POSCO was legally or operationally in a position to exercise restraint or direction, i.e. control over NEXTEEL.

7.140. The USDOC explained that in its analysis, it would first consider whether these two entities had a close supplier relationship, considering POSCO's status as a supplier of steel coils to NEXTEEL.[190] The threshold issue in finding whether there was such a close supplier relation was whether either the buyer, i.e. NEXTEEL or the supplier, i.e. POSCO, was reliant on the other.[191] Further, if such reliance existed, the USDOC would consider whether one of the parties was in a position to exercise direction or restraint over the other.[192] However, the USDOC would not find affiliation on this basis unless the relationship between the entities had the potential to affect decisions concerning the production, pricing or cost of the subject merchandise or foreign like

[184] Korea's response to Panel question No. 28, para. 88; and United States' response to Panel question No. 28, para. 76.
[185] In this Report, we use the term "affiliation" when we describe the USDOC's own analysis of the record evidence, or what the USDOC did, in determining whether there was "affiliation" between the concerned entities, under US law. We use the term "association" when describing the obligations under the Anti-Dumping Agreement, and in deciding whether the USDOC met these obligations.
[186] Korea's first written submission, paras. 160 and 161; response to Panel question No. 30(a), para. 94.
[187] Korea's response to Panel question No. 30(a), para. 97.
[188] Customs duties, General Provisions, *United States Code*, Title 19, Section 167719 USC 1677 (33) G, (Exhibit KOR-55). See also United States' response to Panel question No. 28, para. 75.
[189] 19 USC 1677 (33), (Exhibit KOR-55). See also United States' response to Panel question No. 28, para. 75.
[190] USDOC's Affiliation Memorandum, (Exhibit KOR-43) (BCI), p. 2. See also 19 C.F.R. § 351.102(b)(3), (Exhibit KOR-52), p. 211.
[191] USDOC's Affiliation Memorandum, (Exhibit KOR-43) (BCI), p. 2.
[192] USDOC's Affiliation Memorandum, (Exhibit KOR-43) (BCI), p. 3.

product, i.e. OCTG.[193] Having set out the criteria that it would apply in examining whether NEXTEEL and POSCO were affiliated, the USDOC proceeded to evaluate the record evidence to determine whether these criteria were met, and concluded, for the reasons described in paragraphs 7.152-7.153 below, that NEXTEEL and POSCO were affiliated with each other.

7.141. The USDOC then turned to examine whether NEXTEEL was affiliated with Company A and Company B. The USDOC noted that Company A was a **[[***]]** of POSCO.[194] The USDOC also found that Company B was **[[***]]** by Company A.[195] The USDOC did not separately examine whether Company A and Company B were in a position to exercise restraint or direction over NEXTEEL. Instead, having already concluded that NEXTEEL was affiliated with POSCO, the USDOC concluded that NEXTEEL was also affiliated with these two entities in which **[[***]]**. Thus, the USDOC concluded that there was association between the concerned entities.

7.4.3 Main arguments of the parties

7.142. Korea asserts that Article 2.3 of the Anti-Dumping Agreement requires an investigating authority to meet two cumulative requirements before it is permitted to construct the export price, both of which the USDOC failed to meet. First, the USDOC constructed the export price without making a proper association determination, contrary to its obligations under Article 2.3. Second, the USDOC "mechanically conclu[ded]" that because of association between the concerned entities, NEXTEEL's export price to Company A was unreliable.[196] That is, it did not affirmatively determine whether or not NEXTEEL's export price was actually unreliable, which Korea maintains is required under Article 2.3. In this regard, Korea states that NEXTEEL submitted evidence to the USDOC showing that its export price was reliable notwithstanding any association between the concerned entities, but the USDOC ignored this evidence.[197]

7.143. The United States rejects both arguments. First, the United States argues that the USDOC made a proper finding of association, based on the record evidence. Second, noting that Article 2.3 of the Anti-Dumping Agreement provides that it should "appear[]" to the investigating authority that the export price is unreliable because of association, the United States asserts that this means that once an investigating authority properly finds association, it may take the view that the export price is unreliable because of that association, without a separate determination that the export price is actually unreliable.[198]

7.4.4 Main arguments of the third parties

7.144. The European Union submits that association itself could be a sufficient basis under Article 2.3 to construct the export price, and that this provision does not impose an additional obligation to determine whether the export price is actually unreliable because of such association.[199] However, if the evidence on record shows that an export price is reliable despite association, an unbiased and objective investigating authority would be required to take that evidence into account.[200]

7.4.5 Evaluation by the Panel

7.145. We will commence our analysis by considering the nature of obligations imposed by Article 2.3 of the Anti-Dumping Agreement on an investigating authority. Then, we will examine whether that provision, as we understand it, was complied with by the USDOC in the underlying investigation.

[193] USDOC's Affiliation Memorandum, (Exhibit KOR-43) (BCI), p. 3. See also 19 C.F.R. § 351.102(b)(3), (Exhibit KOR-52), p. 211.
[194] USDOC's Affiliation Memorandum, (Exhibit KOR-43) (BCI), p. 4.
[195] USDOC's Affiliation Memorandum, (Exhibit KOR-43) (BCI), p. 4.
[196] Korea's second written submission, para. 242.
[197] Korea's second written submission, para. 244.
[198] United States' first written submission, para. 155.
[199] European Union's third-party submission, para. 41.
[200] European Union's third-party submission, para. 43.

7.146. Article 2.3 permits an investigating authority to disregard the transaction export price and construct the export price where, *inter alia*, "*it appears to the authorities concerned that the export price is unreliable because of association*" between the exporter and the importer or a third party. In our view, it is clear that an investigating authority must have grounds for the view that there is association. If there is no association, the export price cannot appear to be unreliable to the investigating authority "because of" association.[201]

7.147. While it is clear that the appearance of unreliability must be because of association, the text of Article 2.3 does not require any "determination", let alone a determination as to the *reliability* of the export price. If such a determination had been intended, in our view Article 2.3 would have been drafted differently, to require, for example, that the investigating authority determine or demonstrate that the export price is unreliable because of association. Instead, it provides that export price may be constructed where it "appears to the authorities" that the export price is unreliable. The verb "appear" has different definitions but we find the definition "seem to the mind, be perceived as, be considered" to be the most appropriate in respect of the text of Article 2.3.[202] The adjective "unreliable" is defined as "not reliable".[203] "Reliable" in turn is defined as "in which reliance or confidence may be put, trustworthy".[204] Thus to us, the use of the terms "appear to the authorities" and "unreliable" in Article 2.3 denotes a situation in which, because of the association at issue, the investigating authority perceives the export price not to be trustworthy. Of course, an investigating authority must have grounds for this view: it is always obliged to establish facts properly and evaluate them in an unbiased and objective manner. Nothing in our understanding of Article 2.3 would suggest, however, any separate requirement to make a "determination" as to the reliability of the export price.

7.148. It is also clear, in our view, that Article 2.3 does not allow an investigating authority to construct export price whenever there is association. If that were the case, we would again have expected Article 2.3 to have been drafted differently, to require, for instance, that an investigating authority may construct the export price where there is association.[205] An investigating authority could not simply ignore evidence before it suggesting that the export price is reliable notwithstanding association and go on to construct the export price without considering such evidence. As noted above, an investigating authority has an obligation to establish facts properly and evaluate them in an unbiased and objective manner, which entails the consideration of relevant evidence on the issues before it.[206]

7.149. Korea argues that, in the underlying investigation, the USDOC erred in finding association between the concerned entities, and ignored evidence presented by NEXTEEL showing that its export price to Company A was reliable notwithstanding the USDOC's finding of association. Therefore, we must consider both the finding of association, and whether the evidence to which Korea refers is relevant to the question of the reliability of the export price in the circumstances of the underlying investigation, such that the USDOC's failure to consider it undermines its decision to construct the export price. Specifically, we will address the following two questions:

a. Whether the USDOC's conclusion of association between the concerned entities was inconsistent with Article 2.3.

[201] Article 2.3 of the Anti-Dumping Agreement also recognizes that an export price may appear to be unreliable to the investigating authority because of a "compensatory arrangement" between the exporter and the importer or a third party. Both parties agree, however, that in the underlying investigation, the USDOC found association and not a compensatory arrangement between the concerned entities.

[202] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 101.

[203] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 3456.

[204] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 2521.

[205] The United States agrees that a finding of association will not necessarily suffice to meet the requirements under Article 2.3. (United States' response to Panel question No. 33, para. 81).

[206] We recall that in reviewing the USDOC's determination under Article 17.6(i) of the Anti-Dumping Agreement, we are required to examine whether its establishment of the facts was proper and whether its evaluation of those facts was unbiased and objective.

b. Whether the USDOC erred in not considering evidence of the reliability of NEXTEEL's export price.

7.4.5.1 Whether the USDOC's conclusion of association between the concerned entities was inconsistent with Article 2.3

7.4.5.1.1 Meaning of "association" under Article 2.3

7.150. Article 2.3 does not define association. The dictionary definitions of "association" include "action of joining or uniting for a common purpose; the state of being so joined".[207] These definitions are not limiting, and thus "association" may arise from formal legal ties or far less structured and non-binding relationships. But it is clear from the overall context of Article 2.3 that the remedy for the appearance of unreliability resulting from association provided for in that Article is the construction of the export price on the basis of the price at which the exported merchandise is first resold to an *independent* buyer. This strongly suggests that a lack of independent action is central to the nature of "association" and gives rise to the problem Article 2.3 seeks to remedy.

7.151. "Independent" is defined as "not subject to the authority or control of any person, country, etc.; free to act as one pleases, autonomous".[208] Thus, for purposes of Article 2.3, association may be understood to mean a *lack* of autonomy to act as one pleases or the *presence* of authority or control over a person. Therefore, we consider that, at a minimum, there may be association for purposes of Article 2.3 where an exporter and the importer or a third party do not act independently of one another. Based on this understanding, a situation in which export sales are between associated entities, as opposed to *independent* entities, may constitute the problem Article 2.3 seeks to remedy: the appearance of unreliability of export price resulting from association. In considering the USDOC's conclusion of affiliation in the underlying investigation, we will consider whether it was consistent with this understanding of association.

7.4.5.1.2 The USDOC's conclusions regarding association

7.152. In the underlying investigation, the USDOC reached its conclusions regarding association on the basis of US law provisions governing a finding of affiliation, which under US law is based on control. The basis of these conclusions is described in paragraphs 7.139-7.141 above. In examining whether NEXTEEL was affiliated with POSCO based on the evidence before it, the USDOC made the following intermediate factual findings:

a. POSCO supplied NEXTEEL with "virtually all" of the steel coil, the main input used in the production of OCTG, used by NEXTEEL[209];

   i. **[[***]]**% of the steel coil purchased by NEXTEEL during the POI was from POSCO;

   ii. **[[***]]**% of steel coils consumed by NEXTEEL during the POI was from POSCO; and

   iii. Steel coils sourced from POSCO accounted for **[[***]]**% of NEXTEEL's total cost for manufacturing OCTG.

b. **[[***]]** to NEXTEEL related to the production of OCTG[210];

c. **[[***]]** of NEXTEEL's US sales were made through **[[***]]**[211];

d. POSCO had a history of working closely on-site with NEXTEEL departments and providing marketing assistance and other promotional activities for the benefit of NEXTEEL.[212]

[207] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 137.
[208] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 1362.
[209] USDOC's Affiliation Memorandum, (Exhibit KOR-43) (BCI), p. 3.
[210] USDOC's Affiliation Memorandum, (Exhibit KOR-43) (BCI), p. 3.
[211] USDOC's Affiliation Memorandum, (Exhibit KOR-43) (BCI), p. 3.
[212] USDOC's Affiliation Memorandum, (Exhibit KOR-43) (BCI), p. 3.

> POSCO continued to provide marketing support to NEXTEEL during the POI, and POSCO and NEXTEEL shared technology and market information pertaining to OCTG.[213]

7.153. On the basis of these factual findings the USDOC reached the following overall conclusion regarding the relationship between POSCO and NEXTEEL[214]:

> The combination of [POSCO's] involvement on both the production and sales side 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. Being in a position both to establish the primary input cost and **[[***]]** enables POSCO to influence the cost of inputs and additionally to **[[***]]**. The preamble to the [USDOC's] regulations states that section 771(3) of the [US Tariff] Act, which refers to a person being "in a position to exercise restraint or direction," focuses the [USDOC] on the ability to exercise "control" rather than the actuality of control over specific transactions. In this case, by playing the role **[[***]]** supplier and, **[[***]]** POSCO is in a rather unique position to exercise restraint or control over NEXTEEL.

7.154. In addition, as stated above, the USDOC concluded that NEXTEEL was affiliated with Company A and Company B because of POSCO's **[[***]]**.

7.155. In reviewing the USDOC's finding of affiliation, which served as its conclusion regarding association between the concerned entities for purposes of Article 2.3, we recall that pursuant to our standard of review, we must examine whether, in light of the evidence and arguments before it, the conclusions reached by the USDOC are such as could be reached by an unbiased and objective investigating authority.[215] Further, considering that the USDOC's overall conclusion was based on several intermediate factual findings, not only must we examine each of these findings, to the extent necessary, but we must also consider whether these findings, taken as a whole, supported the USDOC's overall conclusion.[216] This means that even were we to conclude that an intermediate factual finding or a particular piece of evidence might not, viewed in isolation, support the USDOC's overall conclusion, if taken as whole, they support that conclusion, we must uphold it.

7.156. Korea contends that in reaching its intermediate factual findings, the USDOC ignored alternative explanations of the record evidence, as well as other evidence which undermined these findings. In particular, Korea argues that:

a. in examining the extent to which NEXTEEL sourced its steel coil supply from POSCO, the USDOC failed to consider that NEXTEEL had alternative sources from which it purchased and consumed steel coils during the POI. The USDOC also drew improper inferences from the nature of the services provided by **[[***]]** to NEXTEEL during the production process of OCTG;

b. the USDOC failed to consider evidence regarding marketing and technology collaboration between NEXTEEL and POSCO that undermined its findings; and

c. the USDOC failed to consider that the volume of NEXTEEL's US sales through Company A and Company B was on the **[[***]]**.

Korea also questions the linkage between the intermediate factual findings and the overall conclusion reached by the USDOC. We will examine each of these arguments below.

7.157. In addition, Korea contends that the USDOC acted inconsistently with the relevant US law provisions governing findings of affiliation based on control.[217] Korea asserts that such a violation

[213] USDOC's Affiliation Memorandum, (Exhibit KOR-43) (BCI), p. 3.
[214] USDOC's Affiliation Memorandum, (Exhibit KOR-43) (BCI), p. 4.
[215] See paras. 7.3-7.5 above.
[216] See, e.g. Appellate Body Reports, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 94; and *US – Countervailing Duty Investigation on DRAMS*, para. 157.
[217] Korea's response to Panel question Nos. 65(a) and (b), para. 78.

of US law led to a violation of Article 2.3 of the Anti-Dumping Agreement in this case, because having decided to find association under Article 2.3 on the basis of US law, the USDOC was required to comply with the requirements of US law.[218] Thus, Korea essentially requests us to determine whether the USDOC's conclusion regarding association or affiliation was consistent with US law.

7.158. As a panel established under the DSU, our role is to determine the consistency of the United States' measures with its obligations under, in this instance, Article 2.3 of the Anti-Dumping Agreement and not under US law. It is not our role, nor are we competent, to review the consistency of the USDOC's findings with governing US law. Therefore, it would be entirely inappropriate for us to review whether the USDOC complied with US law in its examination of affiliation based on control, and we will not do so. At the same time, however, we must consider the consistency of the United States' measure with Article 2.3 on the basis of the conclusions reached by the USDOC. We may not engage in a *de novo* review of the evidence and arguments that were before the USDOC to determine whether it could have found association under Article 2.3 on some other basis than that on which it reached its conclusions.

7.159. Keeping these considerations in mind, we will proceed in the following manner: We will first review the USDOC's intermediate factual findings, and whether taken as a whole, these findings support the USDOC's overall conclusion regarding affiliation. Then, we will examine whether this overall conclusion was a sufficient basis for a conclusion that there was association between the concerned entities within the meaning of Article 2.3 of the Anti-Dumping Agreement.[219]

7.4.5.1.2.1 NEXTEEL's purchases and consumption of steel coils during the POI and USDOC's inferences based on the nature of services provided by [[***]] to NEXTEEL during the production process of OCTG

7.160. In the underlying investigation, the USDOC considered the role of POSCO in the production of OCTG by NEXTEEL. The USDOC noted that POSCO supplied NEXTEEL with "virtually all" of the steel coils used to produce OCTG and that steel coils purchased from other sources were negligible.[220] Further, the USDOC found that **[[***]]** to NEXTEEL related to the production of OCTG.

7.161. Korea argues that the USDOC failed to consider submissions made by NEXTEEL that it had alternative sources of supply available to it, and that it had, in fact, used steel coils sourced from other suppliers during the period of investigation.[221] The United States notes, and the record confirms, that the USDOC did not ignore this evidence, but nonetheless found that POSCO accounted for **[[***]]**% of NEXTEEL's consumption of steel coils in the POI and **[[***]]**% of its total POI purchases of steel coils.[222] As stated above, the USDOC did not conclude that POSCO supplied NEXTEEL with all steel coils used in the production of OCTG[223], and the evidence does

[218] Korea's response to Panel question Nos. 65(a) and (b), para. 80.

[219] Noting the USDOC's conclusion that "[b]eing in a position to establish the primary input cost and **[[***]]** enables POSCO to influence the cost of inputs and additionally to **[[***]]**", Korea asserts that this statement shows that instead of determining association between NEXTEEL and POSCO on the basis of control, as it sought to do, the USDOC determined association on the basis of the **[[***]]** exercised by POSCO over **[[***]]**. (Korea's second written submission, para. 235). Considering that our role is not to adjudge the consistency of this conclusion with US law, we do not find it necessary to consider whether the concept of **[[***]]** is consistent with that of control, under US law.

[220] USDOC's Affiliation Memorandum, (Exhibit KOR-43) (BCI), p. 3.

[221] Korea's first written submission, para. 171 (referring to NEXTEEL Rebuttal Brief, 23 June 2014, (Exhibit KOR-42) (BCI), pp. 63 and 64); response to Panel question No. 61, para. 65.

[222] United States' comments on Korea's response to Panel question No. 61, para. 52 (citing USDOC's Affiliation Memorandum, (Exhibit KOR-43) (BCI), p. 3).

[223] We recognize that just because a buyer purchases its inputs predominantly or even exclusively from a single seller does not necessarily mean that the buyer and seller do not act independently of each other. Otherwise, association between a buyer and seller would exist whenever the seller has a monopoly on the production and sale of a particular input used in the production of the product being investigated. However, this was not the only basis of the USDOC's conclusion in the underlying investigation.

support the finding that the USDOC did make.[224] Thus, the USDOC did not ignore evidence or arguments before it.

7.4.5.1.2.2 Marketing and technology collaboration between POSCO and NEXTEEL

7.162. The USDOC found that POSCO had a history of working closely with NEXTEEL, providing marketing assistance and conducting other promotional activities for NEXTEEL's benefit.[225] The USDOC also found that POSCO continued to provide marketing support to NEXTEEL and both companies shared technology and market information pertaining to OCTG.[226] The USDOC relied on evidence furnished by the domestic industry in making this finding.[227]

7.163. That evidence relates to technical consulting provided by POSCO to NEXTEEL, technical checks provided by POSCO on finished products, joint development of new materials and POSCO's takeover of NEXTEEL's overseas public relations campaign, as well as NEXTEEL's acknowledgement that "mutual cooperation" between NEXTEEL and POSCO boosted its competitiveness, and would continue in the future.[228] In addition, a **[[***]]** between NEXTEEL and POSCO provides for **[[***]]**.[229] [230] Korea does not question the reliability of this evidence in these proceedings.

7.164. Korea argues that the evidence relied on by the USDOC could not have supported the USDOC's intermediate factual finding of marketing and technology collaboration between NEXTEEL and POSCO, and that the USDOC ignored evidence other than these that could have undermined its conclusions regarding association.[231] First, Korea notes that the record evidence showed that POSCO shared technology and market information pertaining to OCTG with other companies with which it did business, and that instances of such cooperation were not exclusive between POSCO and NEXTEEL but in line with normal supplier-customer relations, and asserts that this evidence was not considered by the USDOC in its analysis.[232]

7.165. Korea essentially argues that evidence of marketing and technology collaboration between NEXTEEL and POSCO could have probative value only if these two entities had an *exclusive* collaborative relationship. We find nothing in the notion of association as we understand it for purposes of Article 2.3 that would suggest that the lack of an exclusive relationship means that the evidence is not probative on the question of association or cannot support the inferences drawn by the USDOC on the basis of this evidence. Indeed, an exporter may have associations with multiple entities, in which case, the relationship between the exporter and any one of those entities will not be exclusive. Yet, that relationship may nonetheless suffice to show association for purposes of Article 2.3.

7.166. Second, Korea notes that the **[[***]]** was not **[[***]]** and there were no **[[***]]** agreements between POSCO and NEXTEEL.[233] Korea has failed to explain why the fact that an agreement regarding various aspects of the relations between two companies is not **[[***]]**

[224] Similarly, we do not consider that evidence that **[[***]]** to NEXTEEL to be sufficient, in and of itself, to show that there was association between NEXTEEL and POSCO.
[225] USDOC's Affiliation Memorandum, (Exhibit KOR-43) (BCI), p. 3.
[226] USDOC's Affiliation Memorandum, (Exhibit KOR-43) (BCI), p. 3.
[227] USDOC's Affiliation Memorandum, (Exhibit KOR-43) (BCI), p. 3 and fns 18 and 19 (referring to evidence in Exhibit USA-17 as well as a **[[***]]** between NEXTEEL and POSCO contained in Exhibit USA-46 (BCI)).
[228] U.S. Steel Deficiency Comments, 20 November 2013, (Exhibit USA-17), attachment C, pp. 3-5; and Korea's response to Panel question No. 64, para. 68.
[229] NEXTEEL confirmed that this actually occurred, stating that [[***]]. (NEXTEEL's supplemental section D questionnaire responses, 23 December 2013, (Exhibit USA-46) (BCI), p. 24).
[230] United States' response to Panel question No. 66, para. 43 (quoting **[[***]]** between NEXTEEL and POSCO, NEXTEEL's supplemental section D questionnaire responses, 23 December 2013, (Exhibit USA-46) (BCI), pp. 1 and 2).
[231] See, e.g. Korea's response to Panel question No. 64, para. 69.
[232] For example, as noted by Korea, NEXTEEL submitted that it cooperated with POSCO as part of the **[[***]]**, but that 1600 companies participated in that program and that POSCO itself partnered with 400 companies as part of that program. (Korea's first written submission, para. 180; and NEXTEEL Rebuttal Brief, 23 June 2014, (Exhibit KOR-42) (BCI), p. 67). See also Korea's first written submission, paras. 179 and 180 (referring to NEXTEEL Rebuttal Brief, 23 June 2014, (Exhibit KOR-42) (BCI), pp. 63-69); and response to Panel question No. 64, paras. 69 and 71.
[233] Korea's comments to the United States' response to Panel question No. 66, para. 100.

demonstrates that it is not relevant to the question of association between those companies. Indeed, as we understand it, association for purposes of Article 2.3 can exist without any formal agreement, much less a **[[***]]** agreement. Accordingly, we are not persuaded that an objective and unbiased investigating authority could not have found, on the basis of the evidence in question, that there was marketing and technological collaboration between NEXTEEL and POSCO with respect to OCTG, or that these two entities did not act independently of each other in the production and sale of OCTG.

7.4.5.1.2.3 [[***]] in US sales through Company A and Company B[234]

7.167. The USDOC found that **[[***]]**.[235] However, Korea notes that NEXTEEL's US sales through Company A and Company B **[[***]]** throughout the POI.[236] In particular, while in the first half of POI, NEXTEEL sold **[[***]]** of its OCTG, by volume, through Company A and B, that percentage **[[***]]** to **[[***]]** in the second half of POI.[237] Korea argues that the **[[***]]** proportion of sales through these entities contradicts the notion that NEXTEEL was controlled by Company A and Company B.

7.168. The USDOC recognized that the proportion of NEXTEEL's sales through Company A and Company B **[[***]]** during the POI in its evaluation[238]:

> [W]e note that while POSCO's **[[***]]** the Department must make its decision regarding affiliation and its impact for purposes of sales and cost based on the POI, the period of time being examined.

7.169. Thus it is clear that the USDOC did consider this issue. However, we recall the USDOC's conclusion that POSCO was in a position to **[[***]]** and that by playing the role of **[[***]]** supplier and **[[***]]** Company A **[[***]]** POSCO was in a position to exercise restraint or direction over NEXTEEL was based, in part, on the fact that POSCO through Company A and Company B sold a **[[***]]** of finished products to the United States.[239] While a more thorough discussion of whether the **[[***]]** in sales through these entities at the end of the POI affected its view that POSCO was in a position to exercise restraint or direction over NEXTEEL would have been desirable, the USDOC's assessment was based on the data for the POI. During the entire POI the volume of exports to the United States that NEXTEEL made through Company A and Company B was a **[[***]]** **[[***]]**, notwithstanding the **[[***]]** at the end of the POI.

7.4.5.1.2.4 The USDOC's overall conclusion of association within the meaning of Article 2.3

7.170. Korea has failed to demonstrate that the evidence relied on by the USDOC did not support its intermediate factual findings. The question that we now turn to is whether the USDOC's overall conclusion of affiliation between the concerned entities was reasonably based on these intermediate factual findings and whether this conclusion sufficed to demonstrate "association" between the exporter and the importer or a third party, within the meaning of Article 2.3 of the Anti-Dumping Agreement.

7.171. We recall that the USDOC's overall conclusion, as set out in paragraph 7.153 was that there was affiliation based on control between NEXTEEL and POSCO because:

a. The combination of POSCO's involvement on both the production and sales side created a unique situation where POSCO was operationally in a position to exercise restraint or

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[234] We understand from Korea's response to our questions that NEXTEEL's exports through both Company A and Company B **[[***]]** during and after the period of investigation. (Korea's response to Panel question No. 63, para. 66).
[235] USDOC's Affiliation Memorandum, (Exhibit KOR-43) (BCI), p. 3.
[236] Korea's response to Panel question No. 31, para. 107.
[237] Korea's response to Panel question No. 31, para. 107. The volume of sales through these entities **[[***]]** further after the POI.
[238] USDOC's Affiliation Memorandum, (Exhibit KOR-43) (BCI), p. 4.
[239] USDOC's Affiliation Memorandum, (Exhibit KOR-43) (BCI), p. 4.

direction over NEXTEEL in a manner that affected the pricing, production, and sale of OCTG.

b. Being in a position to establish the primary input cost and **[[***]]** enabled POSCO to influence the cost of inputs and additionally to **[[***]]**.

c. By playing the role **[[***]]** supplier and **[[***]]** POSCO was in a rather unique position to exercise restraint or control over NEXTEEL.

7.172. The USDOC also concluded that there was affiliation between NEXTEEL, Company A, and Company B because of POSCO's **[[***]]**.

7.173. We recall that the USDOC reached this conclusion based on: (a) undisputed evidence of marketing and technology collaboration between POSCO and NEXTEEL, including through a **[[***]]** that **[[***]]**; and (b) evidence of POSCO's direct and indirect involvement in NEXTEEL's production and sale of OCTG. We recall our view that where the exporter and the importer or a third party are joined or united for a common purpose, this may suggest that they do not act independently of one another, but are instead, dependent on each other, and thus are associated within the meaning of Article 2.3 of the Anti-Dumping Agreement. We consider that the USDOC's overall conclusion of affiliation between POSCO and NEXTEEL sufficed to demonstrate that they were joined or united for a common purpose, and thus there was "association" between the exporter and the importer or a third party, within the meaning of Article 2.3 of the Anti-Dumping Agreement.

7.174. We further consider that the USDOC's conclusion of affiliation between NEXTEEL and Company A and B sufficed to demonstrate that they were joined or united for a common purpose, and thus there was "association" between the exporter and the importer or a third party, within the meaning of Article 2.3 of the Anti-Dumping Agreement. It remains undisputed that POSCO had **[[***]]** and **[[***]]**. Indeed, in its questionnaire response before the USDOC, Company B stated that it was **[[***]]**.[240] Because these entities were **[[***]]** of POSCO, we consider that the conclusion of association between NEXTEEL and POSCO sufficed as a basis to find that these entities, like POSCO, did not act independently of NEXTEEL.

7.175. Therefore, we consider that the USDOC's conclusions regarding the relationship between the concerned entities were supported by the evidence, and sufficed to satisfy the requirement of Article 2.3 that there be association between the exporter and the importer or a third party.

7.4.5.2 Whether the USDOC erred in not considering evidence allegedly pertaining to the reliability of the export price

7.176. During the underlying investigation, NEXTEEL presented evidence to the USDOC, which Korea alleges showed that NEXTEEL's export price was reliable despite association between the concerned entities:

a. evidence that NEXTEEL's relationship with both POSCO and its relationship with the Company A predated the relationship between POSCO and Company A;

b. sales agreement between NEXTEEL, Company A and a US customer that predated POSCO's affiliation with Company A, and the terms of which remained unchanged since POSCO **[[***]]**, and even into the POI;

c. Company A testified that **[[***]]** was not directly or indirectly involved in the sales negotiation or sale of OCTG between NEXTEEL and Company A; and

d. NEXTEEL's sales through Company A **[[***]]** throughout the period of investigation, demonstrating that neither POSCO nor Company A was in a position to control NEXTEEL's sales.

[240] Company A supplemental questionnaire responses, 14 March 2014, (Exhibit KOR-89) (BCI), p. A-7.

Korea argues that the USDOC erred in ignoring this evidence.

7.177. Considering that NEXTEEL's relationship with POSCO, Company A, and Company B predated POSCO's **[[***]]** in Company A, and **[[***]]** in Company B, in Korea's view, there was no effect on NEXTEEL's export price.[241] The United States disagrees with Korea's assertion, stating that because NEXTEEL's export price to Company A was set on a short-term basis, this export price was not set on terms that existed prior to POSCO's **[[***]]** in Company A and Company B.[242] The record supports the United States' assertion in this regard.

7.178. First, the sales agreement between NEXTEEL, Company A, and a US customer cited by Korea does not state **[[***]]**, but rather provides for **[[***]]**. This shows that the export price during the POI was not set on terms that existed prior to POSCO's affiliation with Company A or Company B. This is further confirmed by Company A's questionnaire response[243]:

[[***]]

7.179. Thus, while the sale agreement appears to predate the affiliation between POSCO and Company A, the export price during the POI was not based on the terms in that agreement, but on a [[***.]][244] Therefore, we are of the view that NEXTEEL's export price to Company A could have appeared unreliable to the investigating authority, without a separate evaluation of the timing of NEXTEEL's relationship with POSCO, Company A, and Company B.

7.180. In addition, during the underlying investigation, Company A testified that **[[***]]** was not directly or indirectly involved in the sales negotiations or sale of OCTG between NEXTEEL and Company A. However, we recall that **[[***]]** had an **[[***]]** in Company A, and the USDOC found that Company A and Company B were affiliated with NEXTEEL on this basis. Considering that Company A and Company B were affiliated with NEXTEEL, we consider that NEXTEEL's export price to Company A could have appeared unreliable to the investigating authority, without a separate evaluation of whether **[[***]]** was involved, directly or indirectly, in the export sales made by NEXTEEL.

7.181. Finally, Korea refers to the fact that NEXTEEL's sales of OCTG through Company A **[[***]]** in the POI. We have already found above that the USDOC considered this fact in finding affiliation. It is not clear, however, and Korea has not shown, the relevance of this fact to the reliability of NEXTEEL's export prices.

7.182. Therefore, we consider that Korea has not demonstrated that the USDOC erred in not considering evidence allegedly showing that the export price was reliable notwithstanding the association between NEXTEEL, POSCO, and the concerned entities.

7.4.6 Conclusion

7.183. For the foregoing reasons, we find that Korea has not demonstrated that the USDOC acted inconsistently with Article 2.3 of the Anti-Dumping Agreement in the underlying investigation.

7.5 Whether the USDOC's decision to reject the price at which NEXTEEL purchased steel coils from POSCO was inconsistent with Article 2.2.1.1 of the Anti-Dumping Agreement

7.184. In constructing the normal value for NEXTEEL on the basis of its cost of production, the USDOC rejected the price that NEXTEEL paid to POSCO for the principal input, steel coils (NEXTEEL's steel coil purchase price), on the ground that NEXTEEL and POSCO were affiliated entities. Korea contends that the USDOC's rejection of this price, reflected in NEXTEEL's records, on the ground that these records did not "reasonably reflect the costs associated with the

[241] See, e.g. Korea's response to Panel question No. 67, paras. 84-86.
[242] United States' comments on Korea's response to Panel question No. 67, para. 65.
[243] Company A supplemental questionnaire responses, 14 March 2014, (Exhibit KOR-89) (BCI), p. A-15.
[244] We note that NEXTEEL did not argue before the USDOC that its export price was reliable regardless of whether there was association because the price at which it sold OCTG to Company A was set on terms determined prior to POSCO's affiliation with Company A.

production and sale" of OCTG, was inconsistent with Article 2.2.1.1 of the Anti-Dumping Agreement.[245]

7.5.1 Provision at issue

7.185. Article 2.2.1.1 reads, in part, as follows:

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

7.5.2 Factual background

7.186. As discussed above, in the underlying investigation, the USDOC found that POSCO was affiliated with NEXTEEL. To consider whether, in this situation, NEXTEEL's steel coil purchase price should be used in constructing normal value, the USDOC calculated the weighted-average price of POSCO's steel coil sales to unaffiliated customers[246], and compared NEXTEEL's steel coil purchase prices (transfer prices) with POSCO's cost of production of OCTG and with the prices at which POSCO sold this product to unaffiliated customers.[247]

7.187. The USDOC found that the transfer prices of all **[[***]]** examined grades of steel coils were above POSCO's corresponding cost of production.[248] However, it found that POSCO had sold **[[***]]** of the **[[***]]** examined grades to unaffiliated customers at prices that were **[[***]]** than the corresponding transfer price to NEXTEEL.[249] The USDOC used the prices of these **[[***]]** grades to the unaffiliated customers in constructing the normal value of NEXTEEL, rather than NEXTEEL's steel coil purchase price.[250]

7.5.3 Main arguments of the parties

7.188. Korea argues that the USDOC acted inconsistently with Article 2.2.1.1 by rejecting NEXTEEL's steel coil purchase price because: (a) the USDOC's finding of affiliation between NEXTEEL and POSCO was erroneous; and (b) there was no evidence on the record of the underlying investigation indicating that NEXTEEL's records did not reasonably reflect the costs associated with production and sale of OCTG. In this regard, Korea acknowledges that the USDOC examined NEXTEEL's steel coil purchase price to assess whether it was an arm's length price. However, Korea contends that in considering whether a producer's records reasonably reflect the costs associated with production and sale of the product under consideration, an investigating authority is required to assess whether the producer's *records* are reliable, and not whether the *costs* reflected in those records are reliable.[251] In Korea's view, the USDOC did not examine, as part of this arm's length test, whether NEXTEEL's *records* were reliable, and thus had no proper basis under Article 2.2.1.1 to reject NEXTEEL's steel coil purchase price.

7.189. The United States contends that the USDOC disregarded NEXTEEL's steel coil purchase price because NEXTEEL's records did not reasonably reflect the costs associated with production and sale of OCTG.[252] The United States notes that the USDOC reached this conclusion based on: (a) a proper finding of affiliation; as well as (b) an arm's length test which compared NEXTEEL's steel coil purchase price with POSCO's cost of production and POSCO's steel coil sales price to

[245] In this regard, there is no dispute between the parties that NEXTEEL's records were kept in accordance with Korean GAAP, as provided in Article 2.2.1.1.
[246] USDOC, Constructed Value calculation adjustments for the Final Determination, 10 July 2014 (USDOC's Constructed Normal Value Memorandum), (Exhibit USA-39) (BCI), p. 3.
[247] USDOC's Constructed Normal Value Memorandum, (Exhibit USA-39) (BCI), p. 3.
[248] USDOC's Constructed Normal Value Memorandum, (Exhibit USA-39) (BCI), p. 3.
[249] USDOC's Constructed Normal Value Memorandum, (Exhibit USA-39) (BCI), p. 3.
[250] USDOC's Constructed Normal Value Memorandum, (Exhibit USA-39) (BCI), p. 3.
[251] See, e.g. Korea's second written submission, para. 235.
[252] United States' second written submission, para. 54.

other unaffiliated customers. The United States asserts that this provided a sufficient basis under Article 2.2.1.1 to reject NEXTEEL's steel coil purchase price.

7.5.4 Main arguments of the third parties

7.190. The European Union argues that the use of the term "normally" in Article 2.2.1.1 means that an investigating authority is permitted to depart from the norm, which is to calculate costs based on the exporter or producer's records provided the two express conditions provided in this Article are met.[253] However, the investigating authority must explain why it departed from this norm.[254]

7.5.5 Evaluation by the Panel

7.191. The issue before us is whether the USDOC's rejection of NEXTEEL's steel coil purchase price, on the ground that NEXTEEL's records did not "reasonably reflect the costs associated with production and sale of" OCTG, was consistent with Article 2.2.1.1 of the Anti-Dumping Agreement. Korea presents two main arguments in support of its claim. First, the USDOC's finding of affiliation between POSCO and NEXTEEL was not proper and hence did not provide a basis under Article 2.2.1.1 to disregard NEXTEEL's steel coil purchase price. Second, even assuming this finding of affiliation was proper, there was still no basis under Article 2.2.1.1 to reject this price because NEXTEEL's records reasonably reflected costs associated with the production and sale of the product under consideration. The United States disagrees with both arguments presented by Korea.[255]

7.192. We begin by noting that nothing in Article 2.2.1.1 sets out any criteria or consideration for determining whether the "records kept by the exporter or producer under investigation … reasonably reflect the costs associated with the production and sale of the product under consideration". It certainly does not address questions of affiliation among companies. The issue before us with respect to this claim is thus not whether the USDOC's finding of affiliation was consistent with Article 2.2.1.1, but whether its rejection of NEXTEEL's steel coil purchase price on the ground that its records did not reasonably reflect the costs associated with production and sale of OCTG was consistent with that provision. Indeed, Korea appears to recognize that there is no basis for concluding that the USDOC's affiliation finding was inconsistent with Article 2.2.1.1, as it makes no argument in this regard. Instead, Korea argues that because the USDOC's finding of affiliation between NEXTEEL and POSCO was inconsistent with Article 2.3 of the Anti-Dumping Agreement, it could not provide a basis under Article 2.2.1.1 to reject NEXTEEL's steel coils purchase price.[256]

7.193. We have already concluded above that the USDOC's conclusion on affiliation was sufficient with respect to the requirements of Article 2.3 of the Anti-Dumping Agreement regarding association. Korea makes no other argument under Article 2.2.1.1 challenging the USDOC's finding of affiliation, and thus there is no basis for us to find error in USDOC's conclusion that, as affiliated companies, NEXTEEL and POSCO did not have an independent buyer-supplier relationship. The issue that we have to consider is whether the USDOC acted inconsistently with Article 2.2.1.1

[253] European Union's third-party submission, para. 46.
[254] European Union's third-party submission, para. 46.
[255] With respect to Korea's second argument, the United States submits that while in its panel request Korea stated that the USDOC acted inconsistently with this provision "because *due to its erroneous finding of affiliation*" between NEXTEEL and POSCO, the USDOC failed to calculate costs on the basis of the records kept by the exporter or producer, as required under Article 2.2.1.1, it is now arguing that the Panel should find that the USDOC violated this requirement even if its finding of affiliation was proper. (United States' second written submission, para. 53 (emphasis added by the United States)). However, the United States does not argue that Korea is precluded from making this argument under Article 6.2 of the DSU. In any case, we do not consider that this argument by Korea deviates from the legal basis of its Article 2.2.1.1 claim, as set out in its panel request. Korea was not required to set out its arguments in the panel request, and is free to present this argument in the panel proceedings. Moreover, the reference in the panel request to the erroneous finding of affiliation between NEXTEEL and POSCO merely identifies the factual basis on which the USDOC made its determination, which was that NEXTEEL and POSCO were affiliated under US law. The legal basis of Korea's claim was, and continues to be, that the USDOC acted inconsistently with Article 2.2.1.1 by failing to calculate costs on the basis of the exporter or producer's, i.e. NEXTEEL's records.
[256] See, e.g. Korea's first written submission, para. 186; and opening statement at the first meeting of the Panel, para. 111.

when it disregarded the price at which NEXTEEL purchased steel coils from POSCO based on its findings that (a) POSCO was an associated supplier; and (b) the price at which POSCO sold **[[***]]** grades of steel coils to NEXTEEL was **[[***]]** than the price at which it sold them to non-affiliated customers.

7.194. Article 2.2.1.1 does not permit an investigating authority to disregard an exporter's or producer's record costs because it considers such costs to be unreasonable or to not be a cost that the exporter or producer would incur under normal circumstances.[257] In *EU – Biodiesel (Argentina)*, the panel and Appellate Body recognized that the focus of this condition is on the exporter's or producer's *records* and on whether these records reasonably reflect the costs incurred by the exporter or producer.[258] The focus is not on whether the reported *costs* are themselves reasonable.[259]

7.195. However, the issue in this case is whether an investigating authority is permitted to disregard the price reflected in an exporter's or producer's records for the purchase of an input from an associated or non-independent supplier, when this price is found to be **[[***]]** that supplier's arm's length prices. In other words, is an investigating authority permitted to conclude, in such a circumstance, that the exporter's or producer's records do not "reasonably reflect" the cost associated with production and sale of the product under consideration? While the panel and Appellate Body reports in *EU – Biodiesel (Argentina)* are relevant to our consideration, this issue was not raised in that dispute, and has not been directly addressed in any previous case.

7.196. The Appellate Body in *EU – Biodiesel (Argentina)* clarified that the phrase "reasonably reflect" means that the records of the exporter or producer *must suitably and sufficiently correspond to or reproduce* the costs that have a genuine relationship with the production and sale of the specific product under consideration.[260] The panel in *EU – Biodiesel (Argentina)*, noting that the ordinary meaning of "reflect" is "to reproduce, esp. faithfully or accurately; to depict" and the ordinary meaning of "reasonable", the adjective underlying the adverb "reasonably" which modifies the verb "reflect", is "rational or sensible, in accordance with reason, and fair and acceptable in amount", found that the requirement that the records *reasonably reflect* the incurred costs means that the records "must depict all the costs [the producer] has incurred in a manner that is – within acceptable limits – accurate and reliable".[261]

7.197. However, this does not mean that the figures reported in an exporter's or producer's records must be accepted for purposes of constructing normal value without further consideration in all cases. Both the panel and the Appellate Body in *EU – Biodiesel (Argentina)* recognized that if the prices recorded in an exporter's or producer's records do not reflect arm's length prices, an investigating authority may find that the records, insofar as those prices are concerned, do not "reasonably reflect" the costs associated with production and sale of the product under consideration.[262] In such a situation, the investigating authority would be entitled to disregard those prices when determining the exporter's or producer's cost of production. Thus, we consider that when the transactions between the exporter or producer and an associated or non-independent entity are found not to be at arm's length, the costs reflected in the exporter's or producer's records cannot be said to be "accurate or reliable" or "suitably and sufficiently correspond" to, i.e. reasonably reflect, the costs associated with production and sale of the product under consideration.

7.198. To examine whether such transactions are or are not at arm's length, and therefore whether the reported prices should be used in constructing normal value, an investigating authority would have to examine the transactions in question. This is what the USDOC did in the underlying investigation. The USDOC calculated the weighted-average price of POSCO's steel coil sales to unaffiliated customers, and compared NEXTEEL's steel coil purchase prices (transfer

[257] Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.30 and 6.37.
[258] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.20; Panel Report, *EU – Biodiesel (Argentina)*, paras. 7.230 and 7.231.
[259] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.37; Panel Report, *EU – Biodiesel (Argentina)*, para. 7.242
[260] Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.20 and 6.22. (emphasis added)
[261] Panel Report, *EU – Biodiesel (Argentina)*, paras. 7.229-7.232.
[262] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.33; Panel Report, *EU – Biodiesel (Argentina)*, fn 400.

prices) with POSCO's cost of production of OCTG and with the prices at which POSCO sold steel coils to unaffiliated customers. The USDOC found that the prices of **[[***]]** grades of steel coils purchased by NEXTEEL from POSCO were **[[***]]** the prices at which POSCO sold these grades of steel coils to other non-affiliated customers. In our view, it was not unreasonable for the USDOC to conclude that NEXTEEL's steel coil purchases were not at arm's length prices, and therefore that NEXTEEL's records did not reasonably reflect the costs associated with the production and sale of OCTG within the meaning of Article 2.2.1.1. In this regard, we note that Korea does not dispute that an investigating authority may conduct an arm's length test in this context.[263] However, Korea asserts that an arm's length test cannot be used to assess whether the costs reflected in the exporter or producer's records reflect some "hypothetical costs" which the investigating authority considers to be more reasonable than the costs actually incurred by the producer or exporter.[264] We agree. As discussed above, the enquiry under Article 2.2.1.1 is not whether costs reported in the producer or exporter's records are reasonable. But this is not the question the USDOC was addressing in this case. In the underlying investigation, the USDOC did not compare NEXTEEL's steel coils purchase price with some "hypothetical" reasonable cost or price. Instead, the USDOC compared the actual price at which POSCO sold steel coils to NEXTEEL with the actual price at which POSCO sold steel coils to non-affiliated customers, and concluded that the former was **[[***]]** the latter.

7.199. In light of the above, we conclude that the USDOC did not act inconsistently with Article 2.2.1.1 in the underlying investigation when it rejected the price at which NEXTEEL purchased **[[***]]** grades of steel coils from POSCO that were found to be **[[***]]** POSCO's arm's length prices to non-affiliated customers.[265]

7.200. For the foregoing reasons, we conclude that the USDOC did not act inconsistently with the second condition in Article 2.2.1.1 in concluding that NEXTEEL's records did not reasonably reflect the costs associated with production and sale of OCTG, and rejecting NEXTEEL's steel coil purchase price for purposes of constructing normal value.

7.6 Whether the USDOC acted inconsistently with Articles 6.2, 6.4, and 6.9 of the Anti-Dumping Agreement

7.201. As discussed above, in its final determination in the underlying investigation, the USDOC determined the CV profit for the Korean respondents on the basis of the Tenaris profit data. It did not, however, make known to interested parties that it had accepted that data on the record or that it had relied on that data for purposes of CV profit determination until the final determination.

7.202. On 17 June 2014, one day before the deadline to submit case briefs in the underlying investigation, the USDOC posted to the record[266] a letter signed by 57 US Senators dated 15 May 2014. On 23 June 2014, the same day as the deadline to submit rebuttal briefs, the USDOC posted to the record a letter signed by 155 Members of the US House of Representatives dated 10 June 2014.[267] These letters, as well as other letters from US lawmakers, local government leaders, and industry representatives and memoranda to the file describing phone calls and meetings with US lawmakers and industry representatives, set out concerns regarding the USDOC's preliminary determination and the impact of OCTG imports on the domestic market in the United States.[268] We refer collectively to these letters and memoranda as the "communications".

7.203. Korea makes the following claims under Articles 6.2, 6.4, and 6.9 of the Anti-Dumping Agreement:

[263] Korea's response to Panel question No. 68, para. 88.
[264] Korea's response to Panel question No. 68, para. 88.
[265] We note that there is no claim in this dispute regarding the USDOC's choice of information on steel input costs to use in constructing normal value for the Korean respondents, and we express no views on that issue.
[266] As we understand, in USDOC practice, all interested parties have access to all information posted to the non-confidential record, which was the case with the communications at issue here.
[267] Letter dated 10 June 2014 from various members of US Congress and Other Memoranda, (Exhibit KOR-22); and Letter dated 15 May 2014 from various senators, (Exhibit KOR-23).
[268] Letter dated 10 June 2014 from various members of US Congress and Other Memoranda, (Exhibit KOR-22).

a. The USDOC acted inconsistently with Articles 6.2, 6.4, and 6.9 in not disclosing, until its final determination, its decision to accept the Tenaris financial data on the record of the underlying investigation; and

b. The USDOC acted inconsistently with Articles 6.4 and 6.9 of the Anti-Dumping Agreement in not posting to the record certain communications in a timely manner.

7.6.1 Provisions at issue

7.204. **Article 6.2** of the Anti-Dumping Agreement provides:

> Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting, and failure to do so shall not be prejudicial to that party's case. Interested parties shall also have the right, on justification, to present other information orally.

7.205. **Article 6.4** of the Anti-Dumping Agreement provides:

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

7.206. **Article 6.9** of the Anti-Dumping Agreement provides:

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

7.6.2 Whether the USDOC acted inconsistently with Articles 6.2, 6.4, and 6.9 in connection with the Tenaris financial statements

7.6.2.1 Main arguments of the parties

7.207. Korea's main arguments are as follows:

a. The USDOC did not afford Korean respondents an opportunity to present evidence in defence of their interests under Article 6.2 because they had no notification from the USDOC that the Tenaris financial statements submitted by U.S. Steel, which Korean respondents contended were submitted untimely, were properly on the record.[269]

b. The Tenaris financial statements constitute "relevant" information under Article 6.4, and the USDOC failed to notify the Korean respondents of its decision to accept the Tenaris financial data and failed to provide the Korean respondents with any opportunity to prepare presentations regarding such data, inconsistently with Article 6.4.[270]

[269] Korea's first written submission, paras. 189, 203 and 204 (referring to Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 241); opening statement at the first meeting of the Panel, para. 115.

[270] Korea's first written submission, paras. 205 and 206 (referring to Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 145; and Panel Reports, *EC – Salmon (Norway)*, para. 7.769; and *EC – Fasteners (China) (Article 21.5 – China)*, para. 7.89).

c. Finally, the USDOC's decision to accept the Tenaris financial statements on the record constitutes an "essential fact" which was not disclosed in sufficient time before the final determination, inconsistently with Article 6.9. In addition, the USDOC's reliance on the Tenaris financial statements was an essential fact that was not disclosed to interested parties in sufficient time before the final determination, inconsistently with Article 6.9.[271]

7.208. The United States argues that:

a. The Korean respondents had the opportunity, which they utilized, to challenge the Tenaris financial data. They submitted written arguments against its use on several occasions, as well as oral arguments at the USDOC hearing.[272] Therefore, the USDOC provided Korean respondents a full opportunity to defend their interests under Article 6.2.

b. The USDOC did notify the respondents, in its preliminary determination, that it had accepted the Tenaris financial data and examined it as one of three possible options for CV profit. In addition, all interested parties had access to the Tenaris financial statements once U.S. Steel filed the information on the record, four months before the final determination.[273] Therefore, the Korean respondents did see all the information, which was relevant to the presentation of their case, and were able to, and did, prepare presentations responding to it in accordance with Article 6.4.[274]

c. Korea's allegations that "whether the USDOC would accept the placement of the Tenaris financial statements on the record" and the "USDOC's reliance on the financial statements" were essential facts conflate "essential facts" with an investigating authority's deliberations and conclusions.[275] Article 6.9 does not require an authority to disclose its reasoning or conclusions. Therefore, the USDOC was not required to inform the respondents that it had chosen to accept the financial statements submitted by the petitioners or that it would rely on the information in those statements.[276]

7.6.2.2 Main arguments of third parties

7.209. The European Union makes the following arguments:

a. Whether an investigating authority's decision to accept a party's submission into the record could, in itself, be considered "information" within the meaning of Article 6.4, is questionable.[277] Whether an investigating authority's decisions pertaining to the formation of the record could, in themselves be considered as "essential facts" is also questionable. A document which formed the basis for the profit rate calculation would, however, set out "essential facts".[278]

b. Where the authority's decision shifts significantly between the preliminary and final determinations due to the submission of new essential facts, it may not suffice that such

[271] Korea's first written submission, para. 212.
[272] United States' first written submission, paras. 206 and 208 (referring to AJU BESTEEL Case Brief, 18 June 2014, (Exhibit USA-18), pp. 5-7; HUSTEEL Case Brief, 18 June 2014, (Exhibit USA-19), pp. 17-24; HYSCO Rebuttal Brief, 24 June 2014 (complete), (Exhibit USA-25), pp. 34-41; HYSCO Case Brief, 19 June 2014, (Exhibit USA-24), pp. 41-55; NEXTEEL Case Brief, 19 June 2014, (Exhibit USA-22); NEXTEEL Rebuttal Brief, 24 June 2014, (Exhibit USA-23); and OCTG Hearing Transcript, 26 June 2014, (Exhibit KOR-32) pp. 112-122).
[273] United States' first written submission, para. 212 (referring to Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, paras. 5.121-5.123).
[274] United States' first written submission, para. 214.
[275] United States' first written submission, para. 216.
[276] United States' first written submission, paras. 219 and 220 (referring to Panel Reports, *China – GOES*, para. 7.407; *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 7.148; and *EC – Salmon (Norway)*, para. 7.808).
[277] European Union's third-party submission, para. 57 (referring to Appellate Body Report, *EC – Fasteners (China)*, para. 480).
[278] European Union's third-party submission, para. 62.

facts are on the record of the investigation, but the investigating authority's reliance on them may need to be additionally disclosed.[279]

7.6.2.3 Evaluation by the Panel

7.210. For purposes of its preliminary determination, the USDOC had considered determining the CV profit on the basis of the Tenaris profit data as one of several options. However, it did not do so for two reasons: (a) the Tenaris data did not relate to production or sales of OCTG in the home market; and (b) it was based on a research paper the accuracy of which was questionable. Ultimately, in its preliminary determination, the USDOC determined CV profit for HYSCO based on sales of non-OCTG pipe products in Korea, and for NEXTEEL using the audited financial statements of six Korean OCTG producers.[280] The USDOC noted in the preliminary determination that it intended to continue exploring other possible options for determining CV profit for both respondents.[281]

7.211. After the preliminary determination, the USDOC issued a supplemental questionnaire to NEXTEEL[282], to which NEXTEEL submitted a response. Subsequently, the petitioner in the underlying investigation, U.S. Steel, made a submission under 19 C.F.R. § 351.301(c)(1)(v), purportedly to rebut, clarify, or correct factual information contained in that questionnaire response. U.S. Steel's submission included Tenaris's audited financial statements.[283] In response, NEXTEEL requested the USDOC to remove the Tenaris financial data from the record, asserting that it had been filed past the deadline for such submissions.[284] The USDOC did not respond separately to that request, but in its final determination noted that the Tenaris financial statements were properly on the record and went on to determine the CV profit, for both HYSCO and NEXTEEL, on the basis of that data.[285]

7.212. The principal legal issue before us is whether the USDOC, in not disclosing its acceptance of the Tenaris financial statements on the record until its final determination, failed to:

a. provide a full opportunity for respondents to defend their interests in accordance with Article 6.2;

b. provide timely opportunities for Korean respondents to see all non-confidential information relevant to the presentation of their cases and to prepare presentations on the basis of this information in accordance with Article 6.4; and

c. disclose "essential facts under consideration which form the basis for the decision whether to apply definitive measures" in a timely manner in accordance with Article 6.9.

7.6.2.3.1 Whether the USDOC acted inconsistently with Article 6.2 in not disclosing, until its final determination, that it had accepted the Tenaris financial statements on the record

7.213. Korea argues that the USDOC's failure to notify its acceptance of the Tenaris financial statements on the record until the final determination precluded the Korean respondents from: (a) launching a "full-scale argument"[286]; and (b) submitting factual information rebutting the content

[279] European Union's third-party submission, para. 65 (referring to Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.130).
[280] Preliminary Decision Memorandum, (Exhibit KOR-5), p. 22.
[281] Preliminary Decision Memorandum, (Exhibit KOR-5), p. 22.
[282] USDOC, Third supplemental section D questionnaire to NEXTEEL, 20 February 2014, (Exhibit KOR-18) (BCI).
[283] U.S. Steel Submission of Tenaris Audit Report, 21 March 2014, (Exhibit KOR-19).
[284] NEXTEEL Request to reject untimely new factual information, 27 March 2014, (Exhibit KOR-20).
[285] Final Decision Memorandum, (Exhibit KOR-21), pp. 28 and 29.
[286] Korea's second written submission, para. 285; opening statement at the first meeting of the Panel, para. 115.

of those statements[287], and thus denied them the opportunity to defend their interests under Article 6.2.

7.214. Article 6.2 of the Anti-Dumping Agreement provides, in relevant part, that "throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests". It is understood that while Article 6.2 imposes a general duty on an investigating authority to ensure that interested parties have a full opportunity throughout an anti-dumping investigation for the defence of their interests, it does not give specific guidance on the type of procedural steps an investigating authority should take in ensuring the rights of interested parties.[288]

7.215. We are not persuaded that because USDOC did not disclose its acceptance of the Tenaris financial statements on the record until the final determination, the Korean respondents were prevented from launching a "full-scale argument".[289] The record shows that the Korean respondents did, in fact, make several submissions commenting on the substantive aspects of the Tenaris profit data and arguing against its use in determining CV profit.[290] Thus, it is clear that the Korean respondents were aware of the data in question, did have opportunities to present arguments against its use as a basis for CV profit determination, and did make use of those opportunities.

7.216. Korea also contends that without notice of an affirmative decision by the USDOC that the Tenaris data was properly on the record, the Korean respondents were not "permitted to" submit factual information to support their arguments against the use of that data as a basis for CV profit determination.[291] In particular, Korea asserts that the Korean respondents could not make factual submissions in response to the Tenaris financial statements (rebuttal facts) because those statements were submitted in contravention of the governing relevant USDOC regulation, 19 C.F.R. § 351.301. Korea contends that even though U.S. Steel stated that it was submitting the Tenaris financial statements under 19 C.F.R. § 351.301(c)(1)(v), the submission was not consistent with the requirements of that provision because it did not "rebut, clarify or correct" factual information in NEXTEEL's Supplemental Questionnaire Response.[292]

7.217. The facts on the record of these proceedings do not support Korea's assertion that the Korean respondents were precluded from presenting rebuttal facts unless the USDOC notified them of its acceptance of those statements on the record. We are also not persuaded that the Korean respondents were prevented from presenting rebuttal facts because the Tenaris statements were submitted in contravention of the governing relevant USDOC regulation. As described above, after the preliminary determination, the USDOC issued a supplemental questionnaire to NEXTEEL[293], in reply to which NEXTEEL submitted its response. The United States relies on US regulation 19 C.F.R. § 351.301(c)(1)(v). That regulation provides that an interested party, other than the original submitter of a supplemental questionnaire response − here U.S. Steel − has one opportunity to submit factual information to rebut, clarify, or correct factual information contained in that questionnaire response within a specified time-frame. Korea has not pointed to any other conditions for such a submission in this regulation.

7.218. The regulation further provides that the original submitter of the supplemental questionnaire response − here NEXTEEL − has one opportunity to submit a sur-rebuttal containing

[287] Korea's second written submission, paras. 285 and 293; first written submission, paras. 189, 203 and 204 (referring to Appellate Body Report, *US − Oil Country Tubular Goods Sunset Reviews*, para. 241).

[288] Panel Reports, *Argentina − Poultry Anti-dumping Duties*, para. 7.160; and *Guatemala − Cement II*, para. 8.162

[289] Korea's opening statement at the first meeting of the Panel, para. 115.

[290] United States' first written submission, paras. 206 and 208 (referring to AJU BESTEEL Case Brief, 18 June 2014, (Exhibit USA-18), pp. 5-7; HUSTEEL Case Brief, 18 June 2014, (Exhibit USA-19), pp. 17-24; HYSCO Rebuttal Brief, 24 June 2014 (complete), (Exhibit USA-25), pp. 34-41; HYSCO Case Brief, 19 June 2014, (Exhibit USA-24), pp. 41-55); NEXTEEL Case Brief, 19 June 2014, (Exhibit USA-22); NEXTEEL Rebuttal Brief, 24 June 2014, (Exhibit USA-23); and OCTG Hearing Transcript, 26 June 2014, (Exhibit KOR-32) pp. 112-122).

[291] Korea's second written submission, para. 294.

[292] Korea's response to Panel question No. 69, paras. 96-99.

[293] USDOC, Third supplemental section D questionnaire to NEXTEEL, 20 February 2014, (Exhibit KOR-18) (BCI).

factual information to rebut, clarify, or correct the interested party's rebuttal, clarification, or correction to its supplemental questionnaire response, within seven days of the filing of such a rebuttal, clarification, or correction. Again, Korea has not pointed to any other conditions for such a submission in this regulation. U.S. Steel submitted the Tenaris financial statements under 19 C.F.R. § 351.301(c)(1)(v), purporting to rebut, clarify, or correct factual information contained in NEXTEEL's Supplemental Questionnaire Response.[294] As we understand it, NEXTEEL, as the original submitter of the supplemental questionnaire response, could have submitted rebuttal facts. NEXTEEL did not do so.[295]

7.219. Korea does not dispute the United States' description of the operation of 19 C.F.R. § 351.301(c)(1)(v). Rather, Korea argues that NEXTEEL did not file a sur-rebuttal because the Tenaris financial statements did not constitute rebuttal information under 19 C.F.R. § 351.301(c)(1)(v) and the provision for sur-rebuttal was therefore, not applicable.[296] We are not convinced by Korea's argument. Whether or not the Tenaris financial statements were submitted consistently with the governing regulation was a decision for the USDOC to make in its capacity as investigating authority, and not for NEXTEEL. NEXTEEL did, in fact, object to the U.S. Steel submission as inconsistent with the governing regulation. However, Korea has not shown that anything in the USDOC regulation requires that, having chosen to object to the Tenaris statements' submission, NEXTEEL was thereby automatically precluded from also responding to the substance of those statements. Apparently, it was their choice to await a decision on that objection, which was not forthcoming from the USDOC, rather than seek to make their own sur-rebuttal submission. Pending a decision, NEXTEEL, even if it believed that the Tenaris financial statements should be rejected, was not, in any formal sense, prevented from taking the opportunity to counter the contents of that submission, without prejudice to its objections to the USDOC's acceptance of those statements. Moreover, even if the USDOC erred in not responding to NEXTEEL's objection, a question which is outside our purview, we fail to see how NEXTEEL was precluded from at least attempting to file a sur-rebuttal.

7.220. Korea further argues that NEXTEEL did not file a sur-rebuttal under 19 C.F.R. 351.301(c)(1)(v) because to do so would have amounted to acknowledging that the Tenaris financial statements constituted rebuttal information under that provision and were therefore on the record.[297] Korea has failed to explain how NEXTEEL was precluded from filing a sur-rebuttal and stating that its submission did not amount to an acknowledgement that the Tenaris financial statements had been properly submitted. We agree with the United States that NEXTEEL could have requested that the USDOC reject the U.S. Steel submission because it was improperly submitted while, at the same time arguing in the alternative that the USDOC should accept the sur-rebuttal information should it decide to accept the U.S. Steel submission.[298] In this regard, we recall that Article 6.2 requires that an investigating authority provide *opportunities* for interested parties to defend their interests. We consider the fact that NEXTEEL did not act to defend its own interests in the underlying investigation cannot be equated with a failure by the USDOC to provide opportunities to interested parties to defend their interests.[299]

7.221. Korea also argues that 19 C.F.R. § 351.301(c)(1)(v) permitted only the submitter of the original factual information to submit rebuttal facts, and therefore only NEXTEEL, and not HYSCO, would have been able to submit such rebuttal facts under these regulations.[300] The United States submits that HYSCO and other Korean respondents could also have filed such rebuttal facts "generally" under 19 C.F.R. § 351.301.[301] Korea denies that HYSCO and other Korean respondents had an opportunity to submit rebuttals under the relevant provisions because 19 C.F.R. § 351.301 only permits parties to present arguments that the record is deficient, and does not permit parties to submit unsolicited factual information.[302]

[294] U.S. Steel Submission of Tenaris Audit Report, 21 March 2014, (Exhibit KOR-19), p. 1.
[295] United States' response to Panel question No. 70, paras. 44-46.
[296] Korea's response to Panel question No. 69, paras. 96-98.
[297] Korea's response to Panel question No. 69, para. 99.
[298] United States' comments on Korea's response to Panel question No. 69, para. 75.
[299] See Panel Report, *Egypt – Steel Rebar*, para. 7.88.
[300] Korea's comments on the United States' response to Panel question No. 70(a), para. 102 and fn 96.
[301] United States' response to Panel question No. 70(a), para. 47.
[302] Korea's comments on the United States' response to panel question no. 70, para. 103.

7.222. We recall, however, that Korea's claim under Article 6.2 does not raise the question whether the *USDOC regulation* in question, 19 C.F.R. § 351.301, prevented Korean respondents from making factual submissions to rebut the Tenaris financial statements. Rather, Korea's claim is that the *absence of* a *USDOC notification of its acceptance of those statements on the record* until its final determination prevented them from doing so. Korea has pointed to no specific evidence to show that NEXTEEL, or for that matter, any other Korean respondent, was prevented from filing sur-rebuttal evidence in response to the submission of the Tenaris financial statements only because the USDOC had not notified its acceptance of the Tenaris data on the record. In particular, Korea has not identified any US laws or procedures or any specific requirement imposed by the USDOC in the underlying investigation that made the filing of rebuttal facts by the Korean respondents conditional upon prior notification by the USDOC of its acceptance of the Tenaris financial statements on the record. Korea has also failed to identify any instance in the course of the underlying investigation where the USDOC declined to accept rebuttal facts from the Korean respondents by invoking 19 C.F.R. § 351.301 or any other provision of US domestic law, or for that matter, even without invoking any legal provision.

7.223. As Korea has failed to demonstrate that the USDOC's failure to notify the Korean respondents that it had accepted the Tenaris financial statements on the record until its final determination prevented the Korean respondents from launching a "full-scale argument" and submitting rebuttal facts, we conclude that Korea has failed to establish that the USDOC acted inconsistently with Article 6.2 in this regard.

7.6.2.3.2 Whether the USDOC acted inconsistently with Article 6.4 in not disclosing, until its final determination, that it had accepted the Tenaris financial statements on the record and that it was using those statements in determining CV profit

7.224. As we understand it, Korea's claim under Article 6.4 is that, because the Korean respondents were not informed that the USDOC had accepted the Tenaris financial statements on the record until the final determination, they were not provided a timely opportunity to prepare presentations on the basis of the fact that the Tenaris financial statements were *being used* by the USDOC.[303]

7.225. Article 6.4 requires an investigating authority to provide interested parties timely opportunities to see all non-confidential information that is relevant to the presentation of their cases and that is used by that authority in the anti-dumping investigation, and to prepare presentations on the basis of this information. We see nothing in Article 6.4 that would suggest that an investigating authority must "inform" interested parties of procedural decisions to accept and/or use certain information in the anti-dumping investigation. In any event, we fail to see how a procedural decision to accept and/or use certain information itself would constitute "information that is relevant to the presentation" of an interested party's case.

7.226. Korea characterizes the Tenaris financial statements as the "information" that is "relevant" to the presentation of the Korean respondents' cases and which was "used" by the investigating authority in the anti-dumping investigation.[304] We do not disagree with this characterisation. However, Korea is not arguing that the Korean respondents did not have timely opportunities to see the Tenaris profit data and prepare presentations on that basis. Rather, Korea is arguing that the "information" the Korean respondents did not have timely opportunities to see, and to prepare presentations on the basis of, is the *decision by the USDOC to accept and/or use* the Tenaris financial data on the record.

7.227. Korea also argues that the USDOC's failure to notify the interested parties that it had accepted the Tenaris financial statements on the record until its final determination precluded the Korean respondents from submitting rebuttal facts[305], and thus denied them the opportunity to prepare presentations on the basis of those statements, as required under Article 6.4. We have rejected Korea's claim that the USDOC's failure to notify the interested parties that it had accepted the Tenaris financial statements on the record until its final determination precluded the Korean

[303] Korea's opening statement at the first meeting of the Panel, para. 116.
[304] Korea's first written submission, para. 206.
[305] Korea's second written submission, para. 293.

respondents from submitting rebuttal facts. Therefore, there is no basis for Korea's argument in this regard.

7.228. Based on the foregoing, we conclude that Korea has not established that, in not disclosing until its final determination, that it had accepted the Tenaris financial data on the record and was using that data for determining CV profit, the USDOC failed to provide timely opportunities for Korean respondents to see all non-confidential information relevant to the presentation of their cases used by the USDOC and to prepare presentations on the basis of this information.

7.6.2.3.3 Whether the USDOC acted inconsistently with Article 6.9 in not disclosing, until its final determination, that it had accepted the Tenaris financial statements on the record and that it relied on those statements in determining CV profit

7.229. We have before us two main questions in regard to this claim:

a. whether the USDOC's reliance on the Tenaris profit rate in determining CV profit constitutes an "essential fact" within the meaning of Article 6.9, whose disclosure was therefore required under that provision; and

b. whether the USDOC's acceptance of the Tenaris financial statements on the record constitutes an "essential fact" within the meaning of Article 6.9, whose disclosure was therefore required under that provision.

7.230. We understand from Korea's submissions that the "acceptance on the record" of a submission containing financial statements by the USDOC means a decision to include that submission on the record of the investigation. We understand the USDOC's "reliance" on the submitted financial statements in determining CV profit to be a decision to use the substance of that submission in making its determination. In view of that difference, we will evaluate these two questions separately.

7.231. Article 6.9 provides that:

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

It is well accepted that Article 6.9 does not require the investigating authority to disclose its decisions or conclusions.[306]

7.232. Article 6.9 requires the disclosure of essential facts "under consideration", which form the basis for the decision whether to apply definitive measures. That the essential facts, which must be disclosed are "under consideration" at the time of their disclosure, implies that the investigating authority has not yet reached conclusions regarding its reliance on them at that stage. We agree with the views of the panel in *EC – Salmon (Norway)* that essential facts for purposes of Article 6.9 are not only those facts that support a determination, but rather are the body of facts essential to any determination *that are being considered* in the process of analysis and decision-making by the investigating authority.[307] That panel further observed that:

> [I]n our view, the essential facts to be disclosed under Article 6.9 are not affected by the substance of the determination an investigating authority may ultimately make. Indeed, they cannot be, as the essential facts to be disclosed are those "under consideration that form the basis of the decision" – that is, the disclosure of essential facts *precedes* the decision. Thus, at the time of the Article 6.9 disclosure, no decision

[306] Panel Report, *China – GOES*, para. 7.407.
[307] Panel Report, *EC – Salmon (Norway)*, para. 7.796.

> has yet been taken, and, it seems to us, the disclosure of essential facts may not enable an interested party to foresee the ultimate decision.[308]

7.233. Given that the final determination may be affected by further arguments or information submitted after the Article 6.9 disclosure, the investigating authority cannot be required to include conclusions in that disclosure. This view is in keeping with the panel's statement in *EC – Salmon (Norway)* that the requirement in Article 6.9 for disclosure of "essential facts" is not necessarily satisfied by the disclosure of the investigating authority's *conclusions on issues of fact* that must be resolved before a decision to apply definitive measures is taken.[309]

7.234. Turning first to the question whether the USDOC's reliance on the Tenaris profit data to determine CV profit constitutes an "essential fact", as we have stated, the USDOC's reliance on the Tenaris profit data to determine CV profit constitutes a decision to use that data in its determination. In light of the foregoing, we are of the view that Article 6.9 requires an investigating authority to disclose only the essential facts and not its reasoning or its conclusions.[310] Given that the USDOC's reliance on the Tenaris profit data to calculate profit constitutes its conclusion to use that data (as opposed to other data it had before it) in calculating CV profit, in our view, that reliance was not an essential fact within the meaning of Article 6.9, and there was therefore no obligation on the USDOC to disclose it.

7.235. We next consider the question whether the USDOC's acceptance of the Tenaris profit data on the record of the underlying investigation constitutes an "essential fact" within the meaning of Article 6.9.

7.236. Korea argues that the acceptance of the Tenaris profit data on the record constitutes an "essential fact" because: (a) that data was "under consideration" as evidenced by the USDOC's decision to rely on it to calculate CV profit; and (b) it formed the basis for the decision whether to apply definitive measures as the use of that data was the most important factor that raised the respondents' dumping margins from a preliminary *de minimis* to a positive final margin.[311]

7.237. The question raised by Korea's assertion is whether the *acceptance* of the Tenaris profit data on the record rather than the *Tenaris profit data* itself was an essential fact under consideration. There is no issue in Korea's claim regarding whether the *Tenaris profit data* itself was an essential fact. What is pertinent to deciding Korea's claim is therefore not whether the Tenaris data was a fact under consideration by the USDOC for the determination of CV profit, but whether "the acceptance of that data on the record" was a fact under consideration for that determination. We are of the view that the acceptance of the Tenaris profit data on the record does not constitute an "essential fact" within the meaning of Article 6.9.

7.238. We recall that what facts are essential is decided by reference to the determinations that must be made by the investigating authority.[312] In the context of Article 2.2.2(iii), the essential facts were those that were under consideration as forming the basis for the USDOC's CV profit determination. While *data* which is used in the CV profit determination is substantively relevant to that determination, the fact of *acceptance of that data on the record* is not. This is because the fact of acceptance of data on the record, unlike the data itself, cannot be used in making the CV profit determination. The fact of acceptance of a submission on the record, even given that the submission contained the Tenaris profit data that was ultimately relied on, is not required to understand the basis for the USDOC's CV profit determination, because the fact of acceptance of the submission on the record has no substantive relevance to the CV profit determination. We do not consider that the fact of acceptance of the Tenaris profit data on the record was substantively relevant to the *content of the USDOC's findings* on the CV profit and therefore, to the content of its findings on the dumping margin. The fact of acceptance of the Tenaris profit data therefore did not *underlie* the USDOC's final findings and conclusions in respect of any of the three essential

[308] Panel Report, *EC – Salmon (Norway)*, para. 7.796. (emphasis added)
[309] Panel Report, *EC – Salmon (Norway)*, para. 7.806.
[310] United States' first written submission, para. 219.
[311] Korea's response to Panel question No. 36, para. 123.
[312] Appellate Body Report, *China – GOES*, para. 241.

elements − dumping, injury and causation − that must be present for application of definitive anti-dumping measures.[313]

7.239. Our conclusion in this regard is consistent with the views of the Appellate Body in *China − GOES*:

> In order to apply definitive measures at the conclusion of countervailing and anti-dumping investigations, an investigating authority must find dumping or subsidization, injury and a causal link between the dumping or subsidization and the injury to the domestic industry. What constitutes an "essential fact" must therefore be understood in light of *the content of the findings* needed to satisfy the substantive obligations with respect to the application of definitive measures under the Anti-Dumping Agreement and the SCM Agreement, as well as the factual circumstances of each case.
>
> Hence, in the context of the second sentence of Articles 3.2 and 15.2, we consider that the essential facts that investigating authorities need to disclose are *those that are required to understand the basis for their price effects examination*, leading to the decision whether or not to apply definitive measures, so that interested parties can defend their interests.[314]

7.240. Moreover, in our view, the acceptance of the Tenaris profit data on the record forms part of the authority's consideration or reasoning with regard to that data, which is not subject to the disclosure obligation under Article 6.9. It is well accepted that the Article 6.9 disclosure obligation does not apply to the reasoning of the investigating authority, but to the "essential facts" that form the factual basis for that reasoning.[315]

7.241. Korea also argues that the acceptance of the Tenaris profit data on the record constitutes an essential fact because it defined the universe of sources that the USDOC was considering for its CV profit determination. In particular, it enabled the USDOC to determine CV profit on the basis of the Tenaris profit data, which according to Korea, in and of itself, also constitutes an "essential fact" that must be disclosed under Article 6.9. Korea argues that the USDOC's failure to disclose its acceptance of the Tenaris profit data on the record is, therefore, tantamount to its failure to disclose the Tenaris profit data itself as an "essential fact".[316]

7.242. The acceptance of the Tenaris profit data on the record would not mean that the USDOC would necessarily consider that data as the basis for its CV profit determination. Acceptance of a submission on the record by an authority does not necessarily mean that the contents of that submission become "essential facts under consideration" which form the basis for its decision whether to apply definitive measures. Even if the USDOC had disclosed its acceptance of the Tenaris profit data on the record, that disclosure in itself would not have identified the Tenaris data as an "essential fact".

7.243. Based on the foregoing, we conclude that Korea has not established that the USDOC's acceptance of the Tenaris profit data on the record constituted an "essential fact" within the meaning of Article 6.9. We therefore find that the USDOC did not act inconsistently with Article 6.9 in not disclosing its acceptance of that data on the record until its final determination.

7.6.2.4 Conclusion

7.244. For the foregoing reasons, regarding Korea's claims under Articles 6.2 and 6.4 of the Anti-Dumping Agreement, we find that:

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[313] In *Mexico − Olive Oil*, the Panel observed that, in the context of the SCM Agreement, "essential facts" are the "specific facts that underlie the investigating authority's final findings and conclusions in respect of the three essential elements − subsidization, injury and causation − that must be present for application of definitive measures". (Panel Report, *Mexico − Olive Oil*, para. 7.110).

[314] Appellate Body Report, *China − GOES*, paras. 241 and 242. (fns omitted; emphasis added)

[315] Panel Report, *China − GOES*, para. 7.407.

[316] Korea's second written submission, para. 302.

a. The USDOC did not act inconsistently with Article 6.2 because Korea has not established that the USDOC, by not notifying its acceptance on the record of the Tenaris financial statements, prevented the Korean respondents from making factual submissions to counter the contents of those statements, thus denying them a full opportunity for the defence of their interests.

b. The USDOC did not act inconsistently with Article 6.4 because:

   i. it was not required under that provision to inform interested parties of its decision to accept and/or use the Tenaris financial statements on the record; and

   ii. Korea has failed to establish a legal or factual basis for its assertion that the USDOC's failure to disclose that it had accepted the Tenaris financial statements on the record prevented the Korean respondents from making factual submissions to counter the substance of those statements.

7.245. Regarding Korea's claim under Article 6.9, we find that:

a. the USDOC's decision to rely on the Tenaris profit data to determine CV profit did not constitute an "essential fact" within the meaning of Article 6.9 and the USDOC was therefore not required to disclose that reliance by Article 6.9; and

b. the USDOC's acceptance of the Tenaris profit data on the record did not constitute an "essential fact" within the meaning of Article 6.9 and the USDOC was therefore not required to disclose that acceptance by Article 6.9.

7.6.3 Whether the USDOC acted inconsistently with Articles 6.4 and 6.9 in connection with the disclosure of certain communications

7.6.3.1 Main arguments of the parties

7.246. Korea argues that the USDOC's delay in disclosing certain communications was inconsistent with Articles 6.4 and 6.9 of the Anti-Dumping Agreement.[317] According to Korea, these communications constituted "relevant" information used by the investigating authority in the anti-dumping investigation under Article 6.4, as well as "essential facts under consideration" within the meaning of Article 6.9 that formed the basis for the USDOC's decisions.[318]

7.247. The United States contends that Korea fails to explain why the communications at issue constituted information that was "relevant" to the presentation of the respondents' cases, or how the information would have been "used" by USDOC in its investigation.[319] Korea also fails to demonstrate that the communications at issue constitute "essential facts" under consideration that formed the basis for USDOC's decision to apply definitive measures.[320] Moreover, the record shows that the Korean respondents had ample opportunity to and did respond to the relevant letters from the US lawmakers and industry representatives.[321] Further, the United States asserts that it is evident from the face of Korea's panel request that it does not include a claim that the USDOC's delay in disclosing the communications in question was inconsistent with Articles 6.4 and 6.9 of the Anti-Dumping Agreement. Therefore, the Panel should find that this claim falls outside its terms of reference.[322]

[317] Korea's first written submission, paras. 216 and 224; opening statement at the first meeting of the Panel, para. 121 (referring to Letter dated 10 June 2014 from various members of US Congress and Other Memoranda, (Exhibit KOR-22)).
[318] Korea's first written submission, para. 221; second written submission, para. 314.
[319] United States' first written submission, para. 226.
[320] United States' first written submission, para. 226.
[321] United States' first written submission, para. 228.
[322] United States' comments on Korea's response to Panel question No. 75, paras. 85 and 86.

7.6.3.2 Main arguments of third parties

7.248. As regards Korea's claim under Article 6.4, the European Union submits that the Panel should first examine whether the content of the letters was relevant from the respondents' standpoint and whether it related to a required step in the analysis, such as to the determination of normal value.[323] The next issue is whether the investigating authority allowed "timely opportunities" for the respondents to see the information and prepare presentations on the basis of it.[324] As regards Korea's claim under Article 6.9, it is doubtful that a letter that merely expresses support for a certain outcome of the investigation constitutes an essential fact, however important its signatories might be. Article 6.9 could only be relevant if such a letter provides new essential facts which formed the basis of the final determination.[325]

7.6.3.3 Evaluation by the Panel

7.249. The principal legal issues before us are whether the timing of the placement of certain communications on the record deprived Korean respondents of timely opportunities to see non-confidential information that was relevant to the presentation of their cases that was used by the USDOC, inconsistently with Article 6.4, and whether the communications at issue constituted "essential facts" within the meaning of Article 6.9 which were not disclosed to interested parties in a timely fashion. Before addressing these questions, however, we consider it necessary to ascertain whether Korea's panel request includes a claim that that the timing of USDOC's posting of these communications to the record resulted in inconsistency with those provisions.

7.250. We recall that a panel request must identify, by way of a brief summary, the "legal basis of the complaint" and that summary must be "sufficient to present the problem clearly". We also recall that compliance with DSU Article 6.2 must be assessed on the face of the panel request and on the merits of each case, considering the panel request as a whole, and in the light of attendant circumstances.[326]

7.251. Korea's panel request states, in relevant part:

> IV. PROCEDURAL CLAIMS UNDER THE ANTI-DUMPING AGREEMENT AND THE GATT 1994
>
> Korea further considers that the USDOC's actions taken in the course of its anti-dumping investigation of Oil Country Tubular Goods from Korea failed to protect the respondents' due process rights and were otherwise inconsistent with procedural obligations under the following provisions of the Anti-Dumping Agreement or GATT 1994:
>
> 1. Articles 6.2, 6.4, and 6.9 of the Anti-Dumping Agreement because the USDOC did not inform interested parties of its decision to accept the petitioners' submission of Tenaris SA's financial statements for inclusion in the record after all regulatory deadlines for the submission of new factual information had passed.
>
> a. Because the USDOC did not address Korean respondent's request to remove the untimely submission from the record until its Final Determination, the respondents were not granted a full opportunity to defend their interests under Article 6.2.
>
> b. By failing to respond to Korean respondent's request to remove the untimely submission from the record or to clarify whether the financial statements were properly admitted to the official administrative record, the USDOC did not ensure an opportunity for Korean respondents to prepare presentations on the basis of this information under Article 6.4.

[323] European Union's third-party submission, para. 70.
[324] European Union's third-party submission, para. 71.
[325] European Union's third-party submission, para. 72.
[326] Appellate Body Report, *US – Carbon Steel*, para. 127.

c. Because the USDOC did not respond to Korean respondents' requests or clarify whether the financial statements were properly on the record, and because the USDOC used the Tenaris SA financial statements to calculate anti-dumping margins for the Korean respondents for the first time in the Final Determination, the USDOC failed to inform interested parties of "essential facts" that formed the basis of its decision to apply definitive measures under Article 6.9.[327]

7.252. On its face, Korea's panel request does not mention the communications at issue at all. The only "brief summary" with respect to claims under Articles 6.4 and 6.9 relates to the facts surrounding the submission, acceptance, and disclosure of the Tenaris financial data. We thus find it difficult to see how the panel request can be understood to set forth a claim that the timing of the USDOC's posting of the communications at issue to the record was inconsistent with Articles 6.4 and 6.9 of the Anti-Dumping Agreement.[328] At a minimum, we would have expected some reference to the facts surrounding the alleged violation in connection with the communications as brief summary of the legal basis of the complaint, giving some indication of *how* or *why* Korea considered the measure at issue to be inconsistent with Articles 6.4 and 6.9 in this regard. However, in this case, there is nothing on this point in the panel request at all. The panel request does not even mention the communications in question, much less give any indication of the nature of any violation of Articles 6.4 and 6.9 in connection with those communications. We therefore conclude that Korea's panel request does not set out a claim that the USDOC acted inconsistently with Articles 6.4 and 6.9 of the Anti-Dumping Agreement in connection with the communications at issue.

7.253. Korea contends, however, that the circumstances surrounding the USDOC's treatment of the communications in question do not constitute a claim, but are "evidence" to support the claim, identified in its panel request, that the USDOC failed to comply with Articles 6.2, 6.4, and 6.9 in the course of the underlying investigation.[329] Korea submits that in its panel request, it described certain instances in which the USDOC's actions were inconsistent with these provisions as evidence supporting that claim. It contends that having enumerated certain evidence in its panel request does not preclude it from presenting additional evidence in these proceedings, because a party is under no obligation to identify, in its panel request, all the evidence that it intends to advance to support its claims.[330]

7.254. We understand Korea's position to be that it was not precluded from relying on the facts surrounding the communications in question as additional evidence supporting the claim of violation of Articles 6.2, 6.4, and 6.9 set out in its panel request. We are not persuaded by Korea's argument. We do not agree that Korea's panel request set out a general claim that "the USDOC failed to comply with Articles 6.2, 6.4 and 6.9 in the course of the underlying investigation". As is clear from the text of the panel request, Korea's claim is that the USDOC acted inconsistently with Articles 6.2, 6.4, and 6.9 of the Anti-Dumping Agreement *because it did not inform interested parties of its decision to accept the petitioners' submission of Tenaris SA's financial statements for inclusion in the record after all regulatory deadlines for the submission of new factual information had passed*. We recall that the panel request serves an important function of giving notice to Members of the substance of the dispute. In light of the limiting nature of Korea's summary of its claim, we fail to see, and Korea has failed to explain, how the circumstances surrounding the USDOC's treatment of the communications in question could be relevant "evidence" to support that claim.[331] In particular, Korea has not shown how an alleged delay in disclosing the communications in question has any relevance to the question of the USDOC's alleged failure to

[327] Emphasis original.

[328] Korea's first written submission, paras. 216 and 224; second written submission, paras. 314 and 316; and opening statement at the first meeting of the Panel, para. 119.

[329] We note that in its arguments presented over the course of these proceedings, as part of submissions referred to in footnote 328 above, Korea has argued that the USDOC's delay in disclosing certain letters from US lawmakers was inconsistent with Articles 6.4 and 6.9 of the Anti-Dumping Agreement. However, in its response to Panel question No. 75, it characterizes the USDOC's delay in disclosing certain letters from US lawmakers as evidence in support of its claim that the USDOC acted inconsistently with Article 6.2 *in addition to* Articles 6.4 and 6.9 of the Anti-Dumping Agreement. (Korea's response to Panel question No. 75, para. 108).

[330] Korea's response to Panel question No. 75, paras. 108 and 109.

[331] Similarly, Korea's claims under Articles 6.2, 6.4, and 6.9, set out under paragraphs 1 (a)-(c) of its panel request, pertain to the USDOC's conduct in relation to the Tenaris financial statements.

give Korean respondents a full opportunity to defend their interests under Article 6.2, to provide timely opportunities to see relevant information and prepare presentations on the basis of this information under Article 6.4, or to disclose "essential facts" concerning the acceptance of the Tenaris data under Article 6.9. Moreover, Korea has expressly argued in these proceedings that the USDOC's alleged delay in disclosing the communications in question violated Articles 6.4 and 6.9, and has requested us to make a finding in this regard.[332] In light of the foregoing, we reject the notion that the circumstances surrounding the treatment of the communications in question are merely evidence in support of a claim of violation of Articles 6.2, 6.4, and 6.9.

7.255. Korea's allegations in connection with the communications in question constitute an entirely new claim, based on different facts and legal arguments, that were not set forth in the panel request. As discussed above, the USDOC's alleged delay in disclosure of the communications in question is not covered by the claims set out in Korea's panel request.

7.256. We find that Korea's claim that the USDOC acted inconsistently with Article 6.4 because it failed to post the communications in question to the record in a timely fashion, and failed to disclose these communications as essential facts pursuant to Article 6.9 falls outside our terms of reference because it is not set out in Korea's panel request.[333] We will therefore make no findings in this regard.

7.7 Whether the USDOC's decision to limit its examination to NEXTEEL and HYSCO was inconsistent with Articles 6.10 and 6.10.2 of the Anti-Dumping Agreement

7.257. In the underlying investigation, the USDOC concluded that it would be impracticable to examine all known exporters and producers of the subject merchandise because of the large number of exporters or producers involved in the investigation and in light of its limited resources.[334] The USDOC selected NEXTEEL and HYSCO as the two mandatory respondents for examination. Korea claims that the USDOC acted inconsistently with Article 6.10 of the Anti-Dumping Agreement by limiting its examination to only these two exporters, and also acted inconsistently with Article 6.10.2 of the Agreement by failing to individually examine the voluntary respondents.

7.7.1 Provisions at issue

7.258. Article 6.10 of the Anti-Dumping Agreement provides:

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

Article 6.10.2 of the Anti-Dumping Agreement further provides:

> In cases where the authorities have limited their examination, as provided for in this paragraph, they shall nevertheless determine an individual margin of dumping for any exporter or producer not initially selected who submits the necessary information in time for that information to be considered during the course of the investigation,

[332] Korea's first written submission, paras. 216, 224, and 277(c)(ii).
[333] Panels are not permitted to address legal claims falling outside their terms of reference. The terms of reference of a panel define the scope of the dispute. (Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 152). Pursuant to Article 7.1 of the DSU, a panel's terms of reference are governed by the request for the establishment of a panel. Article 6.2 of the DSU sets forth the requirements applicable to such requests.
[334] USDOC, Antidumping duty investigation of certain oil country tubular goods from the Republic of Korea: Respondent Selection Memorandum, 26 August 2013 (Respondent Selection Memorandum), (Exhibit KOR-3), p. 6.

except where the number of exporters or producers is so large that individual examinations would be unduly burdensome to the authorities and prevent the timely completion of the investigation. Voluntary responses shall not be discouraged.

7.7.2 Factual background

7.259. In the underlying investigation, the USDOC issued a Respondent Selection Memorandum (Exhibit KOR-3) in which it explained why it considered that the individual examination of all known Korean exporters would be impracticable. It stated that it was selecting the two Korean exporters, NEXTEEL and HYSCO which together accounted for the largest volume of subject imports from Korea into the United States, for individual examination.[335] The USDOC also issued a Treatment of Voluntary Respondents Memorandum (Exhibit KOR-50) in the underlying investigation, in which it explained why it would be unduly burdensome to individually examine voluntary respondents, i.e. exporters other than NEXTEEL and HYSCO which submitted voluntary responses to the USDOC questionnaire.[336]

7.7.3 Main arguments of the parties

7.260. Korea makes two main arguments under Article 6.10. First, Korea argues that the USDOC did not provide a reasoned explanation as to why it would be impracticable to examine all known exporters, and further, why it would be practicable to examine only two exporters.[337] Second, Korea notes that where it is impracticable to examine all known exporters, Article 6.10 permits an investigating authority to limit its examination to either: (a) a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the investigating authority at the time of the selection (first method) or, in the alternative; (b) the largest percentage of the volume of exports from the country in question which can reasonably be investigated (second method). Korea asserts that the USDOC relied on the first method in the underlying investigation, but did not properly comply with this method.[338] In particular, the USDOC failed to explain why only two Korean respondents constituted a *reasonable* number of exporters to be examined, and did not limit its examination on the basis of a statistically valid sample.[339] Regarding its claim under Article 6.10.2, Korea asserts that the USDOC failed to provide any explanation as to why it would be "unduly burdensome" to individually examine voluntary respondents.[340]

7.261. The United States asserts that in its Respondent Selection Memorandum, the USDOC adequately explained why it would be impracticable to examine all known exporters.[341] The United States further submits that the USDOC's record shows that the USDOC relied on the second rather than the first method for limiting its examination provided for in Article 6.10.[342] According to the United States, the USDOC fully complied with this second method.

7.262. The United States maintains that the "Treatment of Voluntary Respondents Memorandum" explained why it would be unduly burdensome to individually examine voluntary respondents in light of its resource constraints, and thus there is no violation of Article 6.10.2.

7.7.4 Main arguments of the third parties

7.263. The European Union submits that a decision under Article 6.10.2 to not determine individual dumping margins for voluntary respondents cannot be arbitrary, and the authority must

[335] Respondent Selection Memorandum, (Exhibit KOR-3), p. 8.
[336] USDOC, Treatment of Voluntary Respondents Memorandum, 30 December 2013, (Exhibit KOR-50), p. 6.
[337] Korea's second written submission, para. 265.
[338] Korea's second written submission, para. 273.
[339] Korea's first written submission, para. 232; response to Panel question No. 37(a) and (b), para. 128.
[340] Korea's first written submission, para. 236.
[341] United States' first written submission, paras. 186 and 188.
[342] United States' second written submission, para. 58.

explain why the number of voluntary respondents would make it unduly burdensome to make an individual examination and prevent the timely completion of the investigation.[343]

7.7.5 Evaluation by the Panel

7.7.5.1 Article 6.10 of the Anti-Dumping Agreement

7.264. Korea's Article 6.10 claim raises the following two principal issues:

a. Was the USDOC's explanation as to why it would be "impracticable" to examine all known exporters sufficient to discharge its obligation under Article 6.10?

b. Did the USDOC act inconsistently with Article 6.10 by failing to properly limit its examination in accordance with one of the methods provided under this provision?

7.7.5.1.1 The USDOC's determination that it would be "impracticable" to examine all known exporters

7.265. The first sentence of Article 6.10 establishes the general rule that an investigating authority shall determine an individual margin of dumping for each known exporter or producer of the product under investigation. However, the second sentence, recognizing that this may not be possible in all cases, permits an investigating authority to deviate from the general rule where it would be "impracticable" to do so, and provides for individual examination of a limited number of exporters. Article 6.10 further provides for two methods of choosing the limited number of exporters for individual examination.[344] However, Article 6.10 contains no guidance on how large the number of exporters must be in order for an investigating authority to limit its examination to a smaller number. Instead, it specifies that the number of exporters must be "so large" as to make an individual determination "impracticable". This is necessarily a judgment which must be made by the investigating authority in each case in which it limits the individual examination, based on the relevant facts and circumstances.

7.266. In the underlying investigation, the USDOC provided the following explanation as to why it would be impracticable to examine all known exporters of the product under investigation[345]:

> Because of the large number of known exporters or producers involved in this investigation, and after careful consideration of our resources, we conclude that it would not be practicable in this antidumping duty investigation to examine all known exporters and producers of the subject merchandise as identified in the Petition and the CBP import data. Antidumping and Countervailing Duty (AD/CVD) Operations Office 7, the office to which this antidumping duty investigation is assigned, does not currently have the resources to examine all such exporters or producers. We find that the number of potential respondents identified in the CBP data is large relative to the resources available to AD/CVD Operations Office 7 and Import Administration that can be dedicated to the investigation. This office is conducting numerous concurrent antidumping duty proceedings, which place a constraint on the number of analysts that can be assigned to this case. Not only do these other cases present a significant workload, but the deadlines for a number of the cases coincide or overlap with deadlines in this antidumping proceeding. In addition, because of the significant workload throughout Import Administration, we do not anticipate receiving additional resources to devote to this antidumping proceeding.[346]

Thus, the USDOC's decision to limit the individual examinations was based on the following considerations: (a) there were a large number of exporters or producers involved in the underlying investigation; and (b) the USDOC lacked the resources to examine all such exporters or producers, considering that the relevant office was conducting numerous concurrent anti-dumping

[343] European Union's third-party submission, para. 84.
[344] See, e.g. Panel Report, *EC – Salmon (Norway)*, para. 7.162.
[345] Respondent Selection Memorandum, (Exhibit KOR-3), pp. 6 and 7.
[346] Fns omitted.

proceedings and the deadline for a number of the cases coincided or overlapped with deadlines in the underlying investigation.

7.267. Korea contends that the USDOC did not provide a reasoned and adequate explanation as to why the number of exporters was so large so as to render individual examination of all these exporters impracticable.[347] Korea also asserts that the USDOC's resource constraints do not evidence the existence of "any extraordinary circumstances" in the underlying investigation considering that such constraints are faced by investigating authorities on a regular basis.[348] In Korea's view, institutional resource constraints are not unique to the investigation at issue and cannot be the basis for a conclusion that it is impracticable to examine all known exporters or producers. Finally, Korea submits that the USDOC did not explain why it would be impracticable to examine more than two respondents, which Korea contends is required by Article 6.10.[349] We are not persuaded by these arguments.

7.268. First, Korea itself acknowledges that the USDOC explained that the number of exporters was large relative to the resources at its disposal.[350] Whether or not Korea agrees with the explanation, it is clear that the USDOC did explain its conclusion that the number of exporters was so large so as to render individual examination of all of them impracticable. It is not clear to us, and Korea does not explain, what else the USDOC could have said in this regard.

7.269. Second, nothing in the text of Article 6.10 supports Korea's position that an investigating authority may limit individual examination only when "extraordinary circumstances" exist. In our view, the text is clear that the trigger for limiting individual examination is the existence of a large number of exporters. Article 6.10 contains no mention of extraordinary circumstances as a relevant consideration, and we see no basis to read such a consideration into the text. Similarly, nothing in Article 6.10 suggests that examination of all exporters may only be found to be "impracticable" for reasons that are unique to the investigation at issue. The text of Article 6.10 simply does not support Korea's position that institutional resource constraints, of the kind cited by the USDOC, cannot be a ground for such limited examination.[351]

7.270. Our conclusion is consistent with the views of the panel in *EU – Footwear (China)* on an analogous question. There the panel was considering whether, under Article 6.10.2 of the Anti-Dumping Agreement, an investigating authority was justified in citing institutional resource constraints and administrative burden as the reason why it would be "unduly burdensome" to examine voluntary responses filed by exporters who were not selected for individual examination. That panel concluded as follows[352]:

> These are precisely the criteria set forth in Article 6.10.2 which an investigating authority may cite in order to justify declining to grant individual examination requests. To the extent China is arguing that it would not, in fact, have been unduly burdensome, and that the Commission could, and should, have allocated its available resources so as to enable it to undertake the individual examinations requested, we reject China's argument. Even assuming China is correct that the Commission had sufficient resources, and/or could have allocated its available resources differently, we consider that it would be entirely inappropriate for us to interfere in this manner in an investigating authority's conduct of anti-dumping investigations.

7.271. Article 6.10.2 is drafted differently from Article 6.10, allowing voluntary responses to not be examined if to do so would be "unduly burdensome". Article 6.10, on the other hand, allows limited examination if it is impracticable to examine all known exporters. However, the underlying rationale of the panel's finding in *EU – Footwear (China)* applies here as well. In particular, both provisions permit some flexibility in examining a limited subset of all exporters of the product

[347] Korea's second written submission, para. 267.
[348] Korea's second written submission, para. 267.
[349] Korea's second written submission, para. 265.
[350] Korea's second written submission, para. 267.
[351] Indeed, it would seem to us that this is the most likely reason for an investigating authority to consider examining all known exporters to be impracticable, given that an anti-dumping investigation is complex and must be completed within 12 months, as a rule, and no more than 18 months in any case, under Article 5.10.
[352] Panel Report, *EU – Footwear (China)*, para. 7.146.

under investigation in certain circumstances. Indeed, we see no reason why institutional resource constraints are not equally valid as a basis for a limited examination under Article 6.10 as they are for not examining voluntary respondents under Article 6.10.2. Thus, we consider that the USDOC's reliance on institutional resource constraints as the reason why it was impracticable to examine all known exporters was not inconsistent with Article 6.10.

7.272. Finally, we see nothing in the first sentence of Article 6.10 that would impose an obligation on an investigating authority to specifically explain why it would be impracticable to examine more than a particular number of respondents, in this case two. The second sentence of Article 6.10 consists of two parts, with the first specifying the circumstances in which it may be impracticable to examine all known exporters (the number is "so large"), and the second setting out the methods for choosing the exporters to be individually examined when not all are examined. We consider that the second part of the second sentence, rather than the first part, is relevant to the number of exporters to be selected for limited examination. If the investigating authority selects the exporters subject to individual examination in a manner consistent with the methods prescribed in the second part of the second sentence of Article 6.10, we do not see why that authority would have to provide a separate explanation of why it is practicable to examine only the number of exporters in the resulting pool. Therefore, we consider that the USDOC was not required to specifically explain why it was practicable to examine only two exporters, and not more.

7.273. Thus, for the reasons discussed above, we conclude that USDOC's explanation on why it would be impracticable to examine all known exporters of the product under investigation was not inconsistent with Article 6.10.

7.7.5.1.2 The USDOC's decision to limit its examination to two mandatory respondents

7.274. The second sentence of Article 6.10 sets out two alternative selection methods for an investigating authority to use in deciding which exporters it will individually examine when it does not examine all exporters of the product under investigation. First, the investigating authority may limit its examination to a reasonable number of interested parties by using samples which are statistically valid on the basis of information available to that authority at the time of the selection. Second, and in the alternative, it may limit its examination to the largest percentage of the volume of exports from the country in question which can reasonably be investigated.

7.275. In connection with the second method, we recall that the panel in *EC – Salmon (Norway)* concluded that the volume of sales that may be reasonable for an investigating authority to investigate is a question that must be assessed on a case-by-case basis, taking into account all the relevant facts that are before the investigating authority, including the nature and type of the interested parties, the products involved and the investigating authority's own investigating capacity and resources.[353] We share this understanding of the types of factors that would be relevant to considering an investigating authority's compliance with this second method of selection provided in Article 6.10 and will apply it in this dispute.

7.276. Before we turn to that question, however, we must resolve a factual question. Korea maintains that the USDOC relied on the first method, selecting exporters for limited examination on the basis of a statistically valid sample, while the United States asserts that the USDOC relied on the second method. The USDOC's decision is clearly set forth in its Respondent Selection Memorandum:

> In selecting respondents in this antidumping duty investigation, the [USDOC] finds that, given its limited resources, *it is most appropriate to select the exporters or producers accounting for the largest volume of the subject merchandise that can reasonably be examined*.[354]

In our view, it is undisputable that the USDOC used the second method, selecting producers accounting for the largest percentage of the volume of exports that it could reasonably investigate,

[353] Panel Report, *EC – Salmon (Norway)*, para. 7.188.
[354] Respondent Selection Memorandum, (Exhibit KOR-3), p. 7. (emphasis added)

that is, the two Korean exporters who accounted for the largest volume of imports of the subject merchandise into the United States from Korea, during the POI.[355]

7.277. Notwithstanding the clear statement by the USDOC in this regard, Korea insists that the USDOC used the first method. Korea asserts that the USDOC selected the number of exporters it considered it could examine rather than limiting its examination to the largest percentage of the volume of exports.[356] Korea appears to be of the view that the USDOC used the first method because it did not state that it could only reasonably investigate X% of the total volume of exports into the United States and instead stated that it could reasonably investigate the two exporters who accounted for the largest volume of exports. We disagree. The limited examination allowed for under Article 6.10 is, necessarily, of exporters, not of a volume of exports. It is self-evident that a dumping margin cannot be determined for the "largest percentage of the volume of the exports" from the subject country, but only for exporters which account for that volume of exports.[357] This is what the USDOC did in the underlying investigation.[358] Korea does not dispute that NEXTEEL and HYSCO were, in fact, the two largest exporters of OCTG into the United States.

7.278. Therefore, we conclude that the USDOC did not act inconsistently with Article 6.10 in this regard.

7.7.5.2 Article 6.10.2 of the Anti-Dumping Agreement

7.279. In the underlying investigation, certain Korean exporters not selected for individual examination by USDOC requested such individual examination as voluntary respondents. The USDOC did not individually examine any of these voluntary respondents, concluding that to do so would be unduly burdensome and would inhibit the timely completion of the underlying investigation.[359] Korea asserts that the USDOC's explanation of why it would be "unduly burdensome" to individually examine the voluntary respondents was not reasoned and adequate, and that the USDOC therefore acted inconsistently with Article 6.10.2.

7.280. Article 6.10.2 establishes a general requirement that an investigating authority determine an individual margin of dumping for any exporter or producer not selected for individual examination which submits the necessary information in time for it to be considered during the course of the investigation. However, there is an exception to this general rule. Where the number of exporters or producers is so large that individual examination would be "unduly burdensome" to the investigating authority and prevent the timely completion of the investigation, the authority need not undertake individual examination of exporters or foreign producers who voluntarily submit the necessary information. However, Article 6.10.2 does not identify any circumstance in which, or criteria for determining whether, individual examination of voluntary respondents would be unduly burdensome.

7.281. In deciding not to individually examine any of the voluntary respondents, the USDOC noted the complex factual issues that it had to address in examining the responses filed by the two

[355] United States' comments on Korea's response to Panel question No. 77, para. 90.
[356] Korea's response to Panel question No. 77, para. 112.
[357] We note that Article 9.4 of the Anti-Dumping Agreement establishes a method for determining a dumping margin for exporters not selected for individual examination under Article 6.10. That method is based on the dumping margins determined for the exporters which are selected. Pursuant to Article 9.4, the margin for unexamined exporters cannot exceed either: (a) the weighted average dumping margin of the exporters selected for limited examination; or (b) where the anti-dumping duty is calculated on the basis of a prospective normal value, the difference between the prospective normal value of the exporters who are selected for limited examination, and the export price of those who are not. Thus, it is clear that to apply an anti-dumping measure in an appropriate amount to unexamined exporters, the investigating authority must determine the dumping margins for the exporters selected for limited examination (or normal values, in the case of a prospective normal value system).
[358] To the extent Korea is arguing that the USDOC was required to first determine what was the largest volume of exports of the subject merchandise into the United States it could investigate, and then consider which exporters accounted for that volume, we see no basis for such sequencing in the text of Article 6.10. In any event, such a sequence would not work as a selection methodology, since as discussed above, it is exporters that are examined, not a volume of exports. The impracticability of examining all exporters is a function of the number of exporters, not of the volume of exports.
[359] USDOC, Treatment of Voluntary Respondents Memorandum, 30 December 2013, (Exhibit KOR-50), p. 7.

mandatory respondents, observed that it had already issued extensive supplemental questionnaires to them, and stated that it expected to issue additional ones.[360] The USDOC then went on to explain why it would be unduly burdensome to examine the voluntary responses filed by certain Korean respondents:

> In addition to the work involved in examining the two mandatory respondents in this investigation, the [USDOC] has also considered its available resources in light of its current workload, to determine whether examining Husteel, IUIN and/or SeAH as voluntary respondents would be unduly burdensome and inhibit timely completion of the investigation. We note that our workload has not decreased since our selection of mandatory respondents. AD/CVD Enforcement Office VI, the office to which this antidumping duty investigation is assigned, is conducting numerous concurrent antidumping and countervailing duty proceedings, which place a constraint on the number of analysts that can be assigned to this investigation. Specifically, Office VI is currently conducting eight investigations and approximately 20 administrative reviews (some covering multiple companies), one remand proceeding, and one ant-circumvention inquiry. Not only do these other proceedings present a significant workload, but the deadlines for a number of these proceedings coincide and/or overlap with deadlines in this investigation. In light of the significant workload throughout Enforcement and Compliance, which includes numerous investigations (including 11 concurrent AD and CVD investigations on OCTG from various countries), we do not anticipate receiving additional resources to devote to this proceeding.
>
> The complications presented by this particular investigation have created an additional burden on the Department's already strained resources. As noted above, the Department is currently handling 11 concurrent AD and CVD investigations on OCTG from various countries, as well as other numerous AD and CVD investigations and reviews. Therefore, individual examination of an additional company or companies, which typically requires multiple rounds of supplemental questionnaires and extensive analysis in order to calculate accurate weighted-average dumping margins for the voluntary respondents, would be unduly burdensome and inhibit timely completion of this investigation. The Department has already extended the preliminary determination to the maximum extent allowable by law, based on the significant challenges posed by the collection and examination of information and data for the two mandatory respondents. Even with the additional time afforded by a full extension of the preliminary determination, we would not be able to individually examine an additional company or companies, because an examination of an additional respondent would place an additional burden on our already strained resources and present the possibility of additional complex issues. Critically, individual examination of an additional company or companies would require separate verifications in Korea and in some cases the United States, which would extend the time required for overseas travel, as well as the accompanying verification reports and data analysis, which in turn would add to the Department's burden and further strain its resources. Each of these steps would place additional administrative burden on the Department and inhibit the timely completion of this investigation. [361]

7.282. Thus, the USDOC's conclusion that it would be unduly burdensome to individually examine the voluntary respondents was based on:

a. complexities unique to the underlying investigation, including complexity of legal issues in the case and administrative issues such as travel time that would be needed for the verification of the sales records of additional Korean respondents, if selected;

b. time constraints faced by the USDOC, which had already extended the preliminary determination to the maximum extent allowable under US law; and

[360] USDOC, Treatment of Voluntary Respondents Memorandum, 30 December 2013, (Exhibit KOR-50), p. 6.

[361] USDOC, Treatment of Voluntary Respondents Memorandum, 30 December 2013, (Exhibit KOR-50), pp. 6 and 7. (fns omitted)

c. resource constraints faced by the USDOC.

7.283. Korea asserts that the USDOC did not provide "any basis" for its conclusion that examination of additional voluntary respondents would have increased the administrative burden on its increasingly limited resources.[362] As a factual matter, the clear statements set out above lead us to a different conclusion. In our view, the USDOC did provide the basis on which it made this conclusion, even if Korea disagrees with that basis.

7.284. Insofar as Korea is challenging the quality of the explanation for the USDOC's conclusion that it would be unduly burdensome to examine voluntary responses, Korea makes two main arguments. First, that the USDOC failed to explain why it was unable to examine at least some, if not all, of the voluntary respondents[363], and second, the reasons cited by the USDOC as to why it would be unduly burdensome to individually examine the voluntary respondents were "largely similar" to the reasons cited by USDOC as to why it would be impracticable to examine all known exporters.[364]

7.285. First, the USDOC explicitly stated that it could individually examine *none* of the voluntary respondents for the reasons it gave. We see nothing in Article 6.10.2 that would require an investigating authority to explain why it cannot individually examine some voluntary respondents in a situation where it has decided it cannot individually examine any of them. The explanation for why it can individually examine none of them suffices to explain why it cannot individually examine some of them.

7.286. Second, Article 6.10.2 comes into play "[i]n cases where the authorities have limited their examination" under Article 6.10, having found that the number of exporters, producers, importers, or types of products involved is so large as to make individual examination of all of them impracticable. Therefore, the question whether it would be unduly burdensome to individually examine voluntary respondents will arise only after an investigating authority has already found it impracticable to make an individual determination for each known exporter. There may well be situations where the investigating authority finds it impracticable to examine all known exporters but does not find it unduly burdensome to examine at least some voluntary responses. Thus, the Article 6.10.2 question of whether it would be "unduly burdensome" to individually examine voluntary respondents is separate from, and not answered by, the conclusion that it is "impracticable" to examine all known exporters.

7.287. However, Article 6.10.2 does not preclude that the factual circumstances making it impracticable to examine all known exporters may also affect whether it would be unduly burdensome to individually examine voluntary respondents. In both cases, an investigating authority deviates from the norm, which is to determine an individual margin of dumping for all known exporters. To us, it is not surprising that a justification for the second deviation, under Article 6.10.2, may overlap and share elements with the justification for the first deviation under Article 6.10. Thus, an investigating authority's explanation for why it would be unduly burdensome to examine voluntary responses will not be insufficient merely because of such similarities. Therefore, we consider that the fact that the USDOC's explanation for why it was unduly burdensome to individually examine any voluntary respondents also cited time and resource constraints, and thus was "largely similar" to its explanation for why it was impracticable to individually examine all known exporters, does not establish any inconsistency with Article 6.10.2.[365]

7.288. In any event, the USDOC also considered other elements in concluding that it would be unduly burdensome to individually examine voluntary respondents, including events that arose subsequent to the selection of the two mandatory respondents, namely, the challenges it was facing in examining their responses, and time constraints that it would face were it to individually examine voluntary respondents.

[362] Korea's first written submission, para. 236; second written submission, para. 280.
[363] Korea's first written submission, para. 236; second written submission, para. 280.
[364] Korea's second written submission, para. 280.
[365] We note in this regard the views of the panel in *EU – Footwear (China)*, that institutional resource constraints and administrative burden may be a valid reason for an investigating authority to find it "unduly burdensome" to individually examine voluntary respondents.

7.289. In sum, we are not convinced that the USDOC's explanation of why it would be unduly burdensome to individually examine the voluntary respondents was not reasoned and adequate, and insufficient to discharge its obligations under Article 6.10.2. The USDOC explained why, in light of its institutional resource constraints, as well as challenges faced by the USDOC in the underlying investigation, it was unable to make this individual examination, and we consider that this explanation was consistent with its obligations under this provision. Therefore, we reject Korea's claim that USDOC acted inconsistently with Article 6.10.2 of the Anti-Dumping Agreement.

7.7.6 Conclusion

7.290. For the foregoing reasons, we find that Korea has not established that the USDOC acted inconsistently with Articles 6.10 and 6.10.2 of the Anti-Dumping Agreement.

7.8 Whether the USDOC acted inconsistently with Article 12.2.2 of the Anti-Dumping Agreement by failing to provide reasons for rejecting certain arguments

7.291. Korea claims that the USDOC acted inconsistently with Article 12.2.2 of the Anti-Dumping Agreement by failing to provide, either in the public notice, or through a separate report, the "reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers". In particular, Korea contends that the USDOC failed to provide the reasons for the rejection of the following arguments made by the Korean respondents[366]:

a. arguments concerning the appropriateness of determining the CV profit rate of the Korean respondents on the basis of the Tenaris financial statements; and

b. arguments that contradicted the facts based on which the USDOC found NEXTEEL to be affiliated with Company A and Company B.

7.8.1 Provisions at issue

7.292. Article 12.2.2 of the Anti-Dumping Agreement provides, in pertinent part:

> A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6.

7.8.2 Main arguments of the parties

7.293. Korea's principal arguments are set forth below:

a. The USDOC failed to include, in its public notice, reasons for rejecting relevant arguments made by Korean respondents regarding the inappropriateness of using the Tenaris financial data to determine the CV profit for the Korean respondents, in light of the substantial differences between the companies.[367]

b. The USDOC failed to address arguments that contradict the facts that it relied upon in making its determination of affiliation between NEXTEEL, POSCO, Company A, and Company B.[368]

[366] Korea's first written submission, paras. 228 and 229.
[367] Korea's first written submission, para. 228.
[368] See, e.g. Korea's first written submission, para. 229.

7.294. The United States makes the following arguments:

a. If the investigating authority does not consider an issue of fact or law to be material to its determination, Article 12.2.2 does not require it to address that issue in its public notice.[369]

b. The USDOC's Issues and Decision Memorandum includes a detailed analysis of the reasoning behind the USDOC's determination to use the Tenaris financial data in the final determination.[370]

c. The Issues and Decision Memorandum and accompanying confidential affiliation memorandum provide the factual findings that led the USDOC to find that NEXTEEL, POSCO, Company A, and Company B were associated for the purposes of the anti-dumping determination.[371]

7.8.3 Main arguments of third parties

7.295. The European Union considers it undisputed that the Tenaris profit data used to establish a profit rate, and the findings on affiliation, were "relevant information" and "material" in the meaning of Article 12.2.[372] The main issue is, therefore, whether the USDOC's reasons for rejecting or accepting the Korean respondents' arguments were "set forth in sufficient detail".[373] It notes however, that previous panels have found that where the investigating authority has contravened a substantive requirement under the Anti-Dumping Agreement, the question of whether the notice is sufficient under Article 12.2.2 is immaterial.[374]

7.8.4 Evaluation by the Panel

7.296. Article 12.2.2 of the Anti-Dumping Agreement, and in particular its second sentence, provides that a public notice of conclusion of an investigation, in case of an affirmative determination to impose definitive duty, shall contain, or otherwise make available through a separate report, "the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers".[375] It is clear on the face of the provision that an investigating authority is not required to provide the reasons for rejecting *all* arguments made by the exporters and importers, but the "relevant" ones. In addressing Korea's claim under Article 12.2.2, we will therefore consider:

a. whether these arguments were adequately addressed by the USDOC in the relevant documents, in this case, the Issues and Decision Memorandum and the Affiliation Memorandum[376];

b. whether the arguments made by the Korean respondents were "relevant" within the meaning of Article 12.2.2.

7.297. Article 12.2.2 does not specify the type of arguments that may be considered "relevant" within the meaning of this provision. But a clearer understanding of how a WTO panel should

[369] United States' first written submission, para. 232 (referring to Appellate Body Report, *China – GOES*, para. 256, and Panel Report, *EC – Tube or Pipe Fittings*, para. 7.422).
[370] United States' first written submission, para. 235 (referring to Final Decision Memorandum, (Exhibit KOR-21), pp. 14-23).
[371] United States' first written submission, para. 238.
[372] European Union's third-party submission, para. 77 (referring to Panel Report, *EU – Footwear (China)*, para. 7.844).
[373] European Union's third-party submission, para. 77 (referring to Panel Report, *China – X-Ray Equipment*, para. 7.472).
[374] European Union's third-party submission, para. 75 (referring to Panel Report, *EC – Bed Linen*, para. 6.261).
[375] In this regard, Article 12.2.2 does not only refer to obligations that apply in case of a public notice of conclusion in case of an affirmative determination providing for the imposition of a definitive duty, but also refers to a public notice of suspension of an investigation.
[376] There is no dispute between the parties that these are the relevant documents for purposes of our analysis.

determine the relevance of an argument in this context emerges when Article 12.2.2 is read as a whole and in the context of Article 12.2 of the Anti-Dumping Agreement.

7.298. Article 12.2 is the *chapeau* of Article 12.2.2 and provides guidance for our understanding of the second sentence of Article 12.2.2.[377] Article 12.2 provides, *inter alia*, that a public notice of an affirmative final determination shall set forth, or otherwise make available through a separate report, in sufficient detail, the findings and conclusions reached on all issues of fact and law considered material by the investigating authority. It is generally understood that an issue of fact or law considered material by an investigating authority includes any issue that has arisen in the course of the investigation that must necessarily be resolved by the investigating authority to be able to reach its determination.[378] Furthermore, the facts that an investigating authority may consider material to its determinations are circumscribed by the framework of the substantive provisions of the Anti-Dumping Agreement.[379]

7.299. Article 12.2.2 elaborates on these obligations. Thus, Article 12.2.2 captures the principle that those parties whose interests are affected by the imposition of final dumping duties are entitled to know, as a matter of fairness and due process, the facts, law, and reasons that have led to the imposition of definitive duties.[380] In particular, the requirement under the first sentence of Article 12.2.2, that the public notice or the separate report contain "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures", establishes a requirement to disclose "relevant" information, including the matrix of facts, law, and reasons that logically fit together to render the decision to impose final measures.[381] It is by requiring the disclosure of "all relevant information" in this regard, that Article 12.2.2 seeks to guarantee that interested parties are able to pursue judicial review of a final determination as provided in Article 13 of the Anti-Dumping Agreement.[382]

7.300. Thus, the arguments that are "relevant" under Article 12.2.2 are those that pertain to issues of facts and law that must be resolved in an investigating authority's decision to impose final measures. Therefore, in considering the relevance of arguments for purposes of Article 12.2.2, we will look to whether those arguments pertain to issues of facts and law that must be resolved in the investigation at issue and are therefore necessarily material.[383]

7.301. Article 12.2.2 requires that the investigating authority provide the reasons for the acceptance or rejection of relevant arguments. In this regard, we agree with the views of the panel in *China – X-Ray Equipment* that the reasons for rejecting or accepting such arguments should be set forth in sufficient detail to allow the exporter or importer to understand why their arguments were treated as they were, and to assess whether or not the investigating authority's treatment of the relevant issue was consistent with domestic law and/or WTO law.[384] However, we do not understand Article 12.2.2 to impose a formalistic obligation to identify each and every relevant argument and explicitly provide the reasons for accepting or rejecting each such argument. Instead, in our view, the obligation to provide reasons for rejecting or accepting arguments will be satisfied if the exporter or importer could clearly understand how its arguments were treated by the investigating authority from the explanations given by the investigating authority in resolving the issue to which they pertain. We now turn to the issue before us.

[377] See, e.g. Panel Reports, *China – X-Ray Equipment*, para. 7.458; and *EU – Footwear (China)*, para. 7.844.
[378] See, e.g. Panel Reports, *China – Broiler Products*, para. 7.327; and *EU – Footwear (China)*, para. 7.844.
[379] Appellate Body Report, *China – GOES*, para. 265.
[380] Appellate Body Report, *China – GOES*, para. 258.
[381] Appellate Body Report, *China – GOES*, para. 258.
[382] Appellate Body Report, *China – GOES*, para. 258.
[383] Our approach in this regard is consistent with that followed by previous panels which evaluated specific claims concerning the investigating authority's alleged failure to provide reasons for the rejection of relevant arguments or claims made by the exporters and importers. (See, e.g. Panel Report, *China – X-Ray Equipment*, para. 7.472).
[384] Panel Report, *China – X-Ray Equipment*, para. 7.472.

7.8.4.1 The USDOC's alleged failure to address the Korean respondents' arguments concerning the use of the Tenaris profit data

7.302. We recall that in the underlying investigation, the USDOC determined CV profit for the Korean respondents on the basis of the profit rate of Tenaris and not the profit rate of the Korean respondents. In their submissions to the USDOC, the Korean respondents made several arguments against the USDOC's use of the Tenaris profit data for CV profit determination, alleging significant differences between Tenaris and the Korean respondents, their products, their sales and production volumes, and their customer bases.

7.303. Korea asserts that the USDOC acted inconsistently with Article 12.2.2 because it failed to include, in its public notice, any reasons for rejecting relevant arguments made by the Korean respondents regarding the inappropriateness of using the Tenaris financial data to determine the Korean respondents' CV profit rate. Korea argues, in particular, that the USDOC did not provide reasons for rejecting the Korean respondents' arguments that:

a. OCTG shares more similarities with non-OCTG pipe products than with the OCTG products sold by Tenaris;

b. the products that the Korean respondents sold in the home market were not physically similar to those sold by Tenaris;

c. the structure and scale of Tenaris's business operations was so different to that of the Korean companies as to make Tenaris not comparable to the Korean respondents for purposes of calculating CV profit;

d. the different position of Tenaris in the distribution chain as compared to the Korean respondents rendered Tenaris's profit not comparable to the Korean respondents' profits; and

e. differences in the customer bases of Tenaris and the Korean respondents rendered the Tenaris profit rates not comparable to the Korean respondents' profit rates.[385]

7.304. The USDOC stated, in its Final Decision Memorandum, that in selecting a profit from available record evidence it may not find a profit source that reflects both production and sales in the home market of the exporting country as well as the foreign like product. Its choice of a profit source would, therefore, depend on factors such as the level of specialization of the foreign like product, the percentage of sales of the foreign like product or same general category of products, among others.[386] The USDOC also noted that, in the underlying investigation, it chose to determine CV profit on the basis of the Tenaris profit data and not the Korean respondents' profit data for the following reasons: (a) as OCTG is a specialized product, CV profit needed to be determined on the basis of a source which most closely reflected the profits pertaining to sales of OCTG; and (b) the Tenaris profit data is representative of sales of OCTG across a broad range of geographic markets, while the Korean respondents' profit data reflects profit on non-OCTG products that cannot reasonably be considered to fall in the same general category as OCTG.[387]

7.305. Korea alleges that the USDOC failed to give reasons for rejecting the first of the specific arguments above. The submissions Korea cites in this regard do not show that the Korean respondents argued that OCTG shares more similarities with non-OCTG pipe products than with the OCTG products sold by Tenaris.[388] Korea refers to submissions in which the Korean respondents argued that OCTG and the non-OCTG pipe products that they sold in the home market fall within the same general category of products. They did not argue, however, that OCTG is more similar to non-OCTG than it is to the OCTG products sold by Tenaris.[389] Therefore, Korea

[385] Korea's first written submission, para. 228; second written submission, para. 324.
[386] Final Decision Memorandum, (Exhibit KOR-21), p. 15.
[387] Final Decision Memorandum, (Exhibit KOR-21), pp. 21 and 23.
[388] Korea's second written submission, para. 324 (referring to HYSCO Rebuttal Brief, 24 June 2014, (Exhibit KOR-80), pp. 17-21; and NEXTEEL Rebuttal Brief, 23 June 2014, (Exhibit KOR-79) (BCI), pp. 18-21).
[389] The Korean respondents did argue that determining "CV profit rate that reflects home market experience for sales of steel pipe products that is far more representative" than the financial data of

has not established that the Korean respondents made the argument in question before the USDOC in the underlying investigation, and we are of the view that Korea has thus failed to establish a *prima facie* case of violation of Article 12.2.2 in this respect.

7.306. Korea's second argument is that the Korean respondents presented arguments related to the alleged lack of comparability between the profit data of Tenaris and the Korean respondents due to differences in the companies' products, scale of production, position in the distribution chain and customer bases in support of their view that Tenaris was not an appropriate source for determination of CV profit of the Korean respondents. The USDOC made the following statements in this context[390]:

> We believe due to the nature of this product that it is more consistent with the statute to calculate profit using a company that mainly sells either the identical product or, alternatively, merchandise that is in the same general category of products. Because Tenaris is an OCTG producer that sells OCTG in significant quantities, and in virtually every market in which OCTG is sold, we find its average profit experience is representative of sales of OCTG across a broad range of different geographic markets. As the profit from its financial statements is predominantly of OCTG, it reflects more precisely the profit on products identical to the subject merchandise. While we would prefer to use the financial statements of an OCTG producer that primarily produces and sells OCTG in Korea, such information is not available. The financial statements of the six Korean producers' reflect sales of OCTG almost exclusively to the U.S., and predominantly sales of non-OCTG pipe products and other non-pipe products.

The USDOC went on to state that it "consider[ed] it important ... to have a profit reflective of the specialized nature of OCTG products", that it had "analyzed the data for all possible CV profit sources" and the record of the underlying investigation showed that a profit figure from those not selected would predominantly reflect profit of non-OCTG products that could not reasonably be considered to be of the same general category of merchandise. It concluded that it was consistent with US law to calculate profit using a company that mainly produced and sold the merchandise under consideration, and considering that Tenaris met these criteria, it was using its financial statements to determine the profit rate of the Korean respondents.[391]

7.307. In considering whether the USDOC provided reasons for rejecting these arguments, we will, as stated above, consider whether the Korean respondents were, or should have been able to, clearly understand from the public notice or report how their arguments were treated by that authority. In this regard, in our view, it is clear from the USDOC's determination that it considered that it had to choose between two options: determining CV profit rate on the basis of sources that met its criteria, i.e. profit of a company that mainly produced and sold the merchandise under consideration, or alternatively determining CV profit rate on the basis of sources that did not meet its criteria. The USDOC noted that "[w]hile [it] would prefer to use the financial statements of an OCTG producer that primarily produce[d] and [sold] OCTG in Korea" that information was not available. Having decided that it was important to have a "profit reflective of the specialized nature of OCTG products", and having found that the profit from the Tenaris financial statements was predominantly of OCTG, the USDOC considered it appropriate to use that data notwithstanding the alleged lack of comparability between that data and the Korean respondents' profit data. In this regard, we recall that we are considering whether the USDOC provided reasons for rejecting the Korean respondents' arguments, and not the substantive consistency of the USDOC's decision with the Anti-Dumping Agreement.[392] In our view, the USDOC's explanation allowed the Korean respondents to understand why their arguments regarding the inappropriateness of determining

companies, such as Tenaris, that have no production or known sales in Korea. However, this is a different argument from the one that Korea asserts that the Korean respondents made. Here, the Korean respondents objected to the use of the Tenaris data as a basis for determining CV profit not because the OCTG products sold by Tenaris were less similar to OCTG than non-OCTG pipe products, as Korea contends they argued, but because the Tenaris data pertained to OCTG sales outside of Korea. See HYSCO Rebuttal Brief, 24 June 2014, (Exhibit KOR-80), p. 22; and NEXTEEL Rebuttal Brief, 23 June 2014, (Exhibit KOR-79) (BCI), p. 22.

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

[391] Final Decision Memorandum, (Exhibit KOR-21), p. 23.

[392] We recall that we have found that the USDOC's substantive determination concerning which products fell within the same general category of products was inconsistent with its obligations under Articles 2.2.2(i) and (iii).

CV profit based on the Tenaris profit data were rejected. We therefore consider that Korea has failed to demonstrate that the USDOC acted inconsistently with Article 12.2.2 in this regard.[393]

7.8.4.2 The USDOC's alleged failure to address NEXTEEL's arguments that it was not affiliated with POSCO, Company A, and Company B

7.308. Korea argues that the USDOC failed to address the following arguments made by NEXTEEL[394]:

a. NEXTEEL did not purchase steel coils **[[***]]** from POSCO[395];

b. NEXTEEL's collaboration with POSCO did not create an affiliation because such a collaboration was part of either joint research projects that were common in the industry, or a broader national program that involved thousands of companies[396]; and

c. the USDOC should not have disregarded NEXTEEL's export price to Company A because this price was reliable.[397]

7.309. As discussed above, Korea's view that the USDOC failed to address NEXTEEL's argument that it did not purchase steel coils **[[***]]** from POSCO is incorrect as a matter of fact. The USDOC did recognize that NEXTEEL purchased steel coils from sources other than POSCO.[398] Thus, there is no factual basis for Korea's claim.

7.310. We examined Korea's argument that NEXTEEL's collaboration with POSCO did not create an affiliation because that collaboration was part of either joint research projects that were common in the industry, or a broader national program that involved thousands of companies in evaluating its claim under Article 2.3 of the Anti-Dumping Agreement. We noted that this argument presumes that association under Article 2.3 may only exist if the associated entities have an exclusive relationship. However, we concluded that there is no such requirement under Article 2.3.[399] It follows, in our view, that the USDOC did not have to resolve whether the relationships in question were exclusive, and therefore the argument was not relevant within the meaning of Article 12.2.2, and the USDOC was not required to provide reasons for rejecting it.

7.311. Korea has failed to identify any arguments by NEXTEEL before the USDOC that its export price to Company A was reliable, notwithstanding association in the context of its claim under Article 12.2.2. Korea refers to NEXTEEL's Supplemental Questionnaire Response, but does not identify where such arguments were actually made.[400] Korea's approach would require the Panel to review the relevant documents, identify any arguments pertaining to the reliability of the export price notwithstanding association, and then decide whether the USDOC set out reasons for rejecting such argument(s) in the relevant documents. This would be tantamount to the Panel making a case for Korea.[401] In our view, Korea has failed to make a *prima facie* case of violation in this regard.

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[393] In this regard, we recall that we found that Korea's panel request does not set out a claim that the USDOC's determination of CV profit based on the Tenaris profit data does not constitute a "reasonable method" under Article 2.2.2(iii) and therefore made no findings on the substance of Korea's arguments in that regard. Whether the USDOC *should have* considered the Korean respondents' arguments regarding the differences between Tenaris and the Korean respondents is an issue which goes to the substantive question of whether the USDOC's choice of the Tenaris profit data as a basis for determining CV profit was consistent with Article 2.2.2(iii).

[394] Korea's response to Panel question No. 76, para. 110.

[395] Korea's first written submission, para. 229.

[396] Korea's second written submission, para. 328.

[397] Korea's second written submission, para. 329 (referring to Company A supplemental questionnaire responses, 14 March 2014, (Exhibit KOR-89) (BCI)).

[398] See paras. 7.160-7.161 above.

[399] See para. 7.165 above.

[400] Korea's second written submission, para. 329 and fn 227.

[401] We recall that in respect of its Article 2.3 claim, Korea referred to specific "evidence" presented by NEXTEEL that allegedly showed that its export prices to Company A were, in fact reliable. (Korea's second written submission, para. 245; response to Panel question No. 31, para. 103). However, Korea has not

7.8.5 Conclusion

7.312. For the foregoing reasons, we conclude that Korea has not established that the USDOC acted inconsistently with Article 12.2.2 by failing to provide the reasons for rejecting:

a. an argument that Korean respondents did not make, i.e. that OCTG shares more similarities with non-OCTG pipe products than with the OCTG products sold by Tenaris;

b. an argument that Korea failed to identify in these proceedings, i.e. that the USDOC should not disregard NEXTEEL's export price to **[[***]]** because these export prices were reliable;

c. arguments made by the Korean respondents concerning the appropriateness of determining the CV profit rate of the Korean respondents on the basis of the Tenaris financial statements, in particular:

   i. the products that the Korean respondents sold in the home market were not physically similar to those sold by Tenaris;

   ii. the structure and scale of Tenaris's business operation was so different to that of the Korean companies as to make Tenaris not comparable to the Korean respondents for purposes of calculating CV profit;

   iii. the different position of Tenaris in the distribution chain as compared to the Korean respondents rendered Tenaris's profit not comparable to the Korean respondents' profits; and

   iv. differences in the customer bases of Tenaris and the Korean respondents rendered the Tenaris profit rates not comparable to the Korean respondents' profit rates.

d. arguments that contradicted the facts based on which the USDOC found NEXTEEL to be affiliated with **[[***]]**, and in particular NEXTEEL's arguments that:

   i. NEXTEEL did not purchase steel coils **[[***]]** from POSCO; and

   ii. NEXTEEL's collaborations with POSCO did not create an affiliation between them because they were either joint research projects that were common in the industry, or were part of a much broader national program that involved thousands of companies.

7.9 Whether the USDOC acted inconsistently with Article X:3(a) of the GATT 1994 in the administration of US laws and regulations

7.313. Korea presents two separate factual bases for its claim that the USDOC failed to administer US laws and regulations in a uniform, impartial and reasonable manner, as required by Article X:3(a) of the GATT 1994:

a. First, Korea notes that in its final determination, the USDOC determined the CV profit of the Korean respondents based on the profits earned by Tenaris, but the profits earned by this company had no relationship with profits earned in the Korean market.[402] Korea submits that by determining the profits this way, the USDOC acted contrary to its "established agency practice" of determining CV profit on the basis of sources located in the home market of the exporter or producer under investigation, without providing any justification for this departure.[403] Korea also asserts that the USDOC deviated from this

identified any "arguments" made by NEXTEEL in this regard. If the exporter or the importer does not make an "argument", the obligation on an investigating authority to provide reasons for accepting or rejecting relevant "arguments" would obviously not apply.

[402] Korea's first written submission, para. 265.

[403] Korea's first written submission, paras. 260, 265 and 275.

practice because of "political influence" exerted by different lobbying groups, including US lawmakers.[404]

b. Second, Korea contends that US domestic regulation 19 C.F.R. § 351.301, which establishes deadlines under the US system for submission of new factual information, and establishes deadlines for rebuttals for each type of submission, was administered differently by the USDOC in the underlying investigation than in a parallel investigation on OCTG from Turkey (Turkish investigation).[405]

7.9.1 Provisions at issue

7.314. Article X:3(a) of the GATT 1994 provides:

> Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

Article X:1 of the GATT 1994, referred to in Article X:3(a), provides:

> Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them.

7.9.2 Main arguments of the parties

7.315. Korea asserts that Article X:3(a) of the GATT 1994 imposes three independent obligations on a Member with respect to the administration of its laws, regulations, judicial decisions and administrative rulings of general application (laws and regulations), namely, to administer them in a: (a) uniform; (b) impartial; and (c) reasonable manner. Korea contends that the USDOC acted inconsistently with each of these three obligations because it failed to administer US anti-dumping laws and regulations in either a uniform or impartial or reasonable manner. Korea presents two separate factual bases for its claim under this provision, as noted above.

7.316. First, Korea contends that by determining the CV profit of the Korean respondents on the basis of profits earned by Tenaris, a company which had no production or sales in Korea, the USDOC failed to administer its laws and regulations in:

a. a *uniform* manner, because it acted contrary to its established practice of determining profits on the basis of sources located in the home market of the exporter or producer under investigation[406];

b. a *reasonable* manner, because it did not have a rational basis to deviate from this practice[407]; and

c. an *impartial manner*, because, in Korea's view, the USDOC's decision to deviate from this practice, and accept the Tenaris financial statements for profit determination was attributable solely to political pressure exerted by different lobbying groups, including US lawmakers.[408]

[404] Korea's first written submission, paras. 268-273.
[405] Korea's response to Panel question No. 78, para. 114; second written submission, para. 345.
[406] Korea's first written submission, para. 265.
[407] Korea's first written submission, para. 275.
[408] Korea's first written submission, para. 275.

7.317. Second, Korea contends that the USDOC failed to administer 19 C.F.R. § 351.301 in[409]:

a. A *uniform* manner, because in the Turkish investigation, in which the Tenaris financial statements were also considered as a source for calculating the profit amount, the USDOC gave the Turkish respondents an opportunity to submit factual comments on this data[410], but failed to provide a similar opportunity to the Korean respondents in the underlying investigation.[411]

b. A *reasonable* manner, because the USDOC provided no reasonable explanation for the difference in how it dealt with the Tenaris financial statement in the underlying investigation and in the Turkish investigation.

7.318. The United States contends that Korea does not challenge the administration of US laws and regulations, but instead challenges the substance of the USDOC's determination.[412] Therefore, in the United States' view, Korea's claim in this regard falls outside the scope of Article X:3(a). With respect to the specific issues raised by Korea, the United States submits:

a. Regarding *uniformity*:

   i. Korea has not shown that the facts in the Turkish investigation were similar to those in the underlying investigation such that the same decisions under 19 C.F.R. § 351.301 were warranted.[413]

   ii. While laws need to be administered uniformly, practice need not, and thus Korea's argument, which is based on the USDOC's alleged deviation from past practice concerning determination of profits, must be rejected.[414]

b. Korea does not provide any evidence to support its view that US laws and regulations were not applied in an *impartial* manner, and speculates about the impact of supposed political pressure on the USDOC's decision.[415]

c. The United States has shown, through its arguments under Article 2.2.2 of the Anti-Dumping Agreement, that the USDOC's decision to use the Tenaris financial statements to determine CV profit was reasonable.[416]

7.9.3 Main arguments of the third-parties

7.319. The European Union comments that the nature of issues raised by Korea under Article X:3(a) of the GATT 1994 can be resolved under the substantive provisions of the Anti-Dumping Agreement rather than under this provision.[417]

7.9.4 Evaluation by the Panel

7.9.4.1 Whether the USDOC's alleged deviation from established agency practice for determining CV profit is within the Panel's terms of reference

7.320. The United States does not contend that the first factual basis of Korea's Article X:3(a) claim falls outside our jurisdiction. However, whether we have jurisdiction to address this aspect of Korea's Article X:3(a) claim is a question that we have to decide for ourselves, even though the parties did not raise it. Thus, we commence our analysis by addressing this question.

[409] Korea does not argue that the USDOC failed to administer 19 C.F.R. § 351.301 in an impartial manner. (See, e.g. Korea's first written submission, paras. 267-273).
[410] Korea's first written submission, paras. 255 and 264.
[411] Korea's first written submission, paras. 255 and 264.
[412] United States' first written submission, para. 250.
[413] United States' first written submission, para. 258.
[414] United States' first written submission, para. 257.
[415] United States' first written submission, para. 261.
[416] United States' first written submission, para. 264.
[417] European Union's third-party submission, para. 89.

7.321. The first basis of Korea's Article X:3(a) claim asserts that the USDOC deviated from "established agency practice" of determining CV profit on the basis of sources located in the home market of the exporter or producer under investigation. We see no reference in Korea's panel request to this first basis of its claim. Korea's panel request states, in pertinent part:

> IV. PROCEDURAL CLAIMS UNDER THE ANTI-DUMPING AGREEMENT AND THE GATT 1994
>
> Korea further considers that the USDOC's actions taken in the course of its anti-dumping investigation of Oil Country Tubular Goods from Korea failed to protect the respondents' due process rights and were otherwise inconsistent with procedural obligations under the following provisions of the Anti-Dumping Agreement or GATT 1994:
>
> ...
>
> 5. Article X:3 of the GATT 1994 because the *USDOC permitted petitioners to place Tenaris SA's financial statements on the record after the expiration of the regulatory time limit for submission of new factual information, while the USDOC applied its regulatory deadlines for the submission of new factual information with respect to other parties and other submissions*. *Consequently*, the USDOC failed to administer its regulations in a uniform, impartial, and reasonable manner.[418]

7.322. We recall that Article 6.2 of the DSU requires that a panel request "present the problem clearly" by plainly connecting the challenged measure with the provision of the covered agreement claimed to have been infringed, and that the narrative of a panel request functions to explain succinctly how or why the measure at issue is considered by the complaining Member to be violating the WTO obligation in question. We also recall that we must determine compliance with the requirements of Article 6.2 on the merits of each case, considering the panel request as a whole, and in light of attendant circumstances.

7.323. The narrative part of Korea's panel request, and in particular the first sentence of paragraph 5 identifies, without qualification, the USDOC's decision to permit the petitioners to place the Tenaris financial statements on the record after the expiration of the regulatory time-limit for submission of "new factual information", as the basis of Korea's Article X:3(a) claim. This relates to the second factual basis of Korea's claims, i.e. the allegedly different administration of 19 C.F.R. § 351.301 in the Turkish and the underlying investigation.[419] We recall that 19 C.F.R. § 351.301 establishes rules for the submission of new factual information, and the second factual basis for Korea's claim relates to the alleged difference in the USDOC's treatment of what Korea considers to be "new factual information" within the meaning of this US domestic regulation, the Tenaris financial statements, in the two investigations.[420] Korea states that "[c]onsequently", that is, as a consequence of its decision to accept the Tenaris data in the underlying investigation, the USDOC failed to administer its regulation in a uniform, impartial and reasonable manner. Thus, Korea connects what it seeks to challenge, the USDOC's application of regulatory deadlines for the submission of new factual information, with Article X:3 of the GATT 1994.

7.324. We see no reference in paragraph 5, or in the panel request as a whole, to the USDOC's alleged deviation from established agency practice of determining profits on the basis of sources located in the home market of the exporter under investigation. Korea's panel request makes no reference whatsoever to this factual basis in connecting the conduct or action that it seeks to challenge with the provisions of Article X:3(a). Therefore, we see no basis to conclude that Korea

[418] Emphasis added.
[419] This becomes even clearer on reading Korea's first written submission. (Korea's first written submission, paras. 263 and 275). In addition, Korea stated in its second written submission that it was challenging, *inter alia*, the US regulations governing the submission and acceptance of new factual information. In its response to our questions at the second substantive meeting, it specifically identified this regulation as 19 C.F.R. § 351.301. (Korea's second written submission, para. 344; response to Panel question No. 78, para. 114).
[420] Korea's response to Panel question No. 78, para. 114.

intended to challenge the USDOC's conduct under Article X:3(a) on this first factual basis, and this aspect of, Korea's Article X:3(a) claim falls outside our terms of reference. We will thus limit our analysis to the second factual basis for Korea's claim.

7.9.4.2 Whether the USDOC failed to administer 19 C.F.R. § 351.301 in a uniform and reasonable manner

7.325. Korea argues that the USDOC failed to administer 19 C.F.R. § 351.301 in a uniform or reasonable manner because of differences in the administration of this regulation in the underlying investigation and in the Turkish investigation.[421] In particular, in the Turkish investigation, where USDOC also considered whether to determine the CV profit of the Turkish respondents on the basis of the Tenaris financial statements, the USDOC explicitly stated that it was "placing [Tenaris's] financial statements on the record of the antidumping duty investigation of OCTG from Turkey as a possible alternative for the calculation of CV profit for the final determination".[422] The USDOC went on to invite all interested parties to submit factual information to rebut, clarify, or correct the Tenaris financial statements by the stipulated deadline or rebuttal facts, in accordance with US regulation 19 C.F.R. § 351.301(c)(4).[423]

7.326. Korea submits that, in contrast, in the underlying investigation the USDOC did not place the Tenaris financial statements "on the record" of this investigation, and did not invite interested parties to submit rebuttal facts. Korea asserts that 19 C.F.R. § 351.301 prohibited the Korean respondents from submitting such rebuttal facts until the USDOC conveyed to them a formal decision placing the Tenaris financial statements "on the record" of the underlying investigation.[424] Therefore, in Korea's view, the USDOC denied an opportunity to the Korean respondents to submit rebuttal facts in the underlying investigation while granting the respondents in the Turkish investigation an opportunity to do so.

7.327. The United States asserts that it is not the case that the Tenaris financial statements would be "on the record" of the underlying investigation only when and if the USDOC notified the interested parties that these statements were on the record of the investigation.[425] The United States submits that these statements were on the record of the underlying investigation once they were submitted, until and unless the USDOC made a decision to remove them.[426] Further, the United States argues that Korea's view that the Korean respondents did not have an opportunity to submit rebuttal facts is incorrect, and the respondents did have such an opportunity.[427] The difference between the underlying investigation and the Turkish investigation is that because of different factual circumstances, the interested parties in the Turkish investigation had this opportunity to submit rebuttal facts under US regulation, 19 C.F.R. § 351.301(c)(4), whereas the Korean respondents in the underlying investigation had this opportunity under different US regulations, 19 C.F.R. § 351.301 and 19 C.F.R. § 351.301(c)(1)(v).

7.328. There is no dispute between the parties that the Tenaris financial statements were available to the Korean respondents in the underlying investigation, just as they were available to the respondents in the Turkish investigation. The dispute is with respect to whether the Korean respondents in the underlying investigation had an opportunity to submit rebuttal facts or whether they were treated differently from the interested parties in the Turkish investigation in this regard.

7.329. The United States explains that in the Turkish investigation, it was the USDOC itself, rather than an interested party, that introduced the Tenaris financial statements into the record of the underlying investigation. When the USDOC itself introduces factual information in the record of an investigation, at any time during the proceeding, US regulation 19 C.F.R. § 351.301(c)(4) requires it to provide interested parties one opportunity to submit factual information to rebut, clarify, or

[421] Korea's response to Panel question No. 78, para. 114.
[422] USDOC, Memorandum of placement of the Tenaris financial statements on the record of the Turkish OCTG investigation, 12 May 2014, (Exhibit KOR-49).
[423] USDOC, Memorandum of placement of the Tenaris financial statements on the record of the Turkish OCTG investigation, 12 May 2014, (Exhibit KOR-49).
[424] Korea's response to Panel question No. 69, para. 93.
[425] United States' response to Panel question No. 71, para. 48.
[426] United States' response to panel question No. 72, para. 49.
[427] United States' response to Panel question No. 72, para. 53.

correct that information within a stipulated deadline.[428] This is what the USDOC did in the Turkish investigation when it notified interested parties that it had placed the information on the record and gave them seven days to submit rebuttal facts.

7.330. We recall that the Tenaris financial statements were submitted by U.S. Steel in the underlying investigation, in the context of a rebuttal to information submitted by NEXTEEL in response to a supplemental questionnaire from the USDOC, pursuant to a different US regulation 19 C.F.R. § 351.301(c)(1)(v).[429] We further recall that, as described in paragraph 7.218 above, within ten days of the submission of a supplemental questionnaire response, an interested party other than the submitter of that questionnaire response is permitted, under this regulation, one opportunity to submit factual information to rebut, clarify, or correct factual information contained in that questionnaire response. The original submitter of the supplemental questionnaire response then has an automatic time of seven days to sur-rebut, clarify, or correct the information submitted by this interested party.[430] In the underlying investigation, U.S. Steel invoked this provision and stated that it was submitting the Tenaris financial statement as factual information to rebut, clarify, or correct information contained in NEXTEEL's Supplemental Questionnaire Response.[431] Thus, NEXTEEL had seven days to provide rebuttal facts.[432] There was no need for the USDOC to solicit rebuttal facts from the Korean respondents. In addition, according to the United States, HYSCO and other Korean respondents, which were not the original submitters of the information, could also file rebuttal information, under 19 C.F.R. § 351.301.[433] However, neither NEXTEEL nor any other Korean respondent took advantage of this opportunity by making any submissions in this regard.

7.331. Therefore, the United States maintains that the interested parties in the two investigations had the same opportunity to submit rebuttal facts, albeit under different US regulations. Hence, in the United States' view, there was no differential treatment. Korea does not dispute the United States' description of the requirements under 19 C.F.R. § 351.301(c)(4) and 19 C.F.R. § 351.301(c)(1)(v)[434], but denies that NEXTEEL or other Korean respondents had an opportunity to submit rebuttal facts under those provisions. Korea also states that 19 C.F.R. § 351.301 only permits parties to present arguments that the record is deficient, and does not permit parties to submit unsolicited factual information, but does not present evidence in support of this view.

7.332. Korea acknowledges that the USDOC did not decline to accept any rebuttal facts proffered by Korean respondents by citing these regulations.[435] Korea does not challenge the US regulations *per se*, but only the alleged different application in this case. Yet, because it is clear that the USDOC did not in fact apply these regulations to prevent Korean respondents from making rebuttal facts[436], Korea apparently bases its argument on an *assumption* that had the Korean respondents sought to submit such facts, the USDOC would have invoked 19 C.F.R. § 351.301 and rejected it. Moreover, Korea proffers no evidence to demonstrate that 19 C.F.R. § 351.301 prohibited the Korean respondents from submitting such rebuttal facts until the USDOC conveyed to them a formal decision to place the Tenaris financial statements on the record of the underlying investigation. We cannot find a violation of Article X:3(a) of the GATT 1994 on the basis of Korea's counter-factual assumption of how a domestic regulation might have been applied.

[428] United States' response to Panel question No. 72, para. 52.
[429] United States' response to Panel question No. 72, para. 51.
[430] United States' response to Panel question No. 72, para. 51.
[431] United States' response to Panel question No. 72, para. 51.
[432] United States' response to Panel question No. 72, para. 51.
[433] See, e.g. United States' response to Panel question No. 70, para. 47.
[434] However, Korea asserts that 19 C.F.R. § 351.301(c)(1)(v) was not applicable in the underlying investigation.
[435] Korea's response to Panel question No. 69, para. 102.
[436] Korea argues that if it were to submit factual information on Tenaris within the seven day sur-rebuttal period granted under 19 C.F.R. § 351.301(c)(1)(v), that would be tantamount to acknowledging that the Tenaris financial statements were "on the record" and therefore, subject to sur-rebuttal. (Korea's response to Panel question No. 69, para. 99). This suggests to us that NEXTEEL did have an option to submit factual information on Tenaris but chose not to submit it. This undermines Korea's argument that 19 C.F.R. § 351.301(c)(1)(v) prohibited NEXTEEL from filing factual information on Tenaris.

7.333. The fact that the opportunity to provide rebuttal facts was available to interested parties under different US domestic regulations in the Turkish and in the underlying investigation does not establish that the Korean respondents in the underlying investigation were treated differently from the interested parties in the Turkish investigation. On the basis of the foregoing, we conclude that Korea has not shown that the USDOC failed to administer 19 C.F.R. § 351.301 in a uniform or reasonable manner.

7.9.5 Conclusion

7.334. For the foregoing reasons, we conclude that:

a. Korea's claim under Article X:3(a) of the GATT 1994 that the USDOC failed to administer US laws and regulations in a uniform, impartial and reasonable manner because it acted contrary to its established agency practice of determining CV profit on the basis of sources located in the home market of the exporter or producer under investigation, and because this decision was attributable to political influence, falls outside our terms of reference and we make no findings in that regard.

b. Korea has not established that the USDOC acted inconsistently with Article X:3(a) of the GATT 1994 because it failed to administered its domestic regulation 19 C.F.R. § 351.301 in a uniform or reasonable manner.

7.10 Consequential claims under Articles 1, 9.3, and 18.4 of the Anti-Dumping Agreement, Article VI of the GATT 1994, and Article XVI:4 of the WTO Agreement

7.335. Korea claims that as a consequence of the USDOC's violation of the substantive and procedural obligations set out in the Anti-Dumping Agreement, the United States also acted inconsistently with Articles 1, 9.3, and 18.4 of the Anti-Dumping Agreement.[437] In particular, Korea argues that the USDOC acted inconsistently with:

a. Article 1 of the Anti-Dumping Agreement because it failed to ensure that the underlying investigation was initiated and conducted in accordance with this Agreement;

b. Article 9.3 of the Anti-Dumping Agreement because the margin of dumping determined by the USDOC was inconsistent with Articles 2.2, 2.2.1.1, 2.2.2, 2.3, and 2.4 of this Agreement, and thus the anti-dumping duty imposed by the USDOC was necessarily in excess of a margin of dumping determined consistently with Article 2 of this Agreement; and

c. Article 18.4 of the Anti-Dumping Agreement because by maintaining the "viability test", which is inconsistent with Article 2.2 of the Anti-Dumping Agreement, the USDOC failed to take all necessary steps, to ensure the conformity of its laws, regulations and administrative procedures with the provision of this Agreement.

In addition, Korea claims that because the USDOC acted inconsistently with the Anti-Dumping Agreement, it acted inconsistently with Article VI of the GATT 1994.[438] Further, as consequence of this, the USDOC also acted inconsistently with Article XVI:4 of the WTO Agreement.[439] The United States requests that we reject each of Korea's consequential claims.

7.336. We reach the following conclusions regarding Korea's claims under Articles 1, 9.3, and 18.4 of the Anti-Dumping Agreement:

a. Having found substantive violations of Articles 2.2.2, 2.2.2(i), and 2.2.2(iii) of the Anti-Dumping Agreement, we do not find it necessary to address Korea's consequential claims under Articles 1 and 9.3 of the Anti-Dumping Agreement to secure a positive resolution to this dispute, and we therefore exercise judicial economy on these claims.

[437] Korea's first written submission, paras. 238-241.
[438] Korea's first written submission, para. 243.
[439] Korea's first written submission, para. 244.

b. Korea's consequential claim under Article 18.4 of the Anti-Dumping Agreement is dependent on a finding that the "viability test" is inconsistent with Article 2.2 of the Anti-Dumping Agreement. Having found that the "viability test" is not inconsistent with Article 2.2 of the Anti-Dumping Agreement, there is no basis for a finding of a consequential violation of Article 18.4, and we reject Korea's claim.

7.337. With respect to Korea's claim under Article VI of the GATT 1994, Korea simply asserts that the USDOC acted inconsistently with Article VI of the GATT 1994, without identifying either in its panel request or in its written submissions the specific paragraphs or the specific obligations under these paragraphs that it seeks to challenge.[440] We would expect Korea, as the complainant in this dispute, to identify the specific obligations in Article VI it considers the United States has violated. We cannot make a finding of a consequential violation of Article VI of the GATT 1994 in general. Moreover, we decline to attempt to parse Korea's claims so as try to identify which obligations in Article VI may be violated as a consequence of findings of violation based on Korea's claims. This is a task for Korea, which it has failed to undertake. Therefore, we reject Korea's consequential claim under Article VI of the GATT 1994.[441]

7.338. Considering that Korea's consequential claim under Article XVI:4 of the WTO Agreement is contingent on a finding of violation of Article VI of the GATT 1994, which we have rejected, we similarly reject Korea's consequential claim under Article XVI:4 of the WTO Agreement.

7.11 Korea's claim under Article I:1 of the GATT 1994

7.11.1 Provision at issue

7.339. Article I:1 of the GATT 1994 provides that:

> With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

7.11.2 Main arguments of the parties

7.340. Korea asserts that the USDOC acted inconsistently with Article I:1 of the GATT 1994 because its relatively lenient treatment of the exporters and foreign producers from countries that were subject to parallel USDOC investigations on OCTG as compared to the exporters and foreign producers from Korea resulted in an "advantage, favour, privilege or immunity" that was not granted to OCTG originating in Korea.[442]

7.341. The United States submits that Korea's claim is based on bare allegations of different actions in different anti-dumping proceedings, and cannot succeed on this basis.[443]

7.11.3 Main arguments of the third parties

7.342. The European Union anticipates that the matters raised by Korea may be resolved by addressing Korea's claims under Article VI of the GATT 1994 and the Anti-Dumping Agreement without having to address these matters under Article I:1 of the GATT 1994.[444]

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[440] See, e.g. Korea's first written submission, paras. 245-256.

[441] In this regard, we are aware that some other WTO panels appear to have found consequential violations under Article VI, as a whole, without identifying the specific obligation that has been violated. (See, e.g. Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.336; and *Canada – Welded Pipe*, para. 7.223). We are not persuaded, however, that a similar approach is warranted in the present case.

[442] Korea's first written submission, para. 253.

[443] United States' first written submission, para. 241.

7.11.4 Evaluation by the Panel

7.11.4.1 Whether Korea's claims under Article I:1 of the GATT 1994 is within our terms of reference

7.343. The United States has raised an objection to the Panel's jurisdiction over aspects of this claim. Thus, we commence our analysis by addressing this question.

7.344. We recall that Article 6.2 of the DSU requires that a panel request "present the problem clearly" by plainly connecting the challenged measure with the provision of the covered agreement claimed to have been infringed, and that the narrative of a panel request functions to explain succinctly how or why the measure at issue is considered by the complaining Member to be violating the WTO obligation in question. We also recall that we must determine compliance with the requirements of Article 6.2 on the merits of each case, considering the panel request as a whole, and in light of attendant circumstances.

7.345. In its panel request, Korea presented its claim under Article I of the GATT 1994 as follows:

> IV. PROCEDURAL CLAIMS UNDER THE ANTI-DUMPING AGREEMENT AND THE GATT 1994
>
> Korea further considers that the USDOC's actions taken in the course of its anti-dumping investigation of Oil Country Tubular Goods from Korea failed to protect the respondents' due process rights and were otherwise inconsistent with procedural obligations under the following provisions of the Anti-Dumping Agreement or GATT 1994:
>
> ...
>
> 4. Article I of the GATT 1994 because, *inter alia*, the USDOC expressly provided interested parties in its investigation of OCTG produced in other subject countries an opportunity to defend their interests by responding to the placement of Tenaris SA's financial statements on the record. Because the Korean respondents were not granted an opportunity to present submissions responding to Tenaris SA's financial statements, the USDOC's actions resulted in less [favourable] treatment of OCTG from Korea compared to like products originating from other countries under investigation.[445]

7.346. In its first written submission, Korea states that the USDOC acted inconsistently with Article I:1 of the GATT 1994 because:

a. The underlying investigation was the only one in which the USDOC required questionnaire responses and on-site verification of companies that were not named as respondents, or identified as affiliates.[446]

b. The questionnaires issued to the Korean respondents were far more extensive than the questionnaires issued to the respondents in any of the other OCTG investigations, although the product at issue as well as the factors that the USDOC considered in reaching its final determination were largely identical.[447]

c. In the Turkish investigation, the USDOC provided the interested parties with an opportunity to respond to the Tenaris financial statements whereas it refused to provide a similar opportunity to the Korean respondents in the underlying investigation.[448]

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[444] European Union's third-party submission, para. 87.
[445] Underlining original; italics added.
[446] Korea's first written submission, para. 253.
[447] Korea's first written submission, para. 253.
[448] Korea's first written submission, para. 256.

7.347. It is clear to us, reading the narrative section of the panel request, in particular, the *chapeau* to Section IV and paragraph 4, that Korea intended to challenge the USDOC's conduct on the basis set out in subparagraph (c) above. However, it is not clear to us, reading this panel request, that Korea also intended to challenge the USDOC's conduct on the basis specified in subparagraphs (a) and (b). The United States contends that Korea is precluded from challenging the USDOC's conduct on these bases, because its panel request makes no reference to them.[449]

7.348. Korea's GATT Article I:1 claim is set out in paragraph 4 of Section IV of its panel request. Korea sets out a series of procedural claims in Section IV, related to different actions taken by the USDOC in the course of the underlying investigation. In the first sentence of paragraph 4, Korea states that the USDOC acted inconsistently with Article I of the GATT because "inter alia" it expressly provided the interested parties in its investigations on OCTG produced in other subject countries an opportunity to defend their interests by responding to the placement of the Tenaris financial statements on the record. Korea contends that the use of the phrase "inter alia" in this paragraph makes it clear that it did not intend to challenge the USDOC's action or conduct on this basis alone, and therefore the other two aspects of its claim argued in its written submissions are also within the Panel's terms of reference.

7.349. We are not persuaded that the use of "inter alia" in this context entitles Korea to challenge any and all actions of the USDOC in the underlying investigation when its panel request specifically refers to one aspect of the USDOC's conduct, the allegedly differential treatment accorded to the Korean respondents by not providing them an opportunity to respond to the Tenaris financial statement. In particular, we note that the USDOC conduct referred in subparagraphs (a) and (b) above is not the conduct challenged in subparagraph (c). In subparagraph (a) Korea challenges the USDOC's decision to ask for questionnaire responses from specific entities. In subparagraph (b), Korea challenges the scope of the USDOC's questionnaires in the underlying investigation. Neither of these two aspects of the USDOC's conduct have anything to do with the USDOC's alleged failure to provide the Korean respondents with an opportunity to respond to the Tenaris financial statements.

7.350. Furthermore, in the second sentence of paragraph 4, unlike the first, Korea did not use the phrase "inter alia". Instead, Korea stated, without any qualification, that "[b]ecause" the Korean respondents were not granted an opportunity to present submissions responding to the Tenaris financial statements, the USDOC's actions resulted in "less [favourable] treatment" of OCTG from Korea. Thus, Korea connected the specific conduct of the USDOC that it was seeking to challenge with the alleged violation of Article I:1 of the GATT 1994. Considering that the basis on which Korea presented its claim under Article I:1 of the GATT 1994 in its panel request is distinctly different from the bases it presents in its written submission, it seems clear to us that Korea has attempted to expand its claims beyond the scope of its panel request. Korea cannot bring claims under Article I:1 of the GATT on wholly new bases not even alluded to in its request for establishment.

7.351. Therefore, we conclude that Korea's claims challenging the USDOC's actions referred in subparagraphs (a) and (b) above fall outside our terms of reference, and we will not address them.

7.11.4.2 The USDOC's alleged denial of an opportunity for the Korean respondents to comment on the Tenaris financial statements

7.352. Korea contends that the USDOC acted inconsistently with Article I:1 of the GATT 1994 because it discriminated against the Korean respondents by providing the interested parties in the Turkish investigation an opportunity to comment on the Tenaris financial statements, while denying that opportunity to the Korean respondents in the underlying investigation.[450] The factual basis of this claim is the same as that of Korea's claim under Article X:3(a) of the GATT 1994, that the USDOC failed to administer 19 C.F.R. § 351.301 in a uniform or reasonable manner in the Turkish and underlying investigations.

[449] United States' comments on Korea's response to Panel question No. 79, para. 99.
[450] Korea's first written submission, paras. 254 and 255.

7.353. We concluded above that Korea has not established the factual basis of its claim that the USDOC discriminated against the Korean respondents by denying them an opportunity to provide rebuttal facts while providing that opportunity to the interested parties in the Turkish investigation.[451] Considering that Korea's Article I:1 claim rests on the same factual basis, we conclude that Korea has also failed to establish the factual basis of its claim under Article I:1 of the GATT 1994. Therefore, we reject Korea's claim under Article I:1 of the GATT 1994.[452]

7.11.5 Conclusion

7.354. For the foregoing reasons, we conclude that Korea's claims that the USDOC acted inconsistently with Article I:1 of the GATT 1994 because: (a) the underlying investigation was the only one in which the USDOC required questionnaire responses and on-site verification of companies that were not named as respondents, or identified as affiliates; and (b) the questionnaires issued to the Korean respondents were far more extensive than the questionnaires issued to the respondents in any of the other OCTG investigations, although the product at issue as well as the factors that the USDOC considered in reaching its final determination were largely identical, are not within our terms of reference.

7.355. We also conclude that Korea has not established that the USDOC acted inconsistently with Article I:1 of the GATT 1994 by discriminating against the Korean respondents because it gave interested parties in the Turkish investigation an opportunity to comment on the Tenaris financial statements but denied such an opportunity to the Korean respondents in the underlying investigation.

8 CONCLUSIONS AND RECOMMENDATIONS

8.1. For the reasons set forth in this Report, we conclude that the United States acted inconsistently with:

a. the *chapeau* of Article 2.2.2 of the Anti-Dumping Agreement because the USDOC did not determine CV profit of the Korean respondents based on actual data pertaining to their sales of the like product in the home market;

b. Articles 2.2.2(i) and (iii) of the Anti-Dumping Agreement because the USDOC relied on an impermissibly narrow definition of the "same general category of products" in concluding it could not determine CV profit under Article 2.2.2(i) and in concluding it could not calculate the profit cap required by Article 2.2.2(iii);

c. Article 2.2.2(iii) of the Anti-Dumping Agreement because the USDOC failed to calculate and apply a profit cap as required by that provision, and as a consequence acted inconsistently with Article 2.2 of the Anti-Dumping Agreement by failing to use a reasonable amount for profits in the construction of normal value for the Korean respondents.

8.2. For the reasons set forth in this Report, we conclude that Korea has failed to demonstrate that the United States acted inconsistently with:

a. Article 2.2 of the Anti-Dumping Agreement "as such" and "as applied" in connection with the "viability test";

[451] See paras. 7.332-7.333 above.
[452] In this regard, we note that the Appellate Body in *EC – Fasteners (China)* stated that in determining whether there was a violation of Article I.1 of GATT 1994, the panel should have considered, as part of its legal analysis, whether and under what circumstances an anti-dumping measure that is inconsistent with the Anti-Dumping Agreement may be reviewed under Article I.1 of the GATT 1994 in the absence of a review under Article VI of the GATT 1994. (Appellate Body Report, *EC – Fasteners (China)*, para. 395). We have concluded that Korea has not established the factual basis of its claim under Article I:1 and thus do not find it necessary to conduct this legal analysis in this particular case.

b. Article 2.3 of the Anti-Dumping Agreement in connection with the USDOC's construction of NEXTEEL's export price where it appeared to the USDOC that NEXTEEL's export price was unreliable because of association;

c. Article 2.2.1.1 of the Anti-Dumping Agreement in connection with the USDOC's rejection, for the purpose of constructing the normal value, of the price at which NEXTEEL purchased steel coils from POSCO;

d. Article 6.2 of the Anti-Dumping Agreement in connection with the absence of notification by the USDOC to the Korean respondents, until its final determination, that it had accepted the Tenaris financial statements on the record;

e. Article 6.4 of the Anti-Dumping Agreement in connection with the absence of notification by the USDOC to the Korean respondents until its final determination that it had accepted the Tenaris financial statements on the record and that it was using these statements in determining CV profit;

f. Article 6.9 of the Anti-Dumping Agreement in connection with the absence of disclosure as an essential fact of the USDOC's decision to accept the Tenaris financial statements on the record and its reliance on the Tenaris financial statements to determine CV profit;

g. Article 6.10 of the Anti-Dumping Agreement in connection with the USDOC's conclusion that and explanation why it would be impracticable to examine all known exporters and why it was limiting its examination to two exporters;

h. Article 6.10.2 of the Anti-Dumping Agreement in connection with the USDOC's conclusion that and explanation why it would be unduly burdensome to individually examine voluntary respondents;

i. Article 12.2.2 of the Anti-Dumping Agreement in connection with the USDOC's reasons for rejecting certain arguments;

j. Article X:3(a) of the GATT 1994 in connection with the USDOC's administration of USDOC regulation 19 C.F.R. § 351.301;

k. Article I:1 of the GATT 1994 in connection with the treatment of interested parties in the Turkish investigation and the treatment of the Korean respondents in the underlying investigation regarding the opportunity to comment on the Tenaris financial statements;

l. Article 18.4 of the Anti-Dumping Agreement as a consequence of the alleged violation of Article 2.2 of the Anti-Dumping Agreement in connection with the "viability test";

m. Article VI of the GATT 1994 as a consequence of alleged violations of the Anti-Dumping Agreement; and

n. Article XVI:4 of the WTO Agreement as a consequence of alleged violations of the Anti-Dumping Agreement and Article VI of the GATT 1994.

8.3. For the reasons set forth in this Report, we find that the following claims asserted by Korea fall outside our terms of reference, and thus do not consider them:

a. alleged violation of Article 2.2.2(iii) of the Anti-Dumping Agreement because the USDOC failed to use a reasonable method to determine the CV profit rate of the Korean respondents by basing this profit rate on the Tenaris financial statements;

b. alleged violation of Article 6.4 of the Anti-Dumping Agreement because the USDOC failed to post certain communications to the record in a timely fashion;

c. alleged violation of Article 6.9 of the Anti-Dumping Agreement because it failed to disclose these communications as essential facts;

d. alleged violation of Article X:3(a) of the GATT 1994 because the USDOC failed to administer US laws and regulations in a uniform, impartial and reasonable manner by acting contrary to its established agency practice of determining CV profit on the basis of sources located in the home market of the exporter or producer under investigation, and because this decision was attributable to political influence;

e. alleged violation of Article I:1 of the GATT 1994 because: (a) the underlying investigation was the only one in which the USDOC required questionnaire responses and on-site verification of companies that were not named as respondents, or identified as affiliates; and (b) the questionnaires issued to the Korean respondents were far more extensive than the questionnaires issued to the respondents in any of the other OCTG investigations.

8.4. For the reasons set forth in this Report, we find the USDOC's remand determination falls outside our terms of reference and therefore we do not consider Korea's claims in connection with it.

8.5. For the reasons set forth in this Report, we exercise judicial economy with respect to Korea's claims that the USDOC acted inconsistently with:

a. the *chapeau* of Article 2.2.2 of the Anti-Dumping Agreement because the USDOC did not determine CV profit of the Korean respondents based on actual data pertaining to their sales of the like product in third-country markets;

b. Article 2.4 because the USDOC did not make a fair comparison between the export price and the constructed normal value by failing to make due allowance for the significant differences between the profit rates of the Korean respondents and that of Tenaris; and

c. Articles 1 and 9.3 of the Anti-Dumping Agreement as a consequence of substantive violations of Articles 2.2.2, 2.2.2(i), and 2.2.2(iii) of the Anti-Dumping Agreement.

8.6. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue are inconsistent with certain provisions of the Anti-Dumping Agreement, they have nullified or impaired benefits accruing to Korea under this agreement.

8.7. Pursuant to Article 19.1 of the DSU, we recommend that the United States bring its measures into conformity with its obligations under the Anti-Dumping Agreement.

WORLD TRADE ORGANIZATION

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

REPORT OF THE PANEL

Addendum

*BCI deleted, as indicated **[[***]]***

This *addendum* contains Annexes A to F to the Report of the Panel to be found in document WT/DS488/R.

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WORKING PROCEDURES OF THE PANEL

ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 30 October 2015

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The parties and third parties shall treat business confidential information in accordance with the procedures set forth in the Additional Working Procedures of the Panel Concerning Business Confidential Information adopted by the Panel.

4. The Panel may open its meetings with the parties and third parties to the public, either in whole or in part, subject to appropriate procedures to be adopted by the Panel after consulting with the parties and third parties. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

5. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

6. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

7. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If Korea requests such a ruling, the United States shall submit its response to the request in its first written submission. If the United States requests such a ruling, Korea shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

8. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

9. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

10. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. For example, exhibits submitted by Korea could be numbered KOR-1, KOR-2, etc. If the last exhibit in connection with the first submission was numbered KOR-5, the first exhibit of the next submission thus would be numbered KOR-6.

Questions

11. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

Substantive meetings

12. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

13. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite Korea to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party a final written version of its opening statement, as well as of its closing statement if possible, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Korea presenting its statement first.

14. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask the United States if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite the United States to present its opening statement, followed by Korea. If the United States chooses not to avail itself of that right, the Panel shall invite Korea to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party a final written version of its opening statement, as well as of its closing statement if possible, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

15. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

16. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

17. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

18. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

19. Each party shall submit executive summaries of the facts and arguments as presented to the Panel in its written submissions, other than responses to questions, and its oral statements, in accordance with the timetable adopted by the Panel. Each executive summary of a written submission shall be limited to no more than 10 pages, and each summary submitted by each party of both opening and closing statements presented at a substantive meeting shall be limited to no more than 5 pages. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions.

20. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

21. The Panel reserves the right to request the parties and third parties to provide executive summaries of facts and arguments presented by a party or a third party in any other submissions to the Panel for which a deadline may not be specified in the timetable.

Interim review

22. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

23. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

24. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

25. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file 2 paper copies of all documents it submits to the Panel. Two paper copies of all exhibits shall be filed. If Exhibits are submitted on CD-ROM or DVD, 2 copies shall be filed. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide one electronic copy of all documents, other than exhibits submitted on CD-ROM or DVD, it submits to the Panel at the same time as

the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy to xxxxx@wto.org and xxxxx@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

26. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING BUSINESS CONFIDENTIAL INFORMATION

Adopted 30 October 2015

These procedures apply to any business confidential information (BCI) that a party wishes to submit to the Panel in the course of the Panel proceedings in DS488.

1. For the purposes of these Panel proceedings, BCI is any information that has been designated as such by the party submitting the information and that was previously treated as confidential within the meaning of Article 6.5 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 by the U.S. Department of Commerce in the course of the anti-dumping proceeding at issue in this dispute, entitled Certain Oil Country Tubular Goods from the Republic of Korea (A-580-870). However, these procedures do not apply to any information that is available in the public domain. In addition, these procedures do not apply to any BCI if the entity which provided the information in the course of the aforementioned investigation agrees in writing to make the information publicly available.

2. If a party considers it necessary to submit to the Panel BCI as defined above from an entity that submitted that information in the investigation at issue, the party shall, at the earliest possible date, obtain an authorizing letter from the entity and provide such authorizing letter to the Panel, with a copy to the other party. The authorizing letter from the entity shall authorize both Korea and the United States to submit in this dispute, in accordance with these procedures, any confidential information submitted by that entity in the course of the investigation.

3. No person may have access to BCI except a member of the Secretariat or the Panel, an employee of a party or third party, and an outside advisor for the purposes of this dispute to a party or third party. However, an outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the products that were the subject of the investigation at issue in this dispute or an officer or employee of an association of such enterprises. All third party access to BCI shall be subject to the terms of these working procedures.

4. Each party shall, at the request of the other party, facilitate the communication to an entity in its territory of any request to provide an authorization letter referred to in paragraph 2. Each party shall encourage any entity in its territory that is requested to grant the authorization referred to in paragraph 2 to grant such authorization. If an entity refuses to grant the authorization referred to in paragraph 2, a party may bring the situation to the attention of the Panel.

5. A party or third party having access to BCI shall treat it as confidential, i.e., shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Each party and third party shall have responsibility in this regard for its employees as well as any outside advisors used for the purposes of this dispute. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose.

6. The party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains Business Confidential Information", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page.

7. Where a party submits a document containing BCI to the Panel, the other party or any third party referring to that BCI in its documents, including written submissions and oral statements, shall clearly identify all such information in those documents. All such documents shall be marked

as described in paragraph 6. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement. The written versions of any such oral statements submitted to the Panel shall be marked as provided for in paragraph 6.

8. Any BCI that is submitted in binary-encoded form shall be clearly marked with the statement "Contains Business Confidential Information" on a label of the storage medium, and be clearly marked with the statement "Contains Business Confidential Information" in the binary-encoded files.

9. If a party or third party considers that information submitted by the other party or a third party contains information which should have been designated as BCI and objects to such submission without BCI designation, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties. The Panel shall deal with the objection as appropriate. Similarly, if a party or third party considers that the other party or a third party submitted information designated as BCI which should not be so designated, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, and the Panel shall deal with the objection as appropriate.

10. Any person authorized to have access to BCI under the terms of these procedures shall treat it as confidential and shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. All documents and electronic storage media containing BCI shall be stored in such a manner as to prevent unauthorized access to such information.

11. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not contain any information that the party has designated as BCI.

12. Submissions containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel's Report.

ANNEX B

ARGUMENTS OF KOREA

ANNEX B-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN
SUBMISSION OF KOREA

I. INTRODUCTION

1. This dispute concerns anti-dumping measures imposed by the United States on oil country tubular goods ("OCTG") imported from the Republic of Korea ("Korea"). The U.S. Department of Commerce ("USDOC") found in its Preliminary Determination that no dumping margin existed for the Korean exporters of OCTG. However, the USDOC ultimately reversed its finding in the Final Determination, having completely shifted its approach on calculating constructed normal value, and, in particular, the constructed value profit rate of the two Korean respondents. The USDOC's determination and its conduct in the investigation are inconsistent with a number of provisions of the Agreement on Implementation of Article IV of the General Agreement on Tariffs and Trade 1994 (the "Anti-Dumping Agreement"), the General Agreement on Tariffs and Trade 1994 (the "GATT 1994"), and the Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement").

2. During the course of the investigation, the USDOC did not allow the Korean respondents to present data on their sales of the merchandise under investigation to third countries, because these sales did not meet the so-called "viability test" under the relevant U.S. law. This viability test violates Article 2.2 of the Anti-Dumping Agreement "as such" and "as applied", because Article 2.2 does not contemplate such a rigid quantitative test for determining the appropriateness of third-country sales.

3. The USDOC's use of constructed value ("CV") in the investigation was also inconsistent with the Anti-Dumping Agreement. First, the USDOC disregarded actual data regarding Korean respondents' home market and third-country market profit rates in violation of the chapeau of Article 2.2.2. Second, the USDOC applied an impermissibly narrow interpretation and application of "same general category of products". Third, the USDOC failed to calculate a "profit cap" as it was required to do under Article 2.2.2(iii). Fourth, the USDOC's use of financial data from Tenaris S.A. ("Tenaris") was not "reasonable" under Article 2.2.2(iii) given that Tenaris had no sales or production in Korea. Fifth, the USDOC's use of Tenaris' financial data violated Article 2.4, as the USDOC failed to make due allowances for differences between Tenaris and the Korean producers that affected price comparability.

4. The USDOC also improperly found an association between NEXTEEL and its raw material supplier, POSCO, based on an erroneous interpretation of Article 2.3, and impermissibly disregarded NEXTEEL's export price to its customer. This erroneous finding of association led the USDOC to improperly disregard POSCO's price of raw materials to NEXTEEL in violation of Article 2.2.1.1.

5. In addition, the USDOC failed to protect the Korean respondents' due process rights in the course of the investigation. In failing to make a ruling regarding the placement of Tenaris' Annual Report on the record despite objections by Korean respondents, the USDOC did not provide Korean respondents a full and ample opportunity to defend their interests before the issuance of the Final Determination, in violation of Articles 6.2, 6.4, and 6.9. Its failure to place records of *ex parte* communications on the administrative record in a timely manner also violates Articles 6.4 and 6.9. Furthermore, the USDOC did not include in its Final Determination and Final Decision Memo all relevant information leading to its imposition of anti-dumping duties as required in Article 12.2.2. The USDOC also failed to protect the interests of other Korean producers by improperly limiting the number of mandatory respondents and failing to examine data submitted by voluntary respondents in violation of Article 6.10.

6. These violations give rise to consequential violations of Articles 1, 9.3, and 18.4 of the Anti-Dumping Agreement, as well as Article VI of the GATT 1994 and Article XVI:4 of the WTO Agreement. Moreover, the USDOC's less favorable treatment of Korean OCTG as compared to OCTG from other Members subject to parallel anti-dumping investigations is inconsistent with

Article I:1 of the GATT 1994. Finally, the USDOC did not administer its laws and regulations in a uniform, impartial, and reasonable manner as required under Article X:3(a) of the GATT 1994 as its decisions were influenced by extreme political pressure, and it failed to provide any other rationale for its sudden change in practice.

II. STATEMENT OF FACTS

7. On 22 July 2014, the USDOC initiated an anti-dumping duty investigation on OCTG from Korea based on a petition filed by petitioners representing the U.S. domestic steel industry, and subsequently selected NEXTEEL and HYSCO as the two mandatory respondents in the investigation. Because the USDOC considered that neither NEXTEEL nor HYSCO had sufficient sales of the merchandise under consideration in the country of export ("home market") or in a third country to use in the calculation of normal value, the USDOC resorted to the calculation of a "constructed value" ("CV").

8. On February 14, 2014, the USDOC issued its Preliminary Determination, in which it determined that OCTG from Korea was not being, and was not likely to be, dumped in the United States. In particular, the USDOC declined to use profit information for Tenaris as argued by petitioners, as the report submitted by petitioners on Tenaris showed that it was a non-Korean corporation that had "neither production nor sales in the market under consideration". Instead, the USDOC calculated HYSCO's CV profit rate based on HYSCO's own sales of the same general category of products − i.e., line pipe and standard pipe − in Korea. For NEXTEEL, the USDOC used the weighted average profit rate of all Korean respondents for home market sales of the same general category of products. The USDOC also addressed allegations by petitioners that NEXTEEL was associated with its raw materials supplier, POSCO, and that a Korean trading company was involved in most of NEXTEEL's sales of OCTG in the United States. Acknowledging that it had not yet reached a decision on the issue of affiliation, the USDOC stated that it would be seeking additional clarification from NEXTEEL about its relationships with these companies.

9. The USDOC issued supplemental questionnaires to the Korean respondents, including a supplemental questionnaire to NEXTEEL relating to its cost of production. Petitioner U.S. Steel submitted as "rebuttal" information the 2012 Annual Report of Tenaris. U.S. Steel's submission, however, did not bear any relation to the factual information submitted by NEXTEEL in the questionnaire response. NEXTEEL immediately requested that the USDOC reject U.S. Steel's untimely submission, as it did not rebut, clarify, or correct NEXTEEL's questionnaire response, but rather, was clearly intended to offer unsolicited CV profit source data past the USDOC's deadline. The USDOC did not rule on, or even acknowledge, NEXTEEL's objection to the placement of the Annual Report on the record until the Final Determination, where it concluded that the petitioner had properly submitted Tenaris' Annual Report.

10. After the Preliminary Determination's negative findings, the U.S. industry and its allies escalated their political activities to unprecedented levels. Notably, among the numerous records of meetings and phone calls by lawmakers and industry representatives to the U.S. Secretary of Commerce on behalf of the U.S. industry, 57 U.S. Senators signed a letter addressed to the Secretary complaining specifically of the USDOC's calculation of profit in its Preliminary Determination.

11. In its Final Determination, the USDOC drastically departed from its Preliminary Determination, calculating a dumping margin of 9.89% for NEXTEEL and 15.75 for HYSCO. To reach this result, the USDOC reversed course and recalculated CV profit for both NEXTEEL and HYSCO, improperly using the 26.11% profit rate of Tenaris as depicted in the financial statements that U.S. Steel had untimely submitted.

III. ARGUMENTS

A. The U.S. Viability Test is Inconsistent with Article 2.2 of the Anti-Dumping Agreement

12. When there are no sales or low volume sales in the ordinary course of trade in the domestic market of the exporting country, or when such sales do not permit a proper comparison because of the particular market situation, Article 2.2 of the Anti-Dumping Agreement permits an

investigating authority to calculate normal value based on third country sales, "provided that this price is representative".

13. The conditions for using third-country sales to calculate normal value under United States law is embodied in the "viability test" pursuant to which the USDOC may use sales prices in a third country to calculate normal value when it is unable to use sales in the country of export, provided three separate and cumulative criteria are met: (1) the price is "representative"; (2) the quantity or value of sales to the third country meets or exceeds five percent of the company's sales to the United States; and (3) no "particular market situation" exists that would make third country market sales prices inappropriate.

14. As explained above, Article 2.2 requires that the price to the third country market be "representative", but does not contemplate a mechanistic minimum threshold as applied by the United States. In particular, Article 2.2 provides "low volume sales" as a factor for excluding the domestic market sales as the basis of normal value, but it does not apply such a standard to third-country sales, demonstrating that the drafters of the Agreement did not intend for the quantitative threshold that may be applied to domestic market sales to be applied to third-country sales.

15. Thus, the U.S. viability test as it applies to third-country market sales is "as such" inconsistent with Article 2.2, as it applies a rigid quantitative test not permitted under the Article. It is also "as applied" inconsistent with Article 2.2, insofar as the Korean respondents were precluded from presenting third-country market data pursuant to the USDOC's application of the viability test in the underlying investigation.

B. The USDOC's Use of Constructed Value in the OCTG Investigation is Inconsistent with the Anti-Dumping Agreement

16. First, the USDOC failed to comply with the Article 2.2.2 requirement to use "actual data" as a CV profit source when available. Article 2.2.2 provides in its chapeau that, when calculating normal value using constructed value, "the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation". The Appellate Body in *EC – Tube or Pipe Fittings* confirmed that it is only when SG&A and profits cannot be calculated based on "actual data" that an investigating authority is permitted to proceed to employ one of the other three methods provided in subparagraphs (i)-(iii). The Appellate Body further confirmed that "low-volume sales" that have failed to meet the five percent threshold for the purposes of determining the viability of the domestic market as a comparison market are not excluded from the "actual data" that must be used to calculate the profit rate under the Article 2.2.2 chapeau.

17. In the underlying investigation, the USDOC refused to use HYSCO's or NEXTEEL's actual data to calculate profit rate, simply stating that it was unable to use the "preferred method", i.e., use of actual data, "absent a viable home or third-country market". Based on requirements of Article 2.2.2 and the guidance provided by the Appellate Body, even if the USDOC had properly disregarded the respondents' sales in the country of export for the purpose of determining an appropriate comparison market due to their "low volume", it was nonetheless obligated to use the actual profit rates for these sales for the purpose of calculating CV profit. The chapeau of Article 2.2.2 does not require that the "actual data" must derive from sales of the like product in the home market. HYSCO and NEXTEEL indicated early in the investigation in their initial questionnaire responses that they both had sales of the like product to third-country markets, and the USDOC had on the record actual profit data for both respondents' OCTG sales in the home market and third-country markets. Because the USDOC disregarded NEXTEEL's and HYSCO's "actual data" pertaining to the respondents' profit rates in the home market and third-country market based on the determination that sales to these markets were of "low volume", the USDOC failed to act consistently with its obligations under the chapeau of Article 2.2.2.

18. Second, the USDOC's decision to rely on Article 2.2.2(iii) and reject other viable options was premised on an impermissibly narrow interpretation and application of the "same general category of products". As the *Thailand – H-Beams* panel clarified, using information from "same general category of products" is meant to provide for the "database to be broadened" in instances where actual data pertaining to "like products" is not available.

19. Rather than broadening the database, the USDOC's Final Determination rested on an overly-narrow interpretation of the "same general category" of products. In its Final Determination, the USDOC reversed course from its Preliminary Determination and found that OCTG was not in the "same general category" of products as non-OCTG pipe products manufactured by the Korean producers, such as line pipe and standard pipe. The USDOC stated that the same *general* category of OCTG would only include "subject OCTG, non-scope OCTG such as stainless steel tubular products, and drill pipes."

20. Having found in its Final Determination that OCTG was not in the "same general category" of products as non-OCTG pipe products, the USDOC determined that it did not have data to calculate the CV profit rate using actual amounts incurred by the producer in the country of origin for the production and sale of the "same general category of merchandise" under Article 2.2.2(i). The USDOC further found that, it was also unable to calculate "the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin", i.e., a "profit cap", as required under Article 2.2.2(iii).

21. By including only one product outside of OCTG – i.e., drill pipe – within the "same general category of products", the USDOC applied a definition of "same general category" that was effectively limited to the "like product". In fact, the USDOC has considered drill pipe to be a "like product" in defining the product scope of OCTG in both the underlying investigation as well as its previous investigations involving OCTG. At the same time, the USDOC has recognized non-OCTG pipe products such as line pipe and standard pipe to be within the "same general category of products" as OCTG in its previous investigations involving OCTG.

22. In sum, the USDOC's definition of the "same general category" in this case resulted in a database that was identical to that containing only "like products", and also contravened its own prior determinations that non-OCTG pipe products such as line pipe and standard pipe fell within the "same general category of products" as OCTG. Thus, the USDOC violated Article 2.2.2 by applying an incorrect standard in its analysis of CV profit calculation methods under the subparagraphs of Article 2.2.2.

23. Third, the USDOC's failure to apply a profit cap is inconsistent with Article 2.2.2(iii). Article 2.2.2(iii) permits the investigating authority to calculate CV profit based on "any other reasonable method, *provided that* the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin", i.e., the "profit cap".

24. The obligation in Article 2.2.2(iii) to calculate a profit cap is unqualified, and there is no indication in the text to suggest that there may be circumstances in which an investigating authority is excused from calculating and applying a profit cap. Indeed, the panel in *Thailand H – Beams* found that the profit cap is in effect a separate reasonability test. The obligatory nature of calculating a profit cap was further confirmed in *EU – Footwear*, where the panel held that the unavailability of relevant data did not excuse a Member from complying with the requirements of Article 2.2.2(iii). Thus, calculation and application of a profit cap is a mandatory requirement when an investigation authority opts to rely on Article 2.2.2(iii), and failure to calculate and apply a profit cap constitutes a *per se* violation of Article 2.2.2(iii).

25. Moreover, Article 2.2 requires that, when relying on constructed value to calculate normal value, the constructed value is to comprise of the cost of production in the country of origin plus a "reasonable" amount for profit. Because the USDOC did not ensure that its calculation of CV profit was "reasonable" by failing to calculate a profit cap, the USDOC also failed to calculate a "reasonable" amount for profit under Article 2.2.

26. In addition, as discussed above, the USDOC determined that it was unable to calculate a profit cap based on an erroneous determination that the administrative record did not contain data regarding the "same general category of products". Thus, because the USDOC did not calculate a profit cap based on an erroneous interpretation of "same general category", the USDOC violated Article 2.2.2(iii).

27. Fourth, the USDOC's construction of profit on the basis of Tenaris' financial statement is inconsistent with the "reasonable method" requirement of Article 2.2.2(iii). While the Anti-

Dumping Agreement does not delineate the exact ambit of what constitutes a "reasonable method" for purposes of Article 2.2.2(iii), if a specific method of constructing SG&A and CV profit is to satisfy this "reasonableness test", it must, at the minimum, be consistent with the central principles of the anti-dumping mechanism enshrined in the Anti-Dumping Agreement, including Article 2.1.

28. According to Article 2.1, "dumping" means introduction of a product "into the commerce of *another country*" at less than the "comparable price" for the like product "when destined for consumption in the *exporting country*". Therefore, in calculating a normal value under the alternative methods, the investigating authority must approximate the actual data that companies under investigation would achieve *in the domestic country of manufacture*.

29. The USDOC relied on the profit rate of Tenaris, despite the existence on the record of various CV profit sources that originated from the country of export, Korea. Tenaris is a multinational company based in Argentina and incorporated under the laws of Luxembourg that has no record of sales of production in Korea. No reasonable basis exists to conclude that Tenaris' 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. Indeed, the only rationale the USDOC provided in its Final Determination to justify its reliance on Tenaris' profit is that Tenaris realizes profit primarily on the basis of OCTG sales from across the globe. Yet, the USDOC never explained why the profits of Tenaris in other geographic market would reasonably reflect the level of profits obtained by producers or exporters in the *Korean* market. Because the profit used by the USDOC to construct the normal value in the underlying investigation was not representative of the profits obtained by producers or exporters in the Korean market and not comparable with the export prices of the Korean exporters, the method used by the USDOC's use of Tenaris' financial data to calculate CV for the Korean exporters does not constitute a "reasonable method" under Article 2.2.2(iii).

30. Fifth, the USDOC failed to make a fair comparison as required by Article 2.4 of the Anti-Dumping Agreement. Article 2.4 requires an investigating authority to conduct a "fair comparison" between the export price and normal price. In doing so, "{d}ue allowance shall be made in each case, on its merits, for differences which affect price comparability". The Appellate Body in *US – Hot-Rolled Steel* interpreted these "differences" broadly, stating that "Article 2.4 expressly requires that allowances be made for *any other differences* that are demonstrated to affect price comparability, and that there are no differences affecting price comparability that would be precluded, as such from being the object of an 'allowance'."

31. The USDOC failed to make a fair comparison because it did not take into account substantial differences between Tenaris and the Korean respondents that affected the price comparability between the Korean respondents' export price and the normal values derived using the profit rate of Tenaris. For example, Tenaris focused on specialized and premium products designed to generate a high profit margin, compared to the low-end products manufactured by Korean respondents. The scale of Tenaris' business operations grossly overshadowed that of Korean respondents, as demonstrated by its production and sales volume, as well as its workforce and facilities. Importantly, because Tenaris sold directly to end users, it was able to retain the entirety of the profits generated between manufacture and retail sale. The Korean respondents, on the other hand, sold OCTG products through resellers at wholesale prices. These factors directly impacted the calculation of the normal value using Tenaris' financial data, and therefore, also affected the comparability between the normal value and the Korean respondents' export price. Because USDOC did not ensure the price comparability between the export price and normal value despite several differentiating factors identified by the Korean respondents, the USDOC failed to comply with Article 2.4.

C. The USDOC's Finding of Association is Inconsistent with Article 2.3 of the Anti-Dumping Agreement

32. As a general rule, an investigating authority must make a dumping determination based on the normal value and the export price of the product exported from one country to another. Article 2.3 permits the investigating authority to disregard export prices when: (i) an association or compensatory arrangement exists between the exporter and the importer/third party; and (ii) it appears to the investigating authority that the export prices are unreliable because of that association or compensatory arrangement.

33. The USDOC improperly disregarded NEXTEEL's sales prices to its customer, a Korean trading company ("Customer"), and instead constructed an export price based on the Customer's price to its own U.S. customer. The USDOC's decision was based on an erroneous determination that NEXTEEL was "associated" with its supplier, POSCO, because it was reliant on POSCO, giving POSCO "control" over NEXTEEL. The USDOC found that POSCO was "operationally in a position to exercise restraint or direction over NEXTEEL in a manner that affects the pricing, production, and sale of OCTG". However, in conducting its analysis, the USDOC replaced the requirement to find "control" based on "restraint or direction" with a much less stringent standard. Furthermore, realizing that POSCO, as a raw materials supplier, could only affect NEXTEEL's costs and not its sales prices, the USDOC reasoned that POSCO exercised control over NEXTEEL's sales prices based on the "combination of {POSCO's} involvement on both the production and sales side" by virtue of POSCO's affiliation with the Customer. However, the USDOC did not find that NEXTEEL was "reliant" on the Customer for its U.S. sales. Rather, the USDOC simply noted that a majority of NEXTEEL's sales were made to the Customer, and automatically assumed that POSCO and the Customer were in a position to control NEXTEEL's export price based on the Customer's relationship with POSCO. Thus, the USDOC's conclusion that POSCO controlled NEXTEEL's export price was not based on an objective assessment of whether either POSCO or the Customer was *in fact* in a position to control NEXTEEL's pricing.

34. Finally, the USDOC ignored evidence on the record demonstrating that NEXTEEL was not reliant on POSCO for its raw material supply, and did not even conduct any meaningful analysis of whether NEXTEEL's sales price to the Customer was "unreliable," as it was required to do before it could disregard NEXTEEL's export prices under Article 2.3. Rather, the USDOC assumed that the export price was unreliable simply by virtue of the Customer's relationship with POSCO. Therefore, the USDOC's disregard of NEXTEEL's export price is inconsistent with Article 2.3 of the Anti-Dumping Agreement.

D. The USDOC Improperly Disregarded NEXTEEL's Costs in Violation of Article 2.2.1.1 of the Anti-Dumping Agreement

35. Article 2.2.1.1 requires that, in calculating a producer's cost of production, "costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation", provided that: (1) such records are in accordance with the generally accepted accounting principles of the exporting country; and (2) reasonably reflect the costs associated with the production and sale of the product under consideration.

36. Having improperly found that NEXTEEL was affiliated with POSCO, the USDOC disregarded NEXTEEL's own records with respect to the price it paid POSCO for raw materials and applied calculated prices for these raw materials. However, the record demonstrates that NEXTEEL kept its records in accordance with the generally accepted accounting principles of Korea. Moreover, the USDOC's decision to disregard NEXTEEL's own cost data was based on an erroneous determination that NEXTEEL was affiliated with POSCO, as explained above.

37. Because the USDOC's determination of affiliation was improper and such determination was the sole basis provided by the USDOC to disregard NEXTEEL's costs, it follows that the USDOC acted inconsistently with its obligation under Article 2.2.1.1.

E. Procedural Claims

38. Article 6.2 of the Anti-Dumping Agreement requires investigating authorities to ensure that "all interested parties shall have a full opportunity for the defence of their interests," while Article 6.4 requires investigating authorities to provide "timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases … and to prepare presentations on the basis of this information". The Appellate Body in *EC – Tube or Pipe Fittings* clarified that whether certain information is "relevant" is not determined by the investigating authority. Moreover, the panel in *EC – Salmon (Norway)* explained that information that the investigating authority considers during the course of the anti-dumping investigation presumptively falls within the scope of Article 6.4. Finally, Article 6.9 requires investigating authorities to, "before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures".

39. Tenaris' Annual Report constituted "relevant" information under Article 6.4 as the USDOC did, in fact, use the data to calculate the Korean respondents' dumping margins. By failing to address the Korean respondents' objections and delaying a ruling on the matter until the Final Determination, the USDOC failed to provide respondents with a full opportunity to defend their interests and prepare presentations based on relevant information, as required under Articles 6.2 and 6.4. Furthermore, whether the USDOC would accept the placement of the Tenaris financial statements on the record constituted an "essential fact" under Article 6.9. The financial statements were clearly "under consideration" and an "essential fact" that formed the basis of the USDOC's determination, as evidenced by the USDOC's decision to rely on the financial data to impose anti-dumping duties on Korean respondents. Therefore, the USDOC was obligated to disclose the fact that it was accepting Tenaris' Annual Report on the record before the Final Determination, in accordance with Article 6.9.

40. The USDOC also failed to comply with its obligations under Articles 6.4 and 6.9 with respect to the disclosure of several *ex parte* communications on the administrative record. It was not until the Korean respondents demanded that USDOC provide the correspondence that USDOC disclosed a large amount of correspondence between USDOC officials and representatives from the U.S. government and domestic industry on behalf of petitioners. These documents included a letter addressed to the Secretary of Commerce signed by 57 U.S. Senators, and a separate letter addressed to the Secretary signed by 155 House Representatives, evidencing extreme political pressure focusing specifically on the issue of CV profit.

41. The various letters sent to the Secretary of Commerce by prominent members of the U.S. Congress and by industry leaders constituted "relevant" information used by the investigating authorities under Article 6.4, as well as "essential facts under consideration" that formed the basis for the USDOC's decisions under Article 6.9. Because the USDOC did not disclose these *ex parte* communications in sufficient time before the Final Determination for respondents to defend their interests, it violated Articles 6.4 and 6.9.

42. Finally, the USDOC failed to comply with its obligations under Article 12.2.2, which requires public notices of the conclusion of an investigation to contain "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures". These public notices must include "the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers". As described above, the USDOC failed to address the Korean respondents' arguments regarding the inappropriateness of using Tenaris' financial data to calculate the Korean respondents CV profit rate in light of the substantial differences between the companies. In addition, the USDOC's determination regarding the "same general category of products" focused only on the differences in physical characteristics between OCTG, line pipe, and standard pipe, and failed to address the arguments raised by the Korean respondents. Finally, the USDOC analysis regarding the alleged association between NEXTEEL and POSCO simply ignored extensive arguments presented by NEXTEEL contradicting allegations by petitioners, in violation of Article 12.2.2.

F. The USDOC's Limitation of Mandatory Respondents and Failure to Consider Information Submitted by Voluntary Respondents is Inconsistent with Article 6.10 of the Anti-Dumping Agreement

43. Article 6.10 requires that investigating authorities determine an individual dumping margin for each known exporter or producer of the subject merchandise, and only permits deviation from this rule when the number of exporters/producers is so large that individual determination would be "impracticable". Even when limiting its investigation, Article 6.10.2 obligates the investigating authority to determine individual dumping margins for voluntary respondents that provide timely information. The investigating authority is relieved of this obligation only when "the number of exporters or producers is so large that individual examinations would be unduly burdensome to the authorities and prevent the timely completion of the investigation".

44. Although the USDOC discussed at length its limitations in examining all identified exports, it failed to provide any explanation of why it considered only two respondents to be a "reasonable number", or why it would not be reasonable to examine any additional respondents. Moreover, although Husteel, ILJIN, and SeAH timely submitted voluntary responses to the USDOC's questionnaire, the USDOC declined to consider these responses citing to various resource constraints not limited to the immediate investigation. Because the USDOC did not adequately

explain why it could not consider additional mandatory or voluntary responses, it failed to comply with its obligations under Article 6.10.

G. The United States' Measures are Inconsistent with Articles 1, 9.3, and 18.4 of the Anti-Dumping Agreement

45. As discussed above, the anti-dumping duties calculated by the USDOC in this case derived from an erroneous and impermissible application of Article 2 that resulted in an artificially high dumping margin, in violation of Article 9.3. Moreover, the panel in *China – HP-SSST (Japan)/China – HP-SSST (EU)* confirmed that a violation of a substantive claim will consequentially result in a violation of Article 1. Finally, the U.S. viability test constitutes a law or regulation that is not in conformity with the Anti-Dumping Agreement, demonstrating that the United States has failed to take all necessary measures to ensure conformity of its measures with the Antidumping Agreement, thereby acting inconsistently with Article 18.4.

H. The United States' Measures are Inconsistent with Article VI of the GATT 1994 and Article XVI:4 of the WTO Agreement

46. The panel in *China – HP-SSST (Japan)/China – HP-SSST (EU)* likewise found that violation of other provisions of the Anti-Dumping Agreement consequentially resulted in a violation of Article VI. Accordingly, this Panel should find that, in violating its obligations under the Anti-Dumping Agreement, the USDOC also failed to comply with its obligations under Article VI of the GATT 1994. Furthermore, to the extent the challenged measures are inconsistent with the Anti-Dumping Agreement and Article VI of the GATT 1994, the United States has failed to comply with Article XVI:4 of the WTO Agreement.

I. The United States Failed to Comply with Fundamental Obligations of the GATT 1994

47. Article I:1 of the GATT 1994 requires that "any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties". The USDOC's relatively lenient treatment of the products from other country respondents in parallel investigations of OCTG imports compared to its treatment of products from Korean respondents resulted in an "advantage, favour, privilege, or immunity" that was not granted to OCTG products originating in Korea. Moreover, the USDOC discriminated against the products from Korean respondents in the underlying investigation by providing an opportunity for respondents in the Turkey investigation to provide comments on the Tenaris financial statements, while no such opportunity was afforded to Korean respondents.

48. The USDOC's conduct is also inconsistent with Article X:3(a) of the GATT 1994, which requires WTO Members to administer laws, regulations, decisions, and rulings in a "uniform, impartial, and reasonable manner". The USDOC's administration of its laws and regulations was not uniform because it reversed decades of past practice with no justification for its departure, and also afforded inconsistent treatment of the Tenaris Annual Report between its anti-dumping investigations of Korea and Turkey. In its Final Determination, the USDOC dramatically and inexplicably changed its approach to CV from past practice as well as the Preliminary Determination after unprecedented political pressure from the U.S. domestic industry and U.S. Congress that specifically focused on the use CV profit, thereby suggesting that the USDOC's administration of its laws and regulations was not impartial. Finally, the use of Tenaris' financial data as a CV profit source required a drastic departure from USDOC's past practices and no rational justification was provided for the sudden change in practice, which indicates that the USDOC's administration of its laws and regulations was not reasonable.

IV. CONCLUSION

49. For the reasons set forth above, Korea requests that the Panel recommend that the United States bring its measures into compliance with the Anti-Dumping Agreement, the GATT 1994, and the WTO Agreement.

ANNEX B-2

EXECUTIVE SUMMARY OF THE ORAL STATEMENTS OF KOREA
AT THE FIRST PANEL MEETING

EXECUTIVE SUMMARY OF KOREA'S OPENING STATEMENT

I. INTRODUCTION

1. There was no basis in this case to apply anti-dumping duties on imports of oil country tubular goods, or "OCTG," from Korea. This was indeed the conclusion of the United States Department of Commerce ("USDOC") in its Preliminary Determination, before it was put under tremendous political pressure from members of the U.S. Congress and the domestic industry to change its conclusion in its Final Determination.

2. What followed after the Preliminary Determination was a politically-motivated, results-oriented investigation, in which USDOC deviated from its own practices, violated respondents' due process rights, and ignored the obligations of the AD Agreement, in an effort to find the positive dumping margin required to impose anti-dumping measures.

3. The USDOC achieved the result demanded by members of the U.S. Congress and the domestic industry by relying on an improperly high constructed value profit rate, or "CV profit". The CV profit source that the USDOC used did not reflect profits in the exporting country and was derived from a company—Tenaris—that sells premium products with a profit margin three times higher than the profit margin initially alleged by petitioners.

4. However, the USDOC could not simply use the Tenaris data. Instead, it had to reason backward and first lay the groundwork to use such data. USDOC did so by adopting an excessively narrow definition of the "same general category of products" that precluded from consideration other data source on the record. The USDOC's overly narrow definition of the "same general category of products" in this case, its improper dismissal of other data, and its ultimate use of the Tenaris data are all actions that were inconsistent with the United States' obligations under the AD Agreement.

5. Korea also challenges, in these proceedings, the "U.S. Viability Test", which imposes an overly rigid threshold that is not permissible under Article 2.2 of the AD Agreement.

II. THE U.S. VIABILITY TEST IS INCONSISTENT WITH ARTICLE 2.2 OF THE AD AGREEMENT

6. The U.S. Viability Test for third-country markets is "as such" inconsistent with Article 2.2 of the AD Agreement. Article 2.2 sets out the circumstances under which the sales price in the home market may not be an appropriate option for normal value. When these circumstances are met, the AD Agreement permits an investigating authority to calculate normal value based on either: (1) the comparable price of the like product exported to an *appropriate* third country, provided that this price is *representative*, or (2) the constructed normal value.

7. Under U.S. law, the USDOC may use third-country sales only where three cumulative requirements are met: (i) the third-country sales price is representative; (ii) the quantity or value of sales to the third-country market meets a five percent threshold; and (iii) no "particular market situation" exists.

8. As should be immediately apparent, the requirement in U.S. law that the quantity or value of sales to the third-country market must meet a five percent threshold is not found in Article 2.2 or elsewhere in the AD Agreement. The establishment in U.S. law of this additional requirement is inconsistent with Article 2.2 of the AD Agreement, which does not contemplate such a rigid quantitative rule to determine whether third-country sales should be used to calculate normal value.

9. Korea also challenges the U.S. Viability Test for third-country markets "as applied" in the OCTG investigation. The application of the Viability Test in the underlying antidumping proceeding is shown clearly in the Section A questionnaire that the USDOC issued to the mandatory respondents. The Section A questionnaire specifically instructed the Korean respondents not to report third-country market sales if those sales were "less than five percent of the volume of your sales to the United States". Thus, the USDOC applied the rigid U.S. Viability Test through its questionnaire and precluded respondents from submitting third-country market data that did not meet the strict five percent threshold..

III. THE OCTG INVESTIGATION

A. The USDOC's Use of Constructed Value in the OCTG Investigation is Inconsistent with the Anti-Dumping Agreement

10. In its Final Determination, the USDOC used the profit rate of Tenaris to calculate the CV profit rate applicable to the Korean respondents. This was inconsistent with the United States' obligations because the USDOC: (1) impermissibly disregarded the respondents' actual data for calculating profits under the preferred method provided in the chapeau of Article 2.2.2; (2) applied an overly narrow definition of "same general category" of products under Articles 2.2.2(i) and 2.2.2(iii); (3) disregarded its obligation to calculate a "profit cap" under Article 2.2.2(iii); (4) failed to comply with the "reasonable method" requirement of Article 2.2.2(iii); and (5) ignored the differences between Tenaris and the Korean respondents, thereby failing to ensure a fair comparison between the export price and constructed normal value under Article 2.4.

B. The USDOC's Finding of Association is Inconsistent with Article 2.3 of the AD Agreement

11. Article 2.3 permits the investigating authority to disregard export prices if the investigating authority finds an "association" between the exporter and importer or a third party. Although the AD Agreement does not directly define the term "association," the definition of "relationship" enshrined in footnote 11 of the Agreement provides interpretive guidance. An examination of the U.S. statute shows that the United States itself has adopted the definition of "relationship" contained in footnote 11 to define "affiliation" in the context of an anti-dumping proceeding.

12. The USDOC's determination of affiliation in its Final Determination was erroneous because the USDOC did not examine whether POSCO was in a position to "exercise restraint" over NEXTEEL, but rather determined only that POSCO was in a position to **[[***]]** NEXTEEL. Because the USDOC used an erroneous standard for determining association, its decision must be rejected.

13. The USDOC's assessment of the facts was also flawed. While the USDOC relied on arguments that NEXTEEL maintained a robust business relationship with POSCO, and that NEXTEEL purchased a large portion of its raw material input from POSCO, these facts do not establish that POSCO was in a position, legally or operationally, to exercise restraint or direction over NEXTEEL's pricing of exported OCTG as required to find an "association" under Article 2.3. Rather, they demonstrate relationships that are common among suppliers and customers that seek to maintain positive business relations.

14. Moreover, even assuming that footnote 11 did not apply under Article 2.3, the USDOC's decision to disregard NEXTEEL's export price to its Customer is still inconsistent with the requirements of the latter provision. In this case, the USDOC's analysis of "association" focused on the relationship between NEXTEEL and its supplier, POSCO. The USDOC then automatically deemed the export price to be unreliable, not because of NEXTEEL's association with "the importer or a third party," but based on *POSCO's relationship with NEXTEEL's Customer.* Finally, Korea notes that the USDOC's determinations were based on a static analysis.

C. The USDOC Improperly Disregarded NEXTEEL's Costs in Violation of Article 2.2.1.1

15. The USDOC also acted inconsistently with Article 2.2.1.1 of the AD Agreement by improperly disregarding NEXTEEL's own cost data and relying, instead, on POSCO's cost data to calculate constructed value. The record demonstrates that NEXTEEL kept its records in accordance with the generally accepted accounting principles of Korea, as required under Article 2.2.1.1. Moreover, the

USDOC did not make any finding that NEXTEEL's costs did not reasonably reflect the costs associated with the production and sale of the product under consideration.

D. Procedural Claims

16. The USDOC only accepted Tenaris's financial statements into the administrative record when it issued its Final Determination, thereby denying respondents an ample and full opportunity to defend their interests contrary to Article 6.2 of the AD Agreement. Second, in contravention of Article 6.4, the USDOC failed to "provide timely opportunities to … see the information … that is used by the authorities … and to prepare presentations on the basis of this information". Third, the USDOC did not comply with the requirements of Article 6.9. Whether the Tenaris financial statements were properly on the record was an "essential fact" in that it defined the universe of sources that the USDOC was considering for its determination of CV profit. Because the USDOC did not disclose this fact until the Final Determination, the respondents did not have a complete view of the "facts" that the USDOC considered relevant in its CV profit determination, and were unable to fully formulate arguments against its use.

17. The USDOC also improperly withheld from the Korean respondents various *ex parte* communications received between the Preliminary and the Final Determinations in violation of Articles 6.4 and 6.9. In addition, several aspects of the USDOC's determinations and disclosures did not meet the AD Agreement's requirement for disclosure of all relevant information leading to the imposition of final measures, as required under Article 12.2.2.

E. The USDOC's Limitation of Mandatory Respondents and Failure to Consider Information Submitted by Voluntary Respondents is Inconsistent with Article 6.10

18. The USDOC's Respondent Selection Memo did not establish why it would be impracticable to examine all known producers and exporters or to consider any of the voluntary responses on the record submitted by non-selected respondents. Also, the USDOC failed to explain why selecting only two mandatory respondents was "reasonable".

F. The USDOC's Conduct is Inconsistent with Article X:3(a) of the GATT 1994

19. The USDOC acted inconsistently with Article X:3(a) of the GATT 1994 because it failed to administer its laws and regulations in a uniform, impartial, and reasonable manner.

EXECUTIVE SUMMARY OF KOREA'S CLOSING STATEMENT

20. The United States has failed both in its written submission and in its presentations over the last two days to demonstrate that its laws allow the USDOC to do anything other than automatically apply a 5 percent threshold, the so-called Viability Test, to third country sales. U.S. law only permits the USDOC to use third-country sales prices to calculate normal value when the aggregate quantity or value of the foreign like product sold by the exporter or producer in the third country is *5% or more* of the aggregate quantity or value of the subject merchandise sold to the United States. Therefore, as a rule, U.S. law requires the USDOC to disregard third country sales when they do not meet the Viability Test.

21. Turning now to the USDOC's use of constructed value, the United States' interpretation applies a viability test that does not exist in the first sentence of Article 2.2.2, as a precondition to using actual data under the preferred method. Further, the United States argues that the Korean exporters did not sell any OCTG in their home market. This statement is contradicted by the record, which clearly shows that the Korean exporters sold non-prime OCTG.

22. The USDOC adopted an overly narrow definition of "same general category of products". The USDOC defined the "same general category of products" more narrowly than even the scope of the investigation, which includes products that cannot be used for down-hole applications. As the United States has admitted, this is not permissible – the "same general category" must be broader than the like product.

23. Despite the plain text of Article 2.2.2(iii) of the AD Agreement, which states that "the amount for profit so established *shall* not exceed the profit normally realized by other exporters or

producers on sales of products of the same general category in the domestic market of the country of origin", the United States argues that the USDOC's decision not to apply a profit cap was consistent with Article 2.2.2(iii). However, the United States again is effectively deleting an entire phrase from the Agreement. The United States admits that the USDOC failed to apply a profit cap, but claims that it was justified in doing so because the necessary data to calculate a profit cap was not on the record. This is factually incorrect, as the Korean exporters provided all the necessary data with which USDOC could calculate the profit cap.

24. The USDOC's reliance on the Tenaris financial statement was inconsistent with Article 6.9. The USDOC's actual use of the Tenaris financial statements as a CV profit source was also inconsistent with the purpose of the subparagraphs of Article 2.2.2 because the Tenaris financial statements do not reflect products in the same general category of the "domestic market of the country of origin". The United States cannot point to any evidence that Tenaris had any meaningful activity in Korea, nor does it consider whether Tenaris had any connection with Korea as relevant.

25. Article 2.3 prescribes two separate requirements, namely, a finding of association and a finding of unreliability of the export price. Meeting the first requirement does not automatically satisfy the second requirement, as the United States argues. In this case, the USDOC did not conduct any assessment of whether the export price was unreliable. Second, Article 2.2.1.1 is concerned with the reliability of the *records* examined, not the appropriateness of the *costs* that those records reflect. There is nothing on the record to indicate that NEXTEEL's actual records associated with raw materials used to produce OCTG were inaccurate or unreliable.

26. Finally, Korea respectfully requests that the Panel rule on the Remand Redetermination as part of this dispute, as the USDOC's Remand Redetermination is inconsistent with the United States' obligations under the AD Agreement. Korea notes that a WTO panel has previously found it appropriate to include in its examination the USDOC's remand redetermination.

ANNEX B-3

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF KOREA

I. INTRODUCTION

1. By adopting the Anti-Dumping Agreement, the United States made a commitment to refrain from imposing anti-dumping measures except when the existence of dumping and its injurious effects are properly demonstrated after an unbiased investigation in which the due process rights of exporters are respected. In this case, the United States did not abide by this commitment. After the negative preliminary determination, the investigation turned into a politically-motivated, results-driven process in which the obligations of the Anti-Dumping Agreement were set aside in the interest of arriving at an affirmative dumping determination and the highest margins possible.

2. In its submissions, Korea has demonstrated that the USDOC made a 180 degree turn as to the usefulness of Tenaris's profit rate and how it withheld this decision from the respondents until the very end of its investigation. Moreover, the USDOC reasoned backwards using an arbitrary definition of "same general category of products" in order to improperly discard other sources of constructed value ("CV") profit. Remarkably, the USDOC went so far as to define the "same general category of products" more narrowly than the product scope of the investigation.

3. Article 2.1 of the Anti-Dumping Agreement provides that a product is "dumped" when it is "introduced into the commerce of another country at less than its normal value," that is, "if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country". This definition of dumping is unrecognizable in the USDOC's final determination in this case. Rather than comparing prices in the United States to prices in Korea, the USDOC compared prices in the United States to the prices of Tenaris, a producer organized under the laws of Luxembourg, with no demonstrated production or sales of OCTG in Korea, and with ties to one of the U.S. petitioners. The determination made by the USDOC therefore is not a determination of "dumping", at least as this concept is defined in the Anti-Dumping Agreement.

II. THE U.S. VIABILITY TEST IS INCONSISTENT "AS SUCH" AND "AS APPLIED" WITH ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT

4. U.S. law-particularly, Title 19, section 1677b(a)(1)(B) of the United States Code-only permits the USDOC to use third-country sales to calculate normal value if the aggregate quantity or value of the foreign like product sold by the exporter or producer in the third country *is 5% or more* of the aggregate quantity (or value) of the subject merchandise sold in the United States or for export to the United States. This five percent threshold, which Korea has referred to as the "U.S. Viability Test", is "as such" inconsistent with Article 2.2 of the Anti-Dumping Agreement, because no such rigid, quantitative threshold is contemplated for third-country sales in the Anti-Dumping Agreement.

5. The United States does not dispute that its statute imposes a strict five percent threshold for third party sales. Instead, the United States has argued that the use of the term "normally" in the regulations implementing the statute overrides the statute and permits the USDOC to use third-country sales that do not meet the five percent threshold.

6. Under U.S. law, however, statutes are hierarchically superior to regulations adopted by administering agencies. Moreover, the term "normally" in the regulations only pertain to the use of home market sales. In contrast, the regulations pertaining to the use of third-country sales reference the statute, confirming that the regulations are subject to the strict five percent threshold established by the statute.

7. The United States also fails in its attempt to rely on the Statement of Administrative Action ("SAA"). The SAA is an interpretive tool that cannot change the meaning of, or override, the statute. Moreover, the text of the SAA confirms that sales to the third country *must not be less*

than five percent of sales to the United States, and it distinguishes the viability requirements for the home market from the viability requirement for third-country markets.

8. Korea has further demonstrated that the USDOC's practice confirms its own understanding that third-country sales must meet a five percent threshold. The USDOC has never deviated from the five percent threshold in the past sixteen years, and the instructions contained in the USDOC's standard questionnaire template do not permit respondents to submit third-country sales data unless these sales meet the strict five percent threshold.

9. The United States has also suggested that Article 2.2 does not prohibit Members from considering the volume of sales in assessing the appropriateness of third-country sales. Nonetheless, the term "appropriate" in Article 2.2 qualifies the *third country* to which a like product is exported, not the *volume* of exports to that third country. Thus, the volume of sales to a third country does not determine whether the third country itself is an "appropriate" comparison market.

10. Nor is the United States correct in that the U.S. Viability Test is justified by the fact that Article 2.2 does not require the use of third-country sales, but rather, presents the use of third-country sales as one of two options. Under the United States' theory, statutes or regulations implementing alternative approaches set out in the Anti-Dumping Agreement could never be challenged "as such" regardless of how far they deviate from a Member's obligations under the Anti-Dumping Agreement. Such a situation cannot be reconciled with the obligation in Article 18.4 of the Anti-Dumping Agreement that "[e]ach Member shall take all necessary steps, of a general or particular character, to ensure … the conformity of its laws, regulations and administrative procedures". 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. Like Article 2.2, Article 2.4.2 does not establish a hierarchy between the first two options. Despite the existence of a choice of methodologies and the absence of a hierarchy between the first two options, the use of zeroing has been found to be "as such" inconsistent with Article 2.4.2.[1]

11. For these reasons, the U.S. Viability Test is "as such" inconsistent with Article 2.2 of the Anti-Dumping Agreement. Korea has demonstrated that the U.S. Viability Test was applied in the investigation of OCTG from Korea. As a result, its application by the USDOC in the investigation of OCTG from Korea also violates Article 2.2 of the Anti-Dumping Agreement.

III. THE USDOC'S FAILURE TO USE ACTUAL DATA IN THE CALCULATION OF CONSTRUCTED VALUE IS INCONSISTENT WITH THE CHAPEAU OF ARTICLE 2.2.2

12. The use of the term "shall" in the chapeau of Article 2.2.2 makes clear that, when constructing normal value, authorities must use the producer/exporter's actual data for SG&A and profit, whenever such data is available. The United States does not dispute that the USDOC did not use actual profit data, but it argues that the USDOC was not required to do so.

13. First, the United States incorrectly argues that the chapeau only applies in situations where the home market is viable but does not contain "like" products that are identical or similar to the exporter merchandise. However, the Appellate Body in *EC – Tube or Pipe Fittings* confirmed that low-volume sales that are dismissed as a basis for calculating normal value under Article 2.2 cannot be dismissed as a source of actual data for the purposes of calculating constructed value under the chapeau of Article 2.2.2. Moreover, the United States is not permitted to unilaterally limit the utility of the chapeau to an arbitrarily defined subset of a "like product" that is neither identical nor similar to the product under consideration.

14. Second, the United States erroneously argues that it did not have information on the record from which it could derive actual profit data for the Korean respondents, because the home market profit data provided by both respondents derived from non-prime OCTG, which the United States argues is not a "like product". The United States' position is undermined by the USDOC's determination in its parallel investigation of *OCTG from Ukraine* that "rejects", which are equivalent to "non-prime" OCTG, were "like" products as defined by the scope of the investigation.

[1] See Appellate Body Report, *US – Zeroing (EC)*, para. 222; Appellate Body Report, *US – Zeroing (Japan)*, paras. 137-138.

As scope definitions apply equally to all investigations initiated based on the same petition (application), the USDOC's scope determination in the Ukraine case applies to the Korea case.

15. Third, the United States mistakenly claims that the Article 2.2.2 chapeau does not contemplate the use of third-country profit data, as this would render the "preferred" method under the chapeau broader than the "alternative" methods under Article 2.2.2(i) and (ii). However, the subparagraphs of Article 2.2.2 operate to encompass certain data sources *in addition to* the data source available under the preferred method, *not to substitute for* the chapeau's data scope. Therefore, the use of the alternative methods inevitably results in a broadening of the data in comparison to the preferred method of the chapeau.

16. The United States' also grossly exaggerates the administrative burden of using third-country data. In any event, the USDOC in the underlying investigation did not decline to use the chapeau because it would be too burdensome but because it found that no viable home or third-country market was available. Moreover, an investigating authority cannot be discharged of its duties under the Anti-Dumping Agreement simply because it is faced with certain practical difficulties.

17. Fourth, the United States' claim that **[[***]]** profit rates cannot be used as a source of CV profit under the Article 2.2.2 chapeau is incorrect. Constructed value calculated under Article 2.2.2 is intended to approximate sales of the like product in the domestic market or third country market under Article 2.2. There may be situations where actual sales data in a domestic market or third country market show that the exporter has sold products at a **[[***]]**. Article 2.2.1, on which the United States relies to support its argument, does not stand for the proposition that **[[***]]** sales should be disregarded. Rather, Article 2.2.1 provides that **[[***]]** sales may only be disregarded in limited instances where several other requirements are met.

18. Fifth, the United States fails to explain the basis for using the Korean respondents' actual data for SG&A while declining to use actual data to calculate profit. Article 2.2.2 does not provide for differential treatment between SG&A and profit, but rather, requires that the investigating authority use actual data with respect to both. Furthermore, even though certain aspects of SG&A may appear not to be specific to a particular product, such non-specific costs must eventually be allocated to a particular product for the purpose of calculating the amount of constructed value for that specific product. In this sense, all SG&A, as well as profit, are specific to particular products.

IV. THE USDOC'S USE OF CV PROFIT IS INCONSISTENT WITH ARTICLE 2.2.2 BECAUSE ITS DEFINITION OF THE "SAME GENERAL CATEGORY OF PRODUCTS" WAS IMPERMISSIBLY NARROW

19. Korea has demonstrated that the USDOC's decision to use Tenaris's financial statements as a CV profit source was based on an impermissibly narrow interpretation of the "same general category of products" under Article 2.2.2. The United States tries to defend the USDOC's determination by interpreting the "same general category of products" to mean that products must have the same characteristics as those of the subject merchandise. However, the term "same" modifies "general category" and not "products," requiring two products to both belong to a "general category," but not requiring these products to be the "same". Thus, the USDOC applied an incorrect standard in defining the scope of the "same general category" of products.

20. The USDOC's decision to exclude line and standard pipe from OCTG's "same general category" also relies on its misplaced distinction between the purposes of OCTG pipes and non-OCTG pipes. The USDOC improperly found that non-OCTG pipes such as line and standard pipes cannot fall within the "same general category" as OCTG because line and standard pipes are "primarily intended for the conveyance of fluids and gases", whereas OCTG is intended for "down hole application". However, "conveyance of fluids and gases" is the purpose of not only line pipe and standard pipe, but also of OCTG.

21. The USDOC's determination is also flawed because the definition of the "same general category of products" in this case is even narrower than the definition of "like products" used in the scope language. In defining the "same general category of products", the USDOC improperly focused on whether the products could be used for down hole applications. However, as described above, the "like product" also included "rejects," *i.e.*, pipes that could not be used for down hole applications.

22. Furthermore, even under the United States' overly-narrow definition (which includes "limited service" OCTG that can be used in some down hole applications), line pipe should be included in the same general category of products as OCTG as it can be used for some down hole applications.

23. Finally, the United States refers to the panel report in *Thailand – H-Beams*, which allegedly relied on Article 3.6 of the Anti-Dumping Agreement for contextual support to conclude that use of a narrower rather than a broader category is permitted. Article 3.6 states that, when "like product" data is not available, the authority may assess the effects of the dumped imports by an examination of "the narrowest group or range of products, which includes the like product, *for which the necessary information can be provided*". Thus, even under the "narrowest group or range of products" standard, the database must still be broadened so that "the necessary information can be provided". By expanding the "same general category" to include only non-subject OCTG and drill pipe, the USDOC did not expand the database *at all*.

V. THE USDOC'S USE OF TENARIS'S FINANCIAL STATEMENTS TO CALCULATE CV PROFIT IS INCONSISTENT WITH ARTICLE 2.2.2(iii)

24. Article 2.2.2(iii) permits the investigating authority to calculate CV profit based on "any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin, *i.e.*, "the profit cap". The United States acted inconsistently with its obligations under Article 2.2.2(iii) because the USDOC did not calculate a profit cap and did not ensure the reasonableness of its method of calculating CV profit.

25. First, as confirmed by the panel in *EU – Footwear*, the calculation of a profit cap is mandatory. The USDOC acted inconsistently with Article 2.2.2(iii) in the underlying investigation by failing to calculate a profit cap.

26. Second, in using Tenaris's financial statements, the USDOC failed to ensure that its method for calculating CV profit was reasonable under Article 2.2.2(iii). As the Korean respondents pointed out in the underlying investigation, there are various differences between Tenaris and the Korean respondents that render the profit rates incomparable, including differences in products and business model, scale of production, and position in the distribution chain. In addition, Tenaris's profit rates reflected revenue generated from its sale of *services*, as opposed to *goods*, as well as Tenaris's sales of non-tubular products.

27. Third, the USDOC's use of Tenaris's financial statements was not rationally directed at approximating what the Korean respondents' profit margin for the like product would have been in Korea, as required to constitute a "reasonable method" according to the panel in *EU – Biodiesel*. Rather, the USDOC chose to only satisfy the requirement to approximate the "like product", while disregarding the requirement to approximate the profit margin as if the products had been sold in the ordinary course of trade in Korea.

28. In addition, Korea requests that this Panel find that the remand redetermination issued by the USDOC in the underlying investigation is inconsistent with the United States' WTO obligations not only because it did not rectify the inconsistencies identified above by Korea, but also because it calculates and applies a profit cap that is in itself inconsistent with Articles 2.2 and 2.2.2(iii) of the Anti-Dumping Agreement.

VI. THE USDOC FAILED TO CONDUCT A FAIR COMPARISON UNDER ARTICLE 2.4

29. Korea has provided extensive explanations of the differences between Tenaris and the Korean respondents that affected price comparability between the normal value incorporating Tenaris's profit rate and the export price incorporating the Korean respondents' own data. The USDOC did not make due allowances for these differences, thus failing to conduct a "fair comparison" under Article 2.4. The USDOC simply dismissed these differences once it determined that "the merchandise produced and sold by Tenaris is predominantly the same as the merchandise under consideration". Thus, rather than examining price comparability in light of the differences raised by the Korean respondents, the USDOC found it *unnecessary to do so* once it had reached its erroneous determination that approximating the "like product" was sufficient to fulfill its obligations in selecting a CV profit source.

VII. THE USDOC'S FINDING OF ASSOCIATION UNDER ARTICLE 2.3 WAS IMPROPER

30. The USDOC's determination that NEXTEEL and POSCO were affiliated was not in accordance with Article 2.3 because it was not based on a proper assessment of whether POSCO was in a position to control, *i.e.*, exercise restraint or direction over, NEXTEEL. Rather, the USDOC applied an incorrect, looser standard to determine whether NEXTEEL and POSCO were associated. Moreover, based on an erroneous finding that NEXTEEL was affiliated with POSCO (and with the Customer through POSCO's relationship with the Customer), the USDOC automatically disregarded NEXTEEL's export price without conducting a separate assessment of the reliability of NEXTEEL's export price to the Customer.

31. The United States incorrectly argues that Article 2.3 only requires a finding of association, and does not require a separate assessment as to the reliability of the export price in order for an authority to construct export price. The United States' interpretation reads out an explicit requirement in Article 2.3 that the "export price is unreliable because of association ... between the exporter and the importer or a third party". The term "appear" in Article 2.3 does not leave the determination of unreliability completely up to the subjective perception of the authority. Such unfettered discretion would be contrary to the requirement stemming from Article 17.6(i) of the Anti-Dumping Agreement that investigating authorities' determination be based on positive evidence and a reasoned and adequate explanation.

32. Furthermore, contrary to the United States' assertion that "NEXTEEL did not present evidence in support of an argument that NEXTEEL's export prices were reliable despite the existence of an association", NEXTEEL submitted abundant evidence that its export prices to the Customer were, in fact reliable, and simply a continuation of a pre-existing business relationship between NEXTEEL and the Customer that pre-dated any affiliation between POSCO and the Customer.

VIII. THE USDOC DID NOT EXAMINE THE RELIABILITY OF NEXTEEL'S COST RECORDS AS REQUIRED UNDER ARTICLE 2.2.1.1

33. Article 2.2.1.1 of the Anti-Dumping Agreement requires investigating authorities to calculate costs on the basis of records kept by the exporter or producer under investigation, where such records: (1) are in accordance with the generally accepted accounting principles of the exporting country; and (2) reasonably reflect the costs associated with the production and sale of the product under consideration. The two conditions set forth in Article 2.2.1.1 are modified by the term "such records," demonstrating that the purpose of the Article is to ensure the reliability of the *cost records*, and not the reliability of the *cost data*.

34. The USDOC's decision to disregard NEXTEEL's cost data is inconsistent with Article 2.2.1.1 because it is premised on an improper finding of affiliation between NEXTEEL and POSCO. Furthermore, even setting aside the USDOC's affiliation determination, the USDOC's decision to disregard NEXTEEL's actual cost data is impermissible under Article 2.2.1.1 because NEXTEEL kept its records in accordance with generally accepted accounting practices, and NEXTEEL provided the actual costs that it paid to POSCO for its purchases of raw materials used in the production of OCTG, ensuring that its cost records reflected the costs associated with the production and sale of the product under consideration. While the United States argues that the use of the term "normally" in Article 2.2.1.1 permits the investigating authority to deviate from the use of actual costs under circumstances beyond those described in Article 2.2.1.1, the panel in *EU – Biodiesel* has already rejected the approach proposed by the United States.

IX. THE USDOC'S LIMITED EXAMINATION OF MANDATORY AND VOLUNTARY RESPONDENTS IS INCONSISTENT WITH ARTICLE 6.10

35. Article 6.10 requires the authority to examine all known exporters and producers of the merchandise under investigation and only permits the authority to limit its investigation when the number of exporters/producers is "so large" that individual determination would be "impracticable". Moreover, Article 6.10 affords the authority only two methods of limiting its examination: (1) *a reasonable number* of interested parties or producers using statistically valid samples, or (2) *the largest percentage* of the volume of exports from the country in question

which can reasonably be investigated. In the underlying investigation, the USDOC improperly limited its investigation and improperly declined to examine voluntary responses.

36. In defending the USDOC's determination to limit its investigation, the United States relies on the USDOC's Respondent Selection Memorandum, which simply concludes that the number of potential respondents (ten) is "large relative to the resources available", but does not explain why the number is "so large" as to render individual examination impracticable. In particular, the USDOC's Respondent Selection Memorandum does not provide a reasonable explanation for its decision that it could only examine *two* mandatory respondents.

37. The USDOC's determination is flawed also because it applied an impermissible method in limiting its examination. While the United States claims that the USDOC limited its examination to the "largest *percentage* of the volume of the exports from Korea", the USDOC arbitrarily determined that it was only able to examine two respondents that accounted for the largest volume of imports of the subject merchandise. Thus, the USDOC selected what it determined to be the appropriate *number of respondents* that it was able to examine and selected these respondents in the order of import volume, rather than determining what the *largest percentage* of volume of exports that can reasonably be investigated would be.

38. Even when it justifiably limits its examination of mandatory respondents, Article 6.10.2 requires the investigating authority to calculate individual dumping margins for respondents not initially selected, as long as the respondents provide the necessary information to do so in a timely manner. The USDOC acted inconsistently with Article 6.10.2 by failing to examine any of the voluntary responses.

X. PROCEDURAL CLAIMS

A. The USDOC's Failure to Render a Decision on the Placement of Tenaris's Financial Statements on the Record Until the Final Determination Violated Articles 6.2, 6.4, and 6.9

39. The USDOC failed to protect the Korean respondents' due process rights under Articles 6.2, 6.4, and 6.9 because it did not render a decision on the placement of Tenaris's financial statements on the record until its final determination. The Korean respondents were not "on notice" that the USDOC could use Tenaris's financial data to calculate CV profit based on a separate student report about Tenaris submitted earlier by a petitioner. The Tenaris financial statements were submitted as a separate submission that petitioners did not claim had any relation to the student report, but rather, purported to rebut NEXTEEL's supplemental questionnaire response. Moreover, the financial statements were untimely, and therefore, not properly placed on the record.

40. The USDOC's failure to render a decision regarding the placement of Tenaris's financial statements on the record denied the Korean respondents an opportunity to submit information rebutting the contents of the Tenaris financial statements. The USDOC has strict deadlines for the submission of factual information, and absent an affirmative decision by the USDOC, the Korean respondents were not permitted to submit information upon which they could rely to defend their position.

41. In addition, the Tenaris profit data constitutes "essential facts" that the USDOC failed to disclose under Article 6.9. The United States errs in suggesting that it constitutes "reasoning or conclusion", because the acceptance of Tenaris's profit data defined the universe of sources that the USDOC was considering for its determination of CV profit.

B. The USDOC Failed to Protect the Korean Respondents' Due Process Rights Under Article 6.4 and 6.9 by Withholding Various *Ex Parte* Communications

42. The USDOC also failed to protect Korean respondents' due process rights under Articles 6.4 and 6.9 because it withheld numerous *ex parte* phone calls and meeting memos until long after the meetings and phone calls took place. The United States does not dispute that the memos were not disclosed in a timely manner, but questions why the letters were "relevant" to the presentation of the respondents' cases, and how they would have been "used" by the Department under

Article 6.4. The *ex parte* letters reflect the political pressure that the USDOC faced after calculating negative margins for the Korean respondents in the Preliminary Determination, and they also constitute the only factual element that has changed between the Preliminary Determination and the Final Determination that could explain the USDOC's about-face. The *ex parte* communications urged the USDOC to reconsider its decision on CV profit, the single issue that could convert the negative preliminary margin into a positive margin. Therefore, the *ex parte* memos constituted information that was relevant to the presentation of the respondents' cases and that would have been "used" by the USDOC under Article 6.4. The *ex parte* memos also constituted "essential facts" that the USDOC failed to disclose under Article 6.9, because they constituted information on the record that the USDOC considered in its decision to reverse its Preliminary Determination and find high affirmative margins in the Final Determination.

C. The USDOC's Final Determination Failed to Include All Relevant Information As Required Under Article 12.2.2

43. Article 12.2.2 of the Anti-Dumping Agreement requires an investigating authority to provide in a public notice all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures, including the reasons why it accepted or rejected arguments and claims made by the exporters in the investigation. Korea has demonstrated that the USDOC failed to comply with Article 12.2.2 because it did not provide the reasons for rejecting the Korean respondents' arguments regarding the inappropriateness of using Tenaris's financial statements as a CV profit source, and NEXTEEL's arguments that it was not affiliated with POSCO or the Customer. The United States points to two documents to argue that the USDOC did provide reasons for rejecting these arguments − the USDOC's Issues and Decision Memorandum and Affiliation Memo. However, the United States does not identify where in these documents it addressed the specific arguments advanced by the Korean respondents.

XI. VIOLATIONS OF THE GATT 1994

A. The USDOC Acted Inconsistently With Article I:1 of the GATT 1994

44. The USDOC treated OCTG from Korea less favorably than OCTG products from the territory of other Members subject to its parallel investigations, contrary to Article I:1 of the GATT. The United States does not contest that Korean OCTG products were treated differently by the USDOC. Rather, the United States attempts to relegate such differential treatment to simple "procedural differences between the parallel OCTG investigations" based on "different facts that arise in antidumping proceedings...". The United States' response is insufficient to rebut the *prima facie* case established by Korea. Specifically, the United States has failed to point to a single factual difference that explains the different treatment. Instead, the United States merely speculates that "several factors *may* have contributed to the treatment accorded to Korean companies and other foreign companies, which resulted in their particular antidumping rates". Such speculation is insufficient to meet the United States' burden to establish any "factual differences" that explained the differential treatment.

B. The USDOC Administered its Laws, Regulations, Decisions, and Rulings In a Manner that was Inconsistent with Article X:3(a) of the GATT 1994

45. The USDOC's conduct is also inconsistent with Article X:3(a) of the GATT 1994. Article X:3(a) seeks to ensure transparency and procedural fairness by requiring WTO Members to "administer in a uniform, impartial, and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article". Article X:1, in turn, covers "[l]aws, regulations, judicial decisions and administrative rulings of general application...". Korea has established a *prima facie* case that the USDOC failed to meet the requirements of Article X:3(a).

46. The United States does not rebut Korea's claim that the USDOC's application of its laws and regulations with respect to the Korean and Turkish respondents was not uniform, impartial or reasonable. Rather, the United States incorrectly argues that Korea's claim falls outside the scope of Article X:3(a) because Korea challenges the contents of the USDOC's determinations and because Korea allegedly did not identify the specific measures being administered. However, Korea's claim concerns the way that the USDOC has *administered* its anti-dumping laws and regulations, which are of general application. Korea has also identified the specific laws and

regulations that were improperly administered by the USDOC including the regulations relating to the submission and acceptance of new factual information, the laws and regulations governing the calculation of an anti-dumping duty margin, and the laws and regulations relating to the calculation of CV profit.

XII. CONSEQUENTIAL CLAIMS

47. The USDOC's failure to comply with the substantive and procedural requirements of the Anti-Dumping Agreement discussed above gives rise to consequential violations of the United States' obligations under Articles 1, 9.3, and 18.4 of the Anti-Dumping Agreement. The United States' violations of the Anti-Dumping Agreement also result in a violation of Article VI of the GATT 1994 and Article XVI:4 of the WTO Agreement. The United States does not dispute that these consequential findings would flow directly from the Panel's findings of inconsistency with respect to Korea's other claims.

XIII. CONCLUSION

48. For the reasons set out in this submission and in previous submissions, Korea respectfully requests that the Panel recommend that the United States bring its measures, including the USDOC's remand redetermination, into compliance with the Anti-Dumping Agreement, the GATT 1994, and the WTO Agreement.

ANNEX B-4

EXECUTIVE SUMMARY OF THE ORAL STATEMENTS OF
KOREA AT THE SECOND PANEL MEETING

EXECUTIVE SUMMARY OF KOREA'S OPENING STATEMENT

I. INTRODUCTION

1. In its previous submissions, Korea demonstrated that the U.S. Viability Test and the USDOC's imposition of anti-dumping duties with respect to OCTG from Korea are inconsistent with the United States' WTO obligations. In its Second Written Submission, the United States repeats many of the same arguments that it presented in its previous submissions, but fails to rebut Korea's arguments.

II. THE U.S. VIABILITY TEST IS "AS SUCH" AND "AS APPLIED" INCONSISTENT WITH ARTICLE 2.2 OF THE AD AGREEMENT

2. The U.S. Viability Test is inconsistent "as such" because it imposes a condition on the use of third-country sales as a basis for calculating normal value that is not allowed under Article 2.2 of the AD Agreement. It is also inconsistent "as applied" with Article 2.2 insofar as the USDOC applied the U.S. Viability Test in the underlying investigation.

3. The term "appropriate" in Article 2.2 does not justify the rigid volume test, as the term directly qualifies the "third country". Thus, Article 2.2 requires that the third country market itself be appropriate, which is distinct from the reference in Article 2.2 to the "volume of sales" as the relevant factor for determining whether to use the "sales" in the home market to calculate normal value. Article 2.2.1 of the AD Agreement also does not support the United States' argument because it does not relate to the appropriateness of a market, but addresses whether specific sales within a market may be excluded from the calculation of normal value. Similarly, any indices used to determine appropriateness of a market would have to relate to the market itself. In any event, the term "appropriate" implies a balancing test, and requires an assessment to be made on a case-by-case basis, as opposed to a rigid bright line rule.

4. The case at hand is analogous to *Mexico – Anti-Dumping Duties on Rice* and to previous challenges to the use of zeroing. Just as the authority imposed additional conditions on a respondent's right to an administrative review in *Mexico – Anti-Dumping Measures on Rice*, the U.S. Viability Test infringes on a respondent's right under Article 18.1 of the AD Agreement to be subject only to measures that are consistent with the AD Agreement. Also, as in the zeroing cases, the authority had a choice between two methodologies that were not subject to any hierarchy.

5. The United States also argues that the U.S. Viability Test is not mandatory. However, the plain language of the U.S. statute forbids the use of third-country sales to calculate normal value when these sales do not meet the five percent threshold. The USDOC's regulations cross-reference the statute, and the requirements contained therein for using sales in the "exporting country" are distinct from the requirements for using sales to the "third country".

6. Finally, the application of the U.S. Viability Test by the USDOC in the investigation of OCTG from Korea also violates Article 2.2.

III. THE USDOC'S FAILURE TO USE ACTUAL DATA IN THE CALCULATION OF CV PROFIT IS INCONSISTENT WITH THE ARTICLE 2.2.2 CHAPEAU

7. The USDOC's failure to use actual data in the calculation of constructed value is inconsistent with the chapeau of Article 2.2.2 of the AD Agreement. The use of the term "shall" in the chapeau of Article 2.2.2 makes clear that, when constructing normal value, authorities *must* use the producer or exporter's actual data for SG&A and profit, whenever such data is available.

8. The United States insists that Article 2.2.2 is primarily intended for situations where normal value is based on home market sales, but where a certain subset of those sales cannot be used because they are outside the ordinary course of trade or do not include sales of products that are identical or similar to those sold in the relevant export market. The United States provides no support for its assertion and fails to explain how products that are neither "identical" nor "similar" could constitute "like products" under Article 2.6 of the AD Agreement. In any case, these scenarios present at most only one possible situation where Article 2.2.2 may apply. With respect to the situation at hand, the Appellate Body has confirmed that "low volume" sales rejected under Article 2.2 can be an appropriate source of CV profit.

9. Furthermore, the Article 2.2.2 chapeau does not preclude the use of third country profit data to construct normal value. As a textual matter, the chapeau contains no prohibition on the use of actual data from third-country sales. As a practical matter, the USDOC had readily available to it actual profit data for each market, and did not even attempt to examine whether the respondents' third country sales were made in the ordinary course of trade.

10. The United States is incorrect that Article 2.2.2 prohibits the use of negative profit margins. The purpose of Article 2.2.2 is to approximate the profit rates that would have been achieved through the sale of like product in the home market. If evidence shows that the profit margin in the home market would have been negative, the CV profit must reflect such profit experience unless the authorities specifically determine that the sales were outside the ordinary course of trade. Finally, the use of the term "plus" in Article 2.2.2 merely instructs the inclusion of SG&A and profit and does not indicate the actual values of these factors.

IV. THE USDOC'S DEFINITION OF THE "SAME GENERAL CATEGORY OF PRODUCTS" WAS IMPERMISSIBLY NARROW UNDER ARTICLE 2.2.2

11. The USDOC's use of CV profit is inconsistent with Article 2.2.2 because its definition of the "same general category of products" was impermissibly narrow and, in many respects, even narrower than its definition of the "like product". The "same general category" of products should be broader than the "like product". While the USDOC concluded in the Korea investigation that products that fall within the "same general category of products" as OCTG must have the ability for use in down-hole applications, the USDOC itself confirmed in its concurrent investigation of OCTG from Ukraine that the like product includes products that cannot be used in such applications, including non-prime and "reject" pipes used for structural purposes or to transport water − the same purposes for which line pipe and standard pipe are used. The USDOC's scope definitions apply equally in all investigations subject to the same petition, including its investigations of Ukraine and Korea.

V. THE USDOC'S CALCULATION OF CV PROFIT IS INCONSISTENT WITH ARTICLE 2.2.2(iii)

12. The USDOC's use of Tenaris's profit data to calculate the CV profit for the Korean respondents is inconsistent with Article 2.2.2(iii) of the AD Agreement. The purpose of Article 2.2.2 is to approximate 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 country of export. The use of Tenaris's financial statements to calculate CV profit was not "reasonable" under Article 2.2.2(iii) because the USDOC did not even attempt to approximate the profit rate in the home market, finding it sufficient to only approximate the "like product". Moreover, the USDOC even failed to properly approximate the *like product* in calculating the CV profit because Tenaris's profit rate included revenues generated from Tenaris's sales of non-tubular products and Tenaris's sales of services.

13. The USDOC also violated Article 2.2.2(iii) because it disregarded the requirement to calculate a profit cap. The plain text confirms that the application of a profit cap is mandatory, and several WTO panels have confirmed the same. The USDOC's failure to calculate a profit cap renders its use of Tenaris's financial data to calculate CV profit *per se* inconsistent with Article 2.2.2(iii).

VI. THE USDOC'S REMAND REDETERMINATION IS ALSO INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT

14. Korea reiterates its request that the Panel find that the USDOC's Remand Redetermination is inconsistent with the United States' WTO obligations because: (1) the USDOC failed to use the Korean respondents' actual profit data as required under Article 2.2.2; (2) the USDOC's calculation of CV profit was unreasonable under Article 2.2.2(iii) because it continued to adhere to its impermissibly narrow definition of the "same general category of products" and calculated the CV profit as an average of profit rates of Tenaris and OAO TMK, a company that bears many of the same flaws as Tenaris as a CV profit source; and (3) the USDOC continued to find that it was not able to calculate a profit cap and that it was not required to calculate a profit cap based on the home market profit data, in contravention of Article 2.2.2(iii).

VII. THE USDOC FAILED TO MAKE A FAIR COMPARISON BETWEEN EXPORT PRICE AND NORMAL VALUE UNDER ARTICLE 2.4

15. The United States also violated Article 2.4 of the AD Agreement because the USDOC did not conduct a "fair comparison" between the export price and normal value by making due allowances for differences that affect price comparability, despite extensive evidence on the record regarding the differences between Tenaris and the Korean respondents. Furthermore, the USDOC continued to commit the same error in its Remand Redetermination by failing to make due allowances for differences that affected price comparability between the normal value based on Tenaris and TMK's profit rates and the Korean respondents' export prices.

VIII. THE USDOC'S FINDING OF ASSOCIATION UNDER ARTICLE 2.3 WAS IMPROPER

16. The USDOC's findings of association, or affiliation, between NEXTEEL and POSCO, and NEXTEEL and its customer, were inconsistent with Article 2.3 of the AD Agreement. The United States has incorporated footnote 11 of the AD Agreement into its own laws, requiring a finding of "control" among parties in order to find that affiliation, or association, exists. In the underlying investigation, however, the USDOC arbitrarily replaced its statutory requirement of "control" with a much less rigid standard. The USDOC also did not make a separate assessment as to the reliability of the export price as required under Article 2.3.

IX. THE USDOC DID NOT EXAMINE THE RELIABILITY OF NEXTEEL'S COST RECORDS AS REQUIRED UNDER ARTICLE 2.2.1.1

17. Article 2.2.1.1 of the AD Agreement requires investigating authorities to calculate costs on the basis of records kept by the exporter or producer under investigation when certain conditions are met. NEXTEEL kept its records in accordance with GAAP, and its cost records reasonably reflected its actual costs of purchases of hot-rolled coil, as required under Article 2.2.1.1. However, after improperly finding that NEXTEEL was affiliated with POSCO, the USDOC disregarded NEXTEEL's actual cost records, and instead, relied on POSCO's sales price of hot-rolled coil to its *other* customers.

X. THE USDOC'S DECISION TO LIMIT ITS EXAMINATION WAS INCONSISTENT WITH ARTICLE 6.10

18. The United States concedes that the USDOC's examination was limited to a "certain number of respondents". However, it did not use statistically valid samples as required under Article 6.10 of the AD Agreement when limiting its examination by the number of respondents. The United States also claims that, in deciding it could not examine any voluntary respondents, the USDOC conducted a separate analysis of its available resources. However, the USDOC did not conduct a separate analysis, but instead relied on the same set of circumstances upon which it relied in order to limit its examination of mandatory respondents.

XI. ADDITIONAL CLAIMS

19. The United States failed to protect the due process rights of the Korean respondents as required under Article 6 of the AD Agreement and failed to comply with the requirements of Article 12 of the AD Agreement. The USDOC also failed to administer its regulations in a uniform,

impartial, and reasonable manner in accordance with Article X:3(a) of the GATT 1994, and failed to provide non-discriminatory treatment to OCTG from Korea as required under Article I:1 of the GATT 1994. Finally, the USDOC's failure to comply with Articles 2, 6, and 12 of the AD Agreement results in consequential violations of Articles 1 and 18.4 of the AD Agreement, as well as Article VI of the GATT 1994 and Article XVI:4 of the WTO Agreement.

EXECUTIVE SUMMARY OF KOREA'S CLOSING STATEMENT

20. The administrative record in this case shows that the Korean respondents have not engaged in dumping. After making a negative dumping determination for both Korean respondents in the preliminary determination, the USDOC was bombarded with letters and communications from the U.S. Congress and industry representatives calling for a reconsideration of its calculation, and in particular, its decision on CV profit. Faced with political pressure, the USDOC accepted and used Tenaris's financial statements to calculate CV profit even though the financial statements had been submitted two months past the deadline. This was the only way for the USDOC to revise its analysis in a way that would increase the Korean respondents' dumping margins. The results-oriented approach adopted by the USDOC has led to inconsistencies and illogical results that go against United States' WTO obligations.

21. The USDOC ignored its obligations under the chapeau of Article 2.2.2 of the AD Agreement to use the Korean respondents' actual profit data as a CV profit source, arguing that these profit data are derived from "low volume" sales. However, the Appellate Body has already confirmed that profit data derived from low volume sales *are* an appropriate CV profit source under the Article 2.2.2 chapeau. With respect to the use of actual third country market profit data, the "doomsday" scenario presented by the United States in which the authority would have to collect and examine large amounts of data simply did not exist here.

22. The USDOC adopted an overly narrow interpretation of "same general category of products" that is narrower than its definition of "like product." The United States does not dispute that such narrow interpretation would be impermissible under Article 2.2.2 of the AD Agreement, but claims that the USDOC's own scope definition, as clarified in the *OCTG from Ukraine* investigation, does not extend to the Korea investigation. Korea has shown that scope definitions apply to all concurrent investigations covered under the same petition.

23. The United States agrees with Korea that the purpose of Article 2.2.2 is to approximate what the profit rate of the like product would have been had the product been sold in the domestic market of the exporter, but it argues that USDOC's use of Tenaris's financial data was "reasonable" under Article 2.2.2(iii) because the data approximated the "like product". Even setting aside the fact that the USDOC did not even attempt to approximate the home market, it even failed to properly approximate the "like product."

24. The United States also continues to ignore the plain text of Article 2.2.2(iii) and argues that it was not required to calculate or apply a profit cap. However, this alleged inability to calculate a profit cap was brought about by the USDOC's own impermissible interpretation of the "same general category of products". Also, even accepting the USDOC's definition, this does not provide a valid justification for circumventing the explicit requirement of calculating a profit cap that the drafters included in Article 2.2.2(iii).

25. The United States concedes that there was substantial evidence on the record addressing the differences between Tenaris and the Korean respondents that affected their profitability and, as a result, the price comparability between the constructed normal value using Tenaris's profit and the export price. Nonetheless, the USDOC failed to fulfill its obligation to make due allowances for such differences, as required under Article 2.4.

26. The United States infringed on the Korean respondents' due process rights and prevented the Korean respondents from defending their interests under Article 6 by accepting the untimely submission of Tenaris's financial statements and failing to inform interested parties of its decision to accept the submission until its final determination.

27. The USDOC could have calculated normal value based on the Korean respondents' sales to an appropriate third-country market under the alternative method of Article 2.2. However, it was

precluded from doing so because the U.S. Viability Test imposes a strict quantitative threshold for the use of third-country markets that is not contemplated under Article 2.2. To be clear, Korea is not requesting that the Panel determine whether the U.S. regulation is in accordance with U.S. domestic law but rather that the U.S. law is inconsistent with Article 2.2.

28. In disregarding NEXTEEL's sales price to its customer, the United States reads out a key requirement of Article 2.3 by failing to determine or examine the reliability of the sales price. The USDOC also failed to properly determine the existence of an "association" between NEXTEEL and its customer. The USDOC did not find that NEXTEEL was affiliated with POSCO based on the absence of an arm's-length relationship. It was only after the USDOC had concluded that the parties were affiliated that it even conducted the major input test. Based on this erroneous affiliation finding, the USDOC also disregarded NEXTEEL's actual cost data for raw material input, despite the fact that NEXTEEL's cost records were maintained in accordance with GAAP and reasonably reflected its actual cost of production of the merchandise under investigation as required under Article 2.2.1.1.

29. Korea reiterates its request that the Panel find that the USDOC's Remand Redetermination is also inconsistent with the United States' obligations under Articles 2.2.2 and 2.4 of the AD Agreement. The United States now claims that the Korea should have raised a claim under Article 6.8 with respect to its arguments relating to the calculation of CV profit in the Remand Redetermination. It is not for the United States to decide the provision under which Korea should bring a claim. Rather, Korea's claim continues to be premised on the requirements of Article 2.2.2(iii), which require that the method employed by the authority must be "reasonable", and subject to a profit cap, however calculated.

ANNEX C

ARGUMENTS OF THE UNITED STATES

ANNEX C-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN
SUBMISSION OF THE UNITED STATES

1. The Republic of Korea challenges U.S. antidumping (AD) duties imposed on oil country tubular goods (OCTG) from Korea. Korea's claims are without merit. As the record establishes and this submission explains, USDOC provided a reasoned and adequate explanation as to how the evidence on the record supported its factual findings and how those factual findings support its overall determination. And as this submission demonstrates, the arguments advanced by Korea otherwise fail to provide plausible alternative explanations of the record evidence before USDOC.

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

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

2. Korea's claim rests on a fundamental misunderstanding of the applicable obligations. First, as acknowledged by Korea, Article 2.2 does not state a preferred alternative method to calculate normal value. Rather, the provision's use of "or" makes clear that an authority may choose to use either of the two available methods.

3. Second, the text of Article 2.2 does not impose an obligation on an authority to consider or analyze both of the two alternative methods before choosing one. Therefore, there is no basis for Korea to contend that application of a "viability test" could lead to an impermissible prohibition on consideration of third-country sales.

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

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

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

6. The focus of the examination in evaluating an "as such" challenge is to ascertain the meaning of the measure itself, and not whether any particular instance of application was inconsistent with the provision. To make such a demonstration, Korea therefore must present to the Panel evidence and legal argument sufficient to show that application of U.S. law necessarily results in an inconsistency with Article 2.2 of the AD Agreement – that is, that the measure necessarily requires WTO-inconsistent action or precludes WTO-consistent action.

7. The U.S. regulation at issue states that USDOC will consider the home market or third-country to be a "viable market" if sales are of a "sufficient quantity". The regulation's use of "normally" indicates that USDOC may define "sufficient quantity" based on the facts of a particular proceeding. The dictionary definition of "normally" is "under normal or ordinary conditions; as a rule, ordinarily". This definition suggests a preference, not a requirement, as distinguished from the use of "shall" or "in all cases".

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

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

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

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

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

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

11. The chapeau of Article 2.2.2 does not require that an investigating authority "use" actual data from the production and sale of the like product. Rather, the chapeau requires that the amount for profits "shall be *based on*" actual data. An obligation that something be "based on" something else does not create an obligation to "use" something else. Thus the obligation of Article 2.2.2 that "profit shall be based on actual data" cannot be read as a strict requirement to *use* actual data in every circumstance.

12. The text of Article 2.2.2, understood in its context, does not require an investigating authority to use data from low-volume domestic sales to calculate CV profit. Therefore, Korea has failed to show that the United States acted inconsistently with Article 2.2.2 of the AD Agreement when USDOC determined that CV profit could not be calculated based on the chapeau because neither HYSCO nor NEXTEEL had sufficient home market sales during the period of investigation. In addition, contrary to Korea's assertion, USDOC did not have access to actual data pertaining to production and sales in the ordinary course of trade of the like product by HYSCO or by NEXTEEL in the home market during the period of investigation.

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

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

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

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

16. USDOC set out in its final determination a reasoned and adequate explanation as to why it decided to exclude line, structural and standard, and downgraded pipe products from the definition of "same general category of products". USDOC found that "[t]he record shows that OCTG and non-OCTG are sold to different end users for use in different applications, and that these different end users have distinct forces which drive prices, demand, and profitability". The evidence in the record thus supports USDOC's final determination that "[t]he performance measures, production processes, alloys, and physical and mechanical characteristics of OCTG casing and tubing products differ in such significant ways from those of standard pipe and line pipe that these products should not be considered to be of the same general category of products as OCTG. The United States thus provided a reasoned and adequate explanation for its findings on the definition of the "same general category of products" as it employed a "reasonable method" consistent with Article 2.2.2(iii).

17. Because the record evidence contradicts Korea's contentions, Korea finds itself in the tenuous position of advocating that calculations concerning normal value of OCTG should be based on profit from non-OCTG products instead of the OCTG-specific data that USDOC used. Korea has failed to show any support in the AD Agreement for its position. Most important, Korea has failed to show that USDOC's interpretation and application in the OCTG investigation is inconsistent with Article 2.2.2.

18. In the instant case, the record and decision memoranda demonstrate that that USDOC engaged in an extensive analysis of the like product and general category of products. Korea, meanwhile, fails to engage the substantive issue, but instead implies that USDOC must be held to the scope definitions for other AD proceedings, preliminary statements in initial questionnaires, or different decisions made in other AD proceedings pursuant to unrelated evidentiary records. The arguments advanced by Korea with respect to the definition of "same general category" of products as understood for the purpose of alternatives (i) and (iii) thus do not provide plausible alternative explanations of the record evidence before USDOC. Therefore, the United States respectfully requests that the Panel find USDOC's definition of the "general category of products" in the Korea OCTG investigation was not inconsistent with Articles 2.2.2(i) and 2.2.2(iii) of the AD Agreement.

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

19. Korea argues that USDOC otherwise had "abundant data" to calculate a profit cap from allegedly dumped OCTG in the United States or sales of non-OCTG products in Korea, but this argument serves to further confirm the soundness of USDOC's decision. First, there is no support in alternative (iii), or anywhere else in the AD Agreement, for the proposition that normal value should be determined on the basis of profit from the allegedly dumped sales. Indeed, the use of allegedly dumped sales in the export market to calculate normal value runs contrary to the concept of determining a dumping margin, which under Article 2.1 is a comparison of normal value with the export price.

20. Korea's other argument, that "the unavailability of data does not excuse a Member from complying with the requirements of the Anti-Dumping Agreement", simply does not address the fact that its proffered information is not relevant to the calculation of a cap under alternative (iii). Korea has failed to demonstrate that USDOC's calculation of amounts of profit for constructed value is inconsistent with the positive obligation imposed by Articles 2.2 and 2.2.2 to determine amounts for profit on the basis of another "reasonable method". The evidence proffered by the Korean companies was not relevant to the profit cap calculation, and there was no other evidence in the record that would permit USDOC to calculate a profit cap. In that circumstance, the United States used a "reasonable method" as the basis to determine the amounts of profit and therefore did not act inconsistently with Articles 2.2 and 2.2.2.

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

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

22. Korea does not identify any flaw, mistake, or inaccuracy in Tenaris's audited financial statement. Nor does Korea explain why profit from sales of OCTG does not reasonably reflect constructed profit for the same product.

23. Instead, according to Korea, Article 2.1 defines dumping in a manner that prohibits an investigating authority from calculating a dumping margin "by comparing an export price to a normal value that, for the most part, represents the international market (as opposed to the single domestic market of the exporting country)". Korea's interpretation is flawed. As an initial matter, Article 2.1 is a definitional provision that, "read in isolation, do[es] not impose independent obligations". Although the Article 2.1 provides when "a product is to be considered as being dumped", it does not specify how the normal value is to be determined. The determination of normal value is governed by Article 2.2 instead.

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

25. Korea asserts that "no reasonable basis exists to conclude that Tenaris's profit rate is reflective of the profit rate that the Korean producers would have achieved if they had sold OCTG in the country of export", but Korea itself acknowledges that Tenaris produces and sells a broad range of OCTG products around the world. As such, Korea has not demonstrated any flaw or inaccuracy in the audited financial statements of Tenaris, nor has it demonstrated that the global prices of OCTG are unrepresentative. Absent evidence to the contrary, there is nothing unreasonable about using the average profit from a broad range of OCTG products sold by a company that operates around the globe, including in Korea, as a reasonable proxy for the profit expected to be made from a sale of OCTG in a specific market.

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

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

27. Article 2.4 obligates an investigating authority to make a "fair comparison" between the export price and the normal value when determining the existence of dumping and calculating a dumping margin. The essential requirement for any adjustment under Article 2.4 is that a factor for which adjustment is requested must affect price comparability. The use of constructed normal value does not preclude the need for due allowances or adjustments *between* the export price and the normal value. However, the construction of normal value through the selection of costs pursuant to Article 2.2.1, or profit pursuant to Article 2.2.2, is not a relevant difference *between* the export value and the normal value, because these selections do not relate to a difference between the export and domestic transactions being compared.

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

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

29. Article 2.3 permits an authority to disregard export prices based on "association". The term "association" does not indicate a limitation to only those entities that may be "related" to the exporter. The nature of the relationship between the exporter and the importer, rather than actual pricing information, are what inform an authority's consideration of whether prices "appear" to be unreliable under Article 2.3.

30. Korea attempts to equate the term "association" with the term "related", as defined in footnote 11, and Korea devotes considerable discussion to interpreting footnote 11. However, footnote 11 defines a different term in a different article of the AD Agreement. Because Korea's claim is premised on its erroneous understanding of "association" in Article 2.3, its claim can be rejected on this basis alone.

31. USDOC properly found NEXTEEL to be associated with the Customer, and therefore did not act inconsistently with Article 2.3 in disregarding export price. USDOC's analysis considered two relationships: (1) POSCO and NEXTEEL and (2) NEXTEEL and Customer. USDOC's finding of association between NEXTEEL and POSCO was based on the unique and remarkably close relationship in which POSCO was positioned to "affect[] the pricing, production, and sale of OCTG" by NEXTEEL. As USDOC concluded in its final determination, NEXTEEL and POSCO coordinated closely in the production, marketing, and sale of OCTG.

32. During the relevant period, USDOC found that POSCO supplied NEXTEEL HRC used for the production of OCTG. HRC accounts for an overwhelming percentage of the cost of producing OCTG. The volume of HRC purchased and consumed by NEXTEEL from POSCO was a key basis of USDOC's finding of association. USDOC concluded that the nature of this supplier relationship extended beyond that of an independent buyer-seller transaction.

33. USDOC's final determination referred to public acknowledgements by POSCO that it "took charge of NEXTEEL's overseas {public relations} campaign for its global launch". USDOC found that the two companies shared technology and market information pertaining to OCTG.

34. USDOC concluded that NEXTEEL worked closely with POSCO at every step of the process: production, marketing, and sale of OCTG. USDOC explained that POSCO has a history of working closely with on-sight NEXTEEL departments and providing marketing assistance and other promotional activities for the benefit of NEXTEEL. USDOC's final determination demonstrates NEXTEEL's close association with POSCO. Accordingly, so too must NEXTEEL be associated with Customer.

35. USDOC concluded that NEXTEEL was associated with Customer, a relationship that, by its very nature, prevented an arm's length transaction of OCTG. USDOC appropriately utilized the first sale to an independent buyer of OCTG in the United States. Accordingly, Korea's claim fails because, in these circumstances, USDOC's use of a constructed export price was not inconsistent with Article 2.3.

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

36. Korea's argument would appear to accept that a proper finding of association justifies deviation from a respondent's books and records in the cost calculation. As demonstrated above, USDOC's final determination properly found an association to exist between NEXTEEL and POSCO. Accordingly, Korea's claim is without merit.

37. Article 2.2.1.1 of the AD Agreement permits an authority to depart from a respondent's books and records in calculating constructed value where the authority provides a rationale for doing so. Where an authority provides a reasoned explanation for why it was required to use market prices for a cost calculation − as here − the authority has not acted inconsistently with Article 2.2.1.1. The obligation of Article 2.2.1.1 to use the books and records of the exporter under investigation is qualified by the use of "normally". The term 'normally' in conjunction with the two conditions ('provided that') in Article 2.2.1.1 indicates that use of a producer's or exporter's books or records is not necessary in every case and the investigating authority has the ability to consider other available evidence in limited instances.

38. USDOC's final determination explained the reasons justifying deviation from NEXTEEL's reported costs. This decision was based on the interconnected business relationship between NEXTEEL and POSCO. USDOC provided a thorough and reasoned explanation for its decision to deviate from NEXTEEL's books and records. USDOC's actions are not inconsistent with Article 2.2.1.1 of the AD Agreement.

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

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

40. Article 6.10 of the AD Agreement allows Members to determine individual margins of dumping for a reasonable number of exporters and producers, and does not require the determination of an individual margin of dumping for all exporters and producers where a large number of exporters and producers is involved. 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". USDOC's decision to limits its examination to two mandatory respondents fully complied with this requirement. Korea has presented no evidence to argue that USDOC's actions were unreasonable, and the Panel therefore should reject Korea's claims that the United States breached Article 6.10.

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

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

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

42. Throughout the Korea OCTG investigation, USDOC provided Korean respondents ample opportunity for the defense of their interests. Before the preliminary determination, respondents were on notice that USDOC might rely on Tenaris's financial data for its dumping calculations. Respondents argued against the use of the Tenaris profit margin through several written submissions before the preliminary determination. Subsequently, after petitioners submitted comments arguing that USDOC should base its calculations on Tenaris's profit information, respondents addressed the Tenaris profit margin extensively in their pre-preliminary determination rebuttal comments.

43. Following the preliminary determination, NEXTEEL and HYSCO had the opportunity to provide views on the Tenaris financial statements that U.S. Steel placed on the record in response to NEXTEEL's Section D Questionnaire. NEXTEEL did so at least three times in writing − once in its

request that USDOC reject the document, and twice more in its brief and rebuttal brief. Similarly, HYSCO, AJU Besteel, and Husteel used the opportunity to challenge Tenaris's profit data, including the data in the financial statements, by providing written arguments against the use of the underlying data.

44. Korea's submission fails to acknowledge that in their written submissions made before and after the preliminary determination, as well as during oral arguments at USDOC's hearing, Korean respondents extensively argued that the information in Tenaris's financial data was not a proper CV profit source. Korea has failed to establish that USDOC did not provide Korean respondents a full opportunity to defend their interests. Therefore, the panel should reject Korea's claim under Article 6.2 of the AD Agreement.

45. Korea also does not explain why the opportunities provided to respondents in the Korea OCTG investigation did not comply with Article 6.4. The Korean respondents were aware that the evidence had been submitted by petitioners, respondents did "see" that information which was evidently relevant to the presentation of their case, and they not only had but utilized numerous opportunities to prepare presentations responding to the evidence. Therefore, Korea has failed to establish that USDOC did not provide Korean respondents timely opportunities to see the Tenaris financial statements and to provide presentations on the basis of information in those statements. Accordingly, Korea's claims that the United States acted inconsistently with Article 6.4 of the AD Agreement must fail.

46. Finally, Korea's claim under Article 6.9 is without merit because Korea fails to correctly identify the "essential facts" that are subject to the disclosure obligation of that provision. As is clear from the record, all interested parties to the investigation had access to Tenaris's financial data and were aware that USDOC was considering that data in its investigation. Korea has failed to establish otherwise. Therefore, Korea has failed to establish that the information contained in the Tenaris financial statements was not disclosed to all interested parties in a manner consistent with Article 6.9 of the AD Agreement.

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

47. Korea argues that the United States breached Articles 6.4 and 6.9 because USDOC "delay[ed] in disclosing" certain *ex parte* communications, particularly several letters, to Korean respondents. Korea fails to explain why the communications referenced constituted information that was "relevant" to the presentation of the respondents' cases, or how the information would have been "used" by USDOC in its investigation. Korea also fails to demonstrate that the relevant correspondences were "essential facts" under consideration that formed the basis for USDOC's decision to apply definitive measures. Further, the record demonstrates that the Korean respondents had ample opportunity to respond to the relevant communications. Therefore, Korea has failed to make a *prima facie* case under Articles 6.4 and 6.9 of the AD Agreement because USDOC was not required to disclose the referenced communications under Articles 6.4 and 6.9 and because USDOC made the letters available to Korean respondents in a timely manner.

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

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

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

data was the best available option, in light of Tenaris's OCTG production, volume of sales, and customer base.

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

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

51. Korea argues that procedural differences constitute an "advantage". But Korea's argument fails to take into account that differences do exist in antidumping proceedings − even investigations involving like products − including differences among the companies under investigation.

52. USDOC made procedural decisions through the course of these proceedings that were based on the specific circumstances of the Korea OCTG investigation and the other OCTG investigations. Unlike in *EU − Footwear*, in which the measure at issue granted an advantage based solely on the country of origin of the products, several factors may have contributed to the treatment accorded to Korean companies and other foreign companies, which resulted in their particular antidumping rates. Korea has failed to demonstrate that any different treatment was not explained by the facts immediately before the investigating authority, here, including the characteristics of the companies participating in the investigation.

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

53. All of Korea's claims under Article X:3(a) of the GATT 1994 must fail because Korea challenges the substance of USDOC's final determination, rather than the United States' administration of relevant laws, regulations, rulings or decisions. Even aside from the fact that Korea has not identified any measure of general application for its claim to fall within the scope of Article X:3(a), Korea has failed to demonstrate that the United States did not administer any laws, regulations, decisions or rulings in a uniform, impartial, and reasonable manner, inconsistent with Article X:3(a).

54. With respect to uniformity, Korea has not shown, nor could it, that the factual circumstances underlying an investigation regarding imports of OCTG produced in Korea required the same procedures as an investigation regarding the imports of OCTG produced in Turkey. Therefore, Korea has failed to establish that the United States did not administer its anti-dumping laws and regulations in a uniform manner.

55. With respect to impartiality, Korea merely concludes that "in the absence of any other reasonable explanation", these letters and meetings "suggest" that "political pressure" impacted the final determination. However, as demonstrated at length, the USDOC provided a reasoned and adequate explanation for its calculation of CV profit, consistent the requirements of the AD Agreement. Therefore, Korea cannot succeed in its claim that USDOC failed to act in an impartial manner as required under Article X:3(a).

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

X. CONCLUSION

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

ANNEX C-2

EXECUTIVE SUMMARY OF THE ORAL STATEMENTS OF THE UNITED STATES
AT THE FIRST PANEL MEETING

EXECUTIVE SUMMARY OF U.S. OPENING STATEMENT

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

1. Korea's challenges of what it refers to as a "viability test" are based on a flawed interpretation of Article 2.2 and a misunderstanding of U.S. law. Where the preferred home-market sales cannot be used, Article 2.2 sets no hierarchy as between the secondary sources for calculating normal value: third-country sales or constructed normal value. Indeed, under Article 2.2, an authority is not required to consider an alternative it will not employ. Rather, because Article 2.2 permits an authority to choose between the alternative methodologies, an investigating authority could simply choose to use constructed normal value to calculate normal value in a given investigation. In such a case, the authority need not even collect third-country sales data.

2. Where an authority considers the use of third-country sales, Article 2.2 permits their use only where the sale is made "to an appropriate third country, provided that the price is representative". An authority would not breach Article 2.2 if it disregards sales to a third country found not to be "appropriate", and the text does not require an authority to consider any one factor.

3. Footnote 2 of the AD Agreement provides relevant context to the phrase "appropriate third country". The general rule of footnote 2 is intended to ensure that sales prices used for normal value are representative, and not an aberration. The reference in footnote 2 to volume thus provides useful guidance to an authority if it is evaluating what constitutes an "appropriate third country". The arguments raised in Korea's submission confuse the relevance of footnote 2 in interpreting Article 2.2. Under Korea's logic, under the general rule of Article 2, an authority would be required *not* to use the preferred home-market sales if those sales constitute less than 5% of total sales, but the authority would be *required* to use third-country market sales of less than 5%. Korea's interpretation is supported by neither logic nor the AD Agreement. Just as the volume of sales may be considered pursuant to footnote 2 to determine whether to use the preferred data source of home-market sales, volume can be considered when evaluating whether third-country sales are "appropriate" within the meaning of Article 2.2.

4. Even aside from Korea's flawed interpretation of Article 2.2, its "as such" claim also fails because it is premised on a misinterpretation of U.S. law. Contrary to Korea's argument, through the use of the term "normally", the regulation does *not* require Commerce to disqualify third-country sales that constitute less than five percent of sales to the United States. Commerce under its regulation is free to consider the complete factual record when determining whether a third country is appropriate for the calculation of normal value, even where third-country sales constitute less than 5% of sales to the United States. Korea has not established that U.S. law requires action that would, even under its theory, result in a breach of Article 2.2.

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

5. Article 2.2.2 lists four methods for the calculation of constructed value ("CV") profit – a preferred method and three alternative methods. The preferred method is to calculate CV profit based on actual data pertaining to production and sales in the ordinary course of trade of the like product by a respondent. When CV profit cannot be calculated using the preferred method, an investigating authority may use one of three alternative methods.

6. In this investigation, Commerce found that, "absent a viable home or third-country market", it could not calculate CV profit based on the preferred method and had to determine CV profit based on an alternative method.

7. Commerce's conclusion was consistent with the requirements of Article 2.2, including Article 2.2.2, because when sales data do not permit a proper comparison under Article 2.2 for purposes of calculating normal value, such data should not be considered under Article 2.2.2 for purposes of calculating profit for constructed normal value.

8. For this reason, the United States did not act inconsistently with the obligations of Articles 2.2 and 2.2.2 when Commerce determined that CV profit could not be calculated based on the preferred method given neither HYSCO nor NEXTEEL had a viable domestic or third-country market during the period of investigation.

9. When an investigating authority cannot calculate CV profit based on the preferred method, the alternative method for CV profit provided for in Article 2.2.2, subparagraph (i), indicates that profit may be determined on the basis of the actual amounts incurred and realized by respondents in respect of production and sales in the domestic market of the "same general category of products".

10. Commerce in its final determination provided an extensive explanation of the reasons why it defined the "same general category of products" in this manner as well as a reasoned and adequate explanation as to why it decided to exclude line pipe and standard pipe, the pipe that Korea believes should be included in this definition.

11. Because Korea has failed to make out its claims, the Panel should find that the United States did not act inconsistently with Article 2.2.2, subparagraph (i), with respect to Commerce's definition of the "general category of products" in the Korea OCTG investigation.

12. Since the information in this investigation did not otherwise permit Commerce to calculate CV profit on the basis of the preferred method, or the alternative methods provided for in Article 2.2.2, subparagraphs (i) or (ii), Commerce had just one option left: It had to calculate CV profit on the basis of an alternative method as provided for in Article 2.2.2, subparagraph (iii), or "any other reasonable method".

13. Korea argues that when an investigating authority opts to base CV profit on "any other reasonable method", it must calculate and apply a profit cap. But there did not exist in the record of this investigation information that would allow Commerce to calculate and apply such a cap.

14. Korea argues that the lack of necessary information does not matter; Commerce still has to cap any profit amounts it calculates pursuant to subparagraph (iii). But Korea does not explain *how* Commerce should calculate this cap other than to assert that Commerce should have used profit data for products *not* included in the "products of the same general category".

15. In point of fact, the answer lies in the ordinary meaning of Article 2.2.2, subparagraph (iii), when read in context with the obligations in Article 2.2; namely, when an investigating authority constructs normal value, it shall include "a reasonable amount for ... profits".

16. When the only alternative method available is the "other reasonable method" provided for under subparagraph (iii), the inability to separately calculate a profit cap because of an absence of information does not, as a consequence, lead to the conclusion that a reasonable method cannot be used. Where data exists to calculate the cap, the amount determined by a reasonable method is limited. But where data does not exist to calculate the cap, the proviso is simply not operative; the investigating authority is still bound to use a reasonable method to calculate a reasonable amount for profits.

17. In the underlying investigation, Commerce reviewed the information in the record and correctly concluded that it did not include data that would allow the calculation of a profit cap. On that basis, Commerce correctly calculated the amounts for profit based on the information before it.

18. After an extensive analysis of this information, Commerce chose to calculate CV profit based on Tenaris's financial statement. Commerce provided a reasoned and adequate explanation why the use of the profit margin from Tenaris's financial statement constituted the most reasonable

method for the calculation of CV profit, as well as the most appropriate of the three options available.

19. The arguments advanced by Korea simply do not provide plausible alternative explanations as to why the use of the Tenaris information does not constitute a reasonable method by which to calculate CV profit. Given Commerce provided a reasoned and adequate explanation for why the use of the Tenaris information constitutes a reasonable method to calculate CV profit, the Panel should find that Korea has failed to establish that the United States acted inconsistently with Article 2.2.2 in its determination of CV profit.

III. Commerce's Decision to Disregard NEXTEEL's Export Price

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

21. Further interpretive guidance is provided by the term "independent buyer". Under Article 2.3, where a price is unreliable "because of association," an authority may construct an export price based on the price to an "independent buyer". An associated buyer is thus informed by what it is not: an independent buyer. An independent buyer has an objective of maximizing profits, a fundamentally different objective than exists in a transaction between two associated entities working towards a "common purpose".

22. Korea's interpretive arguments are unavailing. First, Korea's interpretation of "association" relies heavily on the definition of the term "related" found in footnote 11. Article 2.3 refers to an "association" between the exporter and importer, while footnote 11 defines the term "related", which does not appear in Article 2.3. Second, Article 2.3 does not require an independent assessment or determination of price reliability. Rather, the article requires only that such prices appear to be unreliable on the basis of the nature of the relationship. The phrase "unreliable *because of* association" draws a direct link between the relationship of the entities and the reliability of the prices. The authority can understand the prices to be unreliable as a consequence of the relationship; under Article 2.3, it is the relationship that provides the appearance of the unreliable nature of the prices.

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

23. We turn next to Korea's claim that Commerce's use of calculated costs was inconsistent with Article 2.2.1.1. Article 2.2.1.1 contains a general rule that costs are to be calculated on the basis of the records kept by the producer, but the obligation is qualified by the use of "normally". The inclusion of "normally" allows an authority to depart from costs based on the producer's records where the authority provides a reasoned explanation. The panel in *China – Broiler Products* applied this interpretation to Article 2.2.1.1, properly recognizing that an authority may derogate from the general rule to use a respondent's books and records if the authority justifies its decision on the record of the investigation.

24. Commerce's final determination satisfied the requirements of Article 2.2.1.1. Commerce's final determination and accompanying memos explained in great detail the interconnected relationship between NEXTEEL and its supplier POSCO. Having made a determination of affiliation, Commerce then undertook a comparison between POSCO's transfer prices to NEXTEEL and both POSCO's cost of production and POSCO's prices sold to unaffiliated customers. Based on that analysis, Commerce determined it was appropriate to utilize the weighted average market price of POSCO's sales to unaffiliated customers. Korea has not demonstrated that Commerce's decision to depart from the general rule, which is permissible under the plain language of Article 2.2.1.1, was inconsistent with that provision.

V. Commerce Met All Disclosure and Participatory Requirements

25. Korea argues that Commerce did not do enough to ensure that respondents had ample opportunity to defend their interests; that Commerce did not disclose all the essential facts

forming the basis for its decision to apply definitive measures; or that Commerce's notice did not contain all relevant information on matters of fact and law and the reasons that lead to the imposition of final measures.

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

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

28. It is beyond dispute that the Korean respondents had seen all information concerning Tenaris in a timely manner, made multiple presentations regarding it, and understood that Commerce was considering this information in its investigation.

29. Korea's claims under Articles 6.2, 6.4, 6.9, and 12.2.2 regarding the Tenaris information and Commerce's public notice, which included the reasons for its acceptance of this information and its rejection of the Korean respondents' arguments to the contrary, are without merit.

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

31. But to suggest, as Korea does, that this delay means that the United States failed to comply with Articles 6.4 and 6.9 does not reflect a proper interpretation of the requirements of these provisions, especially since the Korean respondents had an opportunity to address these letters and did so by submitting new information and argument on 18 June 2014, and again on 26 June 2014.

32. In sum, Korea fails to explain why the letters that it complains about in its First Written Submission constituted information that was "relevant" to the presentation of the respondents' cases, or how the information would have been "used" by Commerce in its investigation. Korea also fails to demonstrate that the letters it complains about were "essential facts" under consideration that formed the basis for Commerce's decision to apply definitive measures. Korea thus has failed to establish that the actions of the United States with respect to the identified letters were inconsistent with Articles 6.4 and 6.9.

EXECUTIVE SUMMARY OF U.S. CLOSING STATEMENT

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

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

ANNEX C-3

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES

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.

ANNEX C-4

EXECUTIVE SUMMARY OF THE ORAL STATEMENTS OF THE UNITED STATES AT THE SECOND PANEL MEETING

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

1. The customary rules of treaty interpretation support the U.S. understanding that Article 2.2 permits an authority to consider the volume of sales when determining an "appropriate" third-country. The parties agree that, where home-market sales cannot be used to calculate normal value, Article 2.2 imposes no hierarchy as between the two alternative methods. Under Article 2.2, an interested party is not entitled to direct the use of a particular method. Rather, the authority may determine to use constructed normal value or sales to "an appropriate third country, provided that this price is representative" to calculate normal value. The text of Article 2.2 does not prescribe how an authority is to identify an "appropriate third country", nor does it *preclude* the consideration of volume. Moreover, relevant context supports an understanding that volume may be a relevant consideration.

2. We turn next to Korea's contention that the challenged measure is contrary to U.S. domestic law. It is not the role of a panel to review the legality of a Member's law as within that municipal legal system. Rather, it is the role of the panel to determine, as a matter of fact, the content and meaning of municipal law, and to evaluate its consistency with WTO law. Despite Korea's contentions, Commerce is required to adhere to its regulations. As reflected in the plain language of Commerce's current regulation, the United States has shown that Commerce has the flexibility to consider the use of third-country sales that are less than 5 percent of sales to the United States.

II. Korea's Claims Regarding the Calculation of CV Profit are Without Merit

3. Korea contends that "[t]he fundamental problem with the United States' argument is that the chapeau of Article 2.2.2 is intended to apply precisely in circumstances in which there is no 'viable' home or third-country market under Article 2.2". Korea has it backwards. This is the fundamental problem with Korea's argument because Article 2.2.2 does not just apply when there is no viable home or third-country market. Article 2.2.2 frequently applies when there *is* a viable home or third-country market and yet, for various reasons, an investigating authority must construct normal value for comparison purposes.

4. For example, an authority using home market sales may nevertheless need to construct normal value for certain sales where the home market data set does not contain contemporaneous sales, or does not contain sales of identical or similar like products. This also may occur where the identical or similar like products in the home market data set have to be rejected because they fall below the cost of production or are outside the ordinary course of trade.

5. Recently, the Appellate Body in *EU – Biodiesel* discussed how the introductory phrase "[f]or the purpose of paragraph 2" impacted the interpretation of Article 2.2.1.1, finding that Article 2.2.1.1 must be interpreted in a manner consistent with Article 2.2. The phrase "[f]or the purpose of paragraph 2" also appears at the beginning of Article 2.2.2. The language of the chapeau of Article 2.2.2 thus should also be interpreted in a manner consistent with Article 2.2.

6. The context provided by Article 2.2 suggests that, where an investigating authority determines that sales in the home market are viable, the chapeau of Article 2.2.2 reflects a similar preference and indicates that those same sales should be used for calculating profit amounts.

7. But where an investigating authority determines under Article 2.2 that sales in the home market are not viable, and determines instead to construct normal value, nothing in the chapeau of Article 2.2.2 suggests that an investigating authority must nevertheless collect home market sales that it purposely did not collect under Article 2.2 or third-country sales that it did not collect under Article 2.2. In such a case, Article 2.2.2 provides three alternative methodologies that can be employed instead.

8. Korea persists with the notion that because HYSCO or NEXTEEL may have produced so-called "non-prime" OCTG, sales of this product in Korea constituted sales of the like product. Korea's argument ignores the key determinant in whether a product falls within the scope of the "like product" definition: whether the product in question was sold on the date of sale *as* "like product". The record here is clear: NEXTEEL said the pipes in question "were sold to customers as standard pipes". HYSCO said the pipes in question were "not marketed to the customer as OCTG" but sold "for structural purposes". Thus, as of the date of sale, the relevant pipes were not sold in Korea as "like products".

9. Finally, the so-called domestic market "profit" figures put forward by Korea do not satisfy the definition of profit. The definitions put forward in this dispute, including the one advocated by Korea, define profit as a "financial gain" or a "positive difference". The "profit" figures in question do not correlate with these definitions of profit.

10. Korea argues that the United States has offered no basis under the chapeau of Article 2.2.2 to justify its differential treatment of SG&A and profit. At the outset, we note that the language in Article 2.2.2 does not require an investigating authority to base its calculation of SG&A and profit on the same methodology, or even the same database. SG&A and profit are completely different factors, so it is acceptable for an authority to base the calculation of SG&A on one method and the calculation of profit on another. Furthermore, contrary to Korea's argument, the record indicates that Commerce did *not* base its calculation of SG&A on the preferred method provided for under the chapeau of Article 2.2.2. It based its calculation of SG&A on an alternative method provided for under the subparagraphs of that article.

11. Contrary to Korea's argument, Article 2.2.2(iii) does not require an investigating authority to impose a profit cap whenever the authority calculates CV profit based on "any other reasonable method." By linking the profit cap to "profit normally realized", Article 2.2.2(iii) foresees situations when there may be no information about the profits in question, because there are no other exporters or producers of sales of products of the same general category in the domestic market, or because this information simply does not appear in the record of the proceeding.

12. Article 2.2.2(iii) should be applied as the word "normally" suggests: If information exists to calculate the profit cap, the proviso is operative. If such a calculation is not possible because information does not exist, then the proviso is not operative. In either case, an investigating authority remains bound under Article 2.2 to calculate "a reasonable amount ... for profits".

13. Korea argues that it was unreasonable for Commerce to base CV profit on the Tenaris financial statement because this profit figure ignores the "'domestic market' requirement" of Article 2.2.2. Consistent with the interpretation set out by the United States in this dispute, the panel in *EU – Biodiesel* found that "the structure of Article 2.2.2 indicates a preference for the actual data of the exporter and like product in question, with an incremental progression away from these principles before reaching 'any other reasonable method' in Article 2.2.2(iii)". In this regard, the panel concluded that "[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". So while the chapeau of Article 2.2.2 and subparagraphs (i) and (ii) have a "domestic market requirement", Article 2.2.2(iii) clearly does not contain a similar requirement.

14. Korea requests that the Panel expand the scope of its examination to include Commerce's Final Redetermination Pursuant to Court Remand, issued on February 22, 2016, and find those results inconsistent with the obligations of the United States under Articles 2.2 and 2.2.2. Commerce's redetermination was not the subject of consultations and did not exist at the time the Panel was established. Commerce's redetermination thus is not a measure before the Panel and falls outside its terms of reference. Furthermore, Korea failed to invoke Commerce's redetermination in this dispute in a timely manner, prejudicing the U.S. ability to respond to Korea's claims regarding that redetermination.

III. Commerce's Decision to Construct NEXTEEL's Export Price Was Not Inconsistent with Article 2.3 of the AD Agreement

15. We turn next to Korea's claims regarding Commerce's use of NEXTEEL's constructed export price. The customary rules of treaty interpretation require that a treaty be interpreted based on the ordinary meaning of the terms in their context. Here, the relevant term is "association," which is defined as "the action of joining or uniting for a common purpose", a definition that captures a broad range of commercial relationships. We recall that guidance on the meaning of this term can be drawn from the parallel treatment in Article 2.3 of "association" and "compensatory arrangement". Neither an "association" nor a "compensatory arrangement" relationship conveys an aspect of control within the relationship. Instead, both terms concern relationships in which transactions may not be made on an arm's length basis. It is the nature of these relationships that gives the appearance of unreliable prices, and in turn permits an authority, under Article 2.3, to construct export price.

16. Korea's Second Written Submission asserts that Article 2.3 requires an authority to separately assess the reliability of prices before deciding to use constructed export price. Again, however, Korea has not explained how its interpretation gives meaning to the terms used in the text of Article 2.3, in this case, "appear". As the United States has explained, the word "appear" is defined as "seem to the mind, be perceived as, be considered". Thus, if the relationship between the exporter and the importer is "perceived [by the authority] as" resulting in a price that cannot be trusted, the authority can resort to the use of a constructed export price. The United States has acknowledged that there may be circumstances in which two companies may meet the broad definition of association, yet the nature of the relationship does not give rise to the perception that the prices cannot be trusted. In such cases, there may not be a basis for the authority to reject actual sales prices.

17. That is not the situation here. As we have explained, the nature of the relationship between NEXTEEL and POSCO, in which POSCO was involved in both the production and sale of NEXTEEL's OCTG, called into question the reliability of NEXTEEL's prices. We refer the Panel to the final affiliation memorandum, which demonstrates that Commerce's inquiry considered the nature of the relationship and its potential effect on the pricing, production, and sale of OCTG.

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

18. Korea has failed to establish that the decision to depart from NEXTEEL's books and records to calculate costs was inconsistent with Article 2.2.1.1. In the recently issued Appellate Body report in *EU – Biodiesel*, the Appellate Body recognized that Article 2.2.1.1 permits an authority to depart from a producer's books and records where transactions were not made on an arm's length basis. The Appellate Body observed that records may "not be found to reasonably reflect the costs associated with the production and sale of the product under consideration" under Article 2.2.1.1 "where transactions involving such inputs are not at arm's length".

19. Here, after concluding that an affiliation existed between the producer and supplier, Commerce undertook a line-by-line comparison of prices charged by POSCO to NEXTEEL with prices charged by POSCO to unaffiliated purchasers. This analysis established that the costs recorded in NEXTEEL's books and records for certain grades of hot-rolled coil did not reflect the full "costs associated with the production of" OCTG.

V. Commerce in the Korea OCTG Investigation Met All Disclosure and Participatory Requirements under the AD Agreement

20. Korea argues under Articles 6.2 and 6.4 that once Commerce decided in its preliminary determination not to base CV profit on the Tenaris data, "there was no reason for the Korean respondents to concern themselves" that Commerce may subsequently change its mind in its final determination. Korea also argues that Commerce denied the Korean respondents an opportunity to submit information rebutting the Tenaris data and that the United States failed to protect respondents' procedural rights.

21. As we have said before, a preliminary determination is just that: *preliminary*. It is not credible for any interested party to suggest they need not concern themselves with the fact that a final determination might differ from a preliminary determination, especially in this matter given that Commerce specifically indicated in its preliminary determination that it "intend[ed] to continue to explore other possible options for CV profit for both respondents".

22. The Korean respondents were informed of the additional Tenaris financial data at the same time as Commerce − when the data was placed on the record. As the United States has explained in its prior submissions, respondents had an opportunity to submit factual information rebutting the Tenaris data but declined to do so. The respondents also made multiple arguments before and after Commerce's preliminary determination, through written submissions and at the hearing, regarding whether and how Commerce should use the Tenaris financial data. It is thus clear from the record that the Korean respondents had ample opportunity to defend their interests and to see all information that was used in Commerce's final determination.

VI. Korea Has Failed to Establish that the Korea OCTG Investigation was Inconsistent with Article I:1 and Article X:3(a) of the GATT 1994

23. We turn now to address claims raised by Korea under Article I:1 and Article X:3(a) of the GATT 1994. First, Korea's claim under Article I:1 must fail because the measure does not fall within the scope of Article I:1. In Korea's Second Written Submission, for the first time, Korea asserts that the challenged measure is within the scope of Article I:1 because "'the method of levying such duties and charges' must cover antidumping investigations". But contrary to Korea's argument, "method of levying" duties relates to the administration of duty collection, not the conduct of a single antidumping investigation. Indeed, an investigating authority necessarily must conduct investigations based on the particular circumstances of each case, as reflected in Article VI:1 of the GATT 1994.

24. Second, Korea's Article X:3(a) argument does not state a claim within the scope of that provision. To establish a breach of Article X:3(a), the complainant must: (1) identify a law, regulation, decision or ruling of general application of the responding Member, and (2) demonstrate that the respondent does not administer that law, regulation, decision or ruling in a uniform, impartial, and reasonable manner. Korea has failed to sufficiently identify either the specific measure at issue, or the nature and scope of its claim regarding the administration of that measure.

EXECUTIVE SUMMARY OF U.S. CLOSING STATEMENT

25. Under Article 7.1 of the DSU, the DSB gives a panel authority to examine a matter through the panel's terms of reference. The "matter" is comprised of the measure and claims (i.e., the legal basis of the complaint) identified in the complainant's panel request. As such, a panel can only consider those measures and claims identified in the complainant's request for the establishment of a panel, consistent with Article 6.2 of the DSU. Korea has argued that the Panel's terms of reference include Commerce's remand redetermination. The redetermination, however, is not identified in Korea's Panel Request, and the redetermination therefore falls outside the Panel's terms of reference. Moreover, Korea has failed to claim in its Panel Request that the United States acted inconsistently with Article 6.8 or Annex II. Therefore, the correct basis for the claim Korea now raises with respect to Commerce's calculation of a profit cap in its redetermination would also fall outside the Panel's terms of reference.

26. As noted in Question 16 of the Panel, Korea also failed to include in its Panel Request a claim that Commerce's determination to base CV profit on the Tenaris financial statement did not constitute an "other reasonable method" within the meaning of Article 2.2.2(iii). Therefore, the Panel should find that its terms of reference do not extend to Korea's claim regarding Commerce's determination to base CV profit on the Tenaris financial statement under Article 2.2.2(iii).

ANNEX D

ARGUMENTS OF THE THIRD PARTIES

ANNEX D-1

EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA

I. INTRODUCTION

1. Mr. Chair, Members of the Panel. China welcomes the opportunity to address you today.

2. China wishes to highlight some of the critical issues that arise in relation to the claims made by Korea regarding USDOC's use of the "viability test" and use of constructed normal value in anti-dumping proceedings. China believes that these issues are of systemic importance and should be underscored.

II. ISSUES ARISING IN CONNECTION WITH KOREA'S CLAIMS AGAINST USDOC'S USE OF THE "VIABILITY TEST"

3. Article 2.2 of the *Anti-Dumping Agreement* is the provision governing how an investigating authority may depart from the domestic sales to determine the normal value for fair price comparisons. The departure may arise from three circumstances: when there are no sales in the ordinary course of trade in the domestic market of the exporting country, or particular market situation, or the low volume of the sales in the domestic market of the exporting country, under which the normal value could be determined by either based on third country sales (like product exported to an appropriate third country) or constructed normal value.

4. The only condition provided explicitly in Article 2. 2 of the AD Agreement when the normal value is determined on the basis of the third country sales is "the price is representative", while one of the three criteria to pass the "viability test" that United States uses third country sales to calculate normal value is the quantity or value of the sales to the third country shall meet 5% or more of the company's sales to the Unites States.

5. China is of the view that Article 2.2 does not set up or implies any minimum threshold as applied by the United States in the "viability test". There is no text or context basis to support this "5% or more" criteria in "viability test" and this additional quantitative threshold, besides "representative" requirement, shall not be permitted and its application is *per se* inconsistent with Article 2.2 of Anti-Dumping Agreement.

III. ARTICLE 2.2.2 (III) REQUIRES THE PROFIT CONSTRUCTION BASED ON A REASONABLE METHOD

6. The foundational concept of "dumping", as embodied in the definition of dumping in Article VI:1 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement and reflected throughout the Anti-Dumping Agreement, is endowed with producer or exporter-specific character. This foundational concept of dumping requires the normal value to be calculated on the basis of the sources can reasonably reflect the pricing behavior of an individual exporter or producer in the domestic market of exporting country.

7. Article 2.2.2 (iii) of *Anti-Dumping Agreement* requires that any alternative calculation method used must be "reasonable" that could represent domestic market of the exporting country. The general rules provided in the chapeau of Article 2.2.2 and its paragraphs (i)-(iii) guarantee the normal value reflects the actual SG&A and profit in a reasonable way, especially if the investigating authority chooses to depart from the relevant data provided by the exporter or producer under investigation.

8. With respect to the calculation of profit as one of the important elements for the constructed normal value, the structure and content of Article 2.2.2 clearly shows its preference for a profit source representing the domestic market of the exporting country

IV. ARTICLE 2.4 REQUESTS DUE ALLOWANCE BE MADE FOR ANY OTHER DIFFERENCES AFFECTING PRICE COMPARABILITY

9. China now goes to the issue of due allowance needed for the differences affecting price comparability. Article 2.4 requires that a fair comparison shall be made between the export prices and the normal value, and provides that due allowance shall be made in each case, on its merits, for differences which affect price comparability. The "fair comparison" requirement in Article 2.4 obliges the investigating authority to take into account substantial differences that may affect the price comparability.

10. Appellate Body in EC-Fasteners states that when differences affecting price comparability between the normal value and export price exist, the authorities must make an adjustment.[1] China believes that the interpretation developed and continuously affirmed by the Appellate Body has clarified the obligation that the investigating authorities shall make due allowance accordingly.

11. In the underlying investigation, the factors cause differences presented by Korean enterprises include the types of products sole, scale of business operations, and position in the distribution chain, may substantially affect the proper calculation of profit rate and thus eventually affect the price comparison, and should be adjusted according to Article 2.4 of Anti-Dumping Agreement.

12. Thus, China shares the same view with Korea that USDOC is obliged to take into account the differences that may affect price comparability and make adjustment for the profit rate. Refusing to do so would amount to denying a fair comparison between the normal value and the export price and ultimately is inconsistent with Article 2.4 of the *Anti-Dumping Agreement.*

V. CONCLUSION

13. This concludes China's remarks. China wishes to thank you, and the Secretariat team supporting you, for the work that has been undertaken to date.

[1] Appellate Body Report, *EC – Fasteners (Article 21.5),* para. 5.163.

ANNEX D-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS
OF THE EUROPEAN UNION

1. THE U.S. VIABILITY TEST FOR THIRD-COUNTRY MARKET SALES UNDER ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT

1. Where the domestic price in the exporting country market may not represent an appropriate normal value for the purposes of comparison with the exporting price, the second part of Article 2.2 of the Anti-Dumping Agreement provides that an importing Member may select one of two alternative methods: "third-country sales" and "constructed normal value". No preference or hierarchy between these alternatives is expressed in the Agreement. Article 2.2 allows investigating authorities to opt for one of the two alternatives. The scope of this discretion is contextually informed by footnote 2. Thus, investigating authorities should meet the requirements laid down for the use of each alternative: (1) third-country sales may be used provided that their price is "representative" (taking into account the context of footnote 2); and (2) constructed normal value is based on the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits, calculated in accordance with the relevant provisions of Articles 2.2.1.1 and 2.2.2.

2. Accordingly, the European Union considers that the absence of a sufficient volume of exports of the like product to an appropriate third country could justify a finding that the price of those exports was not representative in the circumstances of the specific proceedings, particularly, as the United States points out, in circumstances where the evidence does not "demonstrate otherwise". Article 2.2 states that it may be "because of … the low volume of sales" that "such sales do not permit a proper comparison". Thus, conceptually, a link is established between the notion of comparability and relatively low volume. Article 2.2 also uses the term "comparable" in connection with the price of the like product when exported to an appropriate third country. The existence of the low volume test reflects the overarching requirement that the export price is to be compared with a proxy or benchmark that is a value that is normal. The Anti-Dumping Agreement expresses that metric in relative terms, by reference to the volume of export sales.

2. THE USDOC'S USE OF CONSTRUCTED VALUE IN THE OCTG INVESTIGATION UNDER ARTICLES 2.2.2 AND 2.4 OF THE ANTI-DUMPING AGREEMENT

3. The European Union recalls that the Appellate Body in *EC — Tube or Pipe Fittings* has clarified that Article 2.2.2 imposes a general obligation on an investigating authority to use "actual data pertaining to production and sales in the ordinary course of trade when determining amounts for administrative, selling and general costs ("SG&A") and profits". The European Union considers that, to the extent that USDOC first ascertained that actual SG&A and profit data for sales in the ordinary course of trade did not exist for the exporters and the like product under investigation, it was entitled to employ one of the other three methods provided in sub-paragraphs (i)-(iii) of Article 2.2.2 of the Anti-Dumping Agreement.

4. In a situation where domestic sales are rejected as a basis for normal value because they are not in the ordinary course of trade by reason of price, it seems that, by definition, there will be no "actual" profit margin that could be used in the construction of normal value. Furthermore, the European Union agrees with the United States that the first sentence of the chapeau of Article 2.2.2 refers to data that pertains, in principle, to the domestic market of the investigated firm. These words do not appear in the first sentence of the chapeau of Article 2.2.2. However, Article 2.2.2 begins with the phrase "For the purpose of paragraph 2". That purpose is to elaborate rules for the determination of a value that is normal, in principle, in the domestic market or in the country of origin. Furthermore, we would point out that the first and second sentences of the chapeau of Article 2.2.2 are closely related. In short, for the purposes of resolving this dispute, the relevant terms of the treaty (as opposed to the context) actually consist of the whole of paragraph 2 and the whole of Article 2.2.2. This is significant because sub-paragraphs (i)-(iii) each also refer to the domestic market of the country of origin.

5. The European Union notes that, while the text of Article 2.2.2 does not provide any elaboration as to the definition of "the same general category of products," its chapeau and overall structure provide certain guidance about "the same general category of products". We agree with both parties that this refers to something broader than "like product". On the other hand, we do not think that the phrase refers to all products capable of being covered by the Anti-Dumping Agreement. Rather, in order to give some reasonable meaning to the phrase, we would tend to think of products where there may be some substitutability on the supply side.

6. While taking no position on the merits, the European Union considers that the application of "profit cap" is a mandatory requirement whenever an investigation authority determines to use "any other reasonable method" under subparagraph (iii) of Article 2.2.2. The presence of the profit cap in subparagraph (iii) and the absence of any cap in subparagraphs (i) and (ii) demonstrate that there is an additional element in subparagraph (iii) that needs to be satisfied.

7. The European Union notes that the Anti-Dumping Agreement does not define the exact scope of what constitutes a "reasonable method" for the purposes of Article 2.2.2 (iii). The panel in *Thailand — H-Beams* held that the intention of subparagraphs under Article 2.2.2 is to obtain results that approximate as closely as possible the price of the like product in the ordinary course of trade in the domestic market of the exporting country. We do not find it easy to envisage a situation in which it is *impossible* to obtain data about the profit normally realised by producers of products of the same general category in the domestic market of the country of origin. It would only be in a truly exceptional situation, in which, despite its best efforts, the investigating authority had been unable to obtain the necessary data, that it would appear justified to fall back on the use of another reasonable method, without the determination or application of the profit cap.

8. The European Union notes that Article 2.4 requires due allowances to be made not only for the differences explicitly mentioned in that Article (i.e. differences in conditions and terms of sale, taxation, levels of trade, etc.) but for any other differences which are also demonstrated to affect price comparability.

9. While taking no position on the merits, the European Union is of the view that, if there were differences between the Korean respondents and Tenaris (i.e. the types of products sold, scale of business operations and position in the distribution chain) that affected price comparability, the failure to make due allowance for these elements is inconsistent with the "fair comparison" requirement under Article 2.4 of the Anti-Dumping Agreement. We agree with the parties that the rules in Article 2.4 of the Anti-Dumping Agreement apply also in the situation in which normal value has been constructed on the basis of costs. However, we would point out that Korea is not comparing a cost item taken from a third country with a cost item pertaining in Korea (and also reflected in the export price). Rather, Korea's complaint is about the amount for profit used in the constructed normal value.

3. CONSTRUCTED EXPORT PRICES IN CASES OF ASSOCIATION UNDER ARTICLE 2.3 OF THE ANTI-DUMPING AGREEMENT

10. Association, for purposes of Article 2.3, may be established directly (that is, between the exporter and the importer) or indirectly, *via* a third party. Unlike Article 4.1, which permits investigating authorities to entirely exclude a "related" producer from the definition of the domestic industry, Article 2.3 merely permits investigating authorities to construct a reliable export price. Therefore, it appears that the requirement of "association" need not be limited to cases of direct or indirect control. Association between the exporter and importer does not necessarily make the export price unreliable. There could, for example, be cases where the price charged to an associated importer is the same as the price charged to independent importers. In such cases, it should be open to the investigating authority to find that the export price is reliable despite the association. Nevertheless, Article 2.3 allows the investigating authority to construct the export price where the actual export price appears to be unreliable *because of* association, i.e. relying solely on the nature of the association.

11. The factual assessment underlying the investigating authority's decision to construct the export price is subject to Article 17.6: it must be unbiased and objective, and the establishment of facts must be proper. The investigating authority should, for example, properly take into account

any evidence on the record that speaks against a finding of association or shows the export price to be reliable despite association.

4. DETERMINATION OF COSTS UNDER ARTICLE 2.2.1.1. OF THE ANTI-DUMPING AGREEMENT

12. Under Article 2.2.1.1, when the records kept by an investigated party (i) are consistent with the generally accepted accounting principles of the exporting country; and (ii) reasonably reflect the costs associated with the production and sale of the product under consideration, an investigating authority will "normally" be required to use them in the calculation of cost of production. The investigating authority may depart from the norm, but is bound to explain why it did so. The calculation of costs in any given investigation must be determined based on the merits, in the light of the particular facts. Assuming that the USDOC departed from the "norm" of using NEXTEEL's own records because of its association with POSCO, the European Union considers that it could have done so as long as it properly and objectively explained and justified this departure from the norm. Naturally, if the finding of association between NEXTEEL and POSCO was itself improper, then there would also be no basis for the USDOC to decline to consider the records of transactions between those enterprises.

5. PROCEDURAL CLAIMS UNDER ARTICLES 6.2, 6.4, 6.9 AND 12.2.2 OF THE ANTI-DUMPING AGREEMENT

5.1. THE PLACEMENT OF TENARIS' ANNUAL REPORT ON THE RECORD

13. Article 6.2 requires liberal opportunities for respondents to defend their interests, but it does not enable respondents to submit relevant evidence or participate in the inquiry as and when they choose, nor does it require the investigating authority to warn an interested party that it intends to use a submission of another interested party in a certain way. A violation of Article 6.2 would take place if an interested party was prevented from commenting on requests made by other interested parties. The right of interested parties to "defend their interests" would not be sufficiently protected if they were only able to *procedurally* object to the acceptance of other parties' submissions, and unable to *substantively* comment on or rebut the newly submitted information.

14. A submission by an interested party could constitute relevant information under Article 6.4, but it is questionable whether an investigating authority's decision to accept that submission into the record could, in itself, be considered as "information" under Article 6.4. The fact that the respondents were able to "see" certain information does not yet necessarily show that Article 6.4 was complied with. Whether the investigating authority provided timely opportunities for the interested parties to prepare presentations on the basis of the information depends on whether, on the facts, the opportunities to respond to the substance of newly submitted information were sufficient.

15. With respect to Article 6.9, it is questionable whether an investigating authority's decisions pertaining to the formation of the record could, in themselves, be considered as "essential facts". On the other hand, it seems clear that a document which served as a basis for the calculation of the profit rate sets out "essential facts". The pertinent question under Article 6.9 therefore appears to be whether the USDOC should have not only made the Tenaris Annual Report available, but also separately, prior to the final determination, disclosed its decision to rely on it in the calculation of normal value. The Appellate Body in *China – GOES* found that Article 6.9 requires that "before a final determination is made, the authority explains, in the light of the substantive obligations of the Anti-Dumping Agreement […] *how the essential facts serve as the basis* for the decision whether to apply definitive measures". On the other hand, Article 6.9 may be complied with in a number of ways, not necessarily by providing all essential facts in a single document entitled "preliminary determination".

16. All essential facts must be disclosed in good time for the interested parties to properly defend their interests. In some circumstances, it may not suffice that an essential fact is on the record of the investigation, but the investigating authority's reliance on that fact may need to be additionally disclosed.

5.2. EX PARTE COMMUNICATIONS

17. The European Union considers that the Panel should tackle Korea's claim by first considering whether the letters at issue fall within the scope of Article 6.4: notably, whether they contain "relevant information … used by the authorities". Information is relevant if it would in fact have been relevant for the presentation of an interested party's case. Whether it has been "used" by the authority should, in turn, be examined by assessing whether it is of a nature and type that relates to a required step in the investigation, such as to the determination of normal value. The next issue is whether the investigating authority allowed "timely opportunities" for the respondents to see the information and prepare presentations.

18. Regarding Korea's parallel claim under Article 6.9, the threshold issue is whether or not the information contained in the letters constitutes "essential facts under consideration which form the basis for the decision to apply definitive measures". In the European Union's view, Article 6.9 could only be relevant if such a letter provided new essential facts which formed the basis of the final determination, but were not disclosed to interested parties in sufficient time.

5.3. THE ADEQUACY OF THE PUBLIC NOTICE

19. The main thrust of Korea's challenge to the use of Tenaris' profit rate and to the finding of association concerns the obligations in Article 2 of the AD Agreement. Both the information used to establish a profit rate, and the determinations on affiliation, seem to be "relevant information" and "material" in the meaning of Article 12.2.2. The crux of the issue is whether the USDOC's reasons for rejecting or accepting the arguments Korea mentions were "set forth in sufficient detail" to allow the Korean respondents to understand why their arguments or claims were treated as they were, and to assess whether or not the investigating authority's treatment of the relevant issue was consistent with domestic law and/or the WTO Agreement."

6. SAMPLING AND INDIVIDUAL DUMPING MARGINS UNDER ARTICLES 6.10 AND 6.10.2 OF THE ANTI-DUMPING AGREEMENT

20. The second sentence of Article 6.10 provides for an exception to the rule that individual dumping margins must be determined. The issue raised by Korea is whether two producers constitute a "reasonable number", i.e. whether USDOC's sample was too small. Whether the number of selected producers is "reasonable" is, in the European Union's view, closely connected to whether samples are "statistically valid". The term "largest percentage of the volume of the exports from the country in question which can reasonably be investigated", is also relevant context. In that context, the *EC – Salmon (Norway)* panel found that "the volume of export sales that may be reasonable for an investigating authority to investigate is a question that must be assessed on a case-by-case basis, taking into account all relevant facts that are before the investigating authority, including the nature and type of interested parties, the products involved and the investigating authority's own investigating capacity and resources". In addition, the Article 17.6 requirement of an unbiased and objective evaluation of the facts would require the investigating authority to provide reasons for its decision to limit the analysis, and for its methodology in doing so.

21. With regard to Article 6.10.2, the European Union considers that the decision not to determine individual dumping margins for voluntary respondents cannot be arbitrary; the authority must explain why the number of voluntary respondents would make it unduly burdensome and prevent the timely completion of the investigation.

7. ARTICLES I AND ARTICLE X:3(A) OF THE GATT 1994

22. Korea appears to claim that a breach of Article I of the GATT 1994 must be preceded by a finding of a breach of Article VI of the GATT 1994, which it argues to have demonstrated. The European Union anticipates that the matters raised by Korea will be resolved, first and foremost, under the provisions of Article VI of the GATT 1994 and the Anti-Dumping Agreement. Similarly, the European Union considers that the position with respect to Tenaris' financial statements will be resolved in the light of the specific provisions of the Anti-Dumping Agreement cited by Korea, and not determinatively on the basis of Article X:3(a) of the GATT 1994.

ANNEX D-3

EXECUTIVE SUMMARY OF THE ARGUMENTS OF TURKEY

I. INTRODUCTION

1. The Republic of Turkey (hereinafter referred to as "Turkey") welcomes the opportunity to present its views as a third party in this case. Turkey is participating in this case because of its systemic interest in correct and consistent interpretation and implementation of the Agreement on the Implementation of Article VI of GATT 1994 (hereinafter referred to as "Anti-Dumping Agreement" or "AD Agreement").

2. Turkey will not elaborate on the particular facts presented by the Parties, rather, underlining its interest, Turkey will share its views on issues addressed by the United States of America (hereinafter referred to as US) and the Republic of Korea (hereinafter referred to as Korea) in their first written submissions pertaining to Article 2.2.2 and Article 2.3 of the AD Agreement.

II. CLAIMS UNDER ARTICLE 2.2.2 OF THE ANTI-DUMPING AGREEMENT

3. The definitive anti-dumping duty on Oil Country Tubular Goods (hereinafter referred to "OCTG") originating in Korea was imposed on July 18, 2014, following the final determination of the U.S. Department of Commerce (hereinafter referred to as "USDOC").[1]

4. Regarding the assessment on the level of profit under the provision of Article 2.2.2 of the AD Agreement, the USDOC determined that the profit calculation is subject to one of the three alternative methods stipulated in Article 2.2.2 of the AD Agreement.

5. USDOC concluded that Article 2.2.2(i) of the AD Agreement was not applicable since the non-OCTG pipe products were not in the "same general category of products" with the OCTG products and that profit rate incurred by the producers in question for the production and sale of the same general category of merchandise cannot be used.

6. The USDOC was equally unable to use profit for other exporters or producers subject to the investigation in line with the Article 2.2.2 (ii) of the AD Agreement, due to the absence of any other respondent subject to the investigation in respect of production and sales of the like product in ordinary course of trade in the domestic market of the country of origin.

7. Consequently, USDOC resorted to any "other reasonable method" under Article 2.2.2(iii) to calculate the level of profit of the product under consideration. Since USDOC determined that Korea does not have a domestic market for merchandise that is in the same general category of products as the subject merchandise, it was not possible for the USDOC to calculate the profit normally realized by Korean OCTG producers.[2] Accordingly, the USDOC reached the decision to use the profit rate of Tenaris, a non-Korean corporation that had neither production nor sales in the Korean market.

8. Considering the facts of the case, Turkey understands that, even though there is no explicit definition of the word "*reasonable*", Article 2.2.2, nevertheless, expects the investigating authorities to determine the "reasonable amount" for profit in light of the rules stressed in Article 2.2 of the AD Agreement which can be considered as a "*chapeau*" to be used in interpretation of Article 2.2.2 of the AD Agreement.

9. The drafters highlighted the importance of "*reasonability*" while evaluating the profit of the product under consideration pursuant to Article 2.2.2(iii) by explicitly including phrase "*any other reasonable method*" in the text of Article 2.2.2(iii). In this context, the "profit cap" is deemed as one of the important instruments to test reasonability of the method.

[1] 79 Federal Register 41983, Certain Oil Country Tubular Goods From the Republic of Korea: Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances.

[2] Final Issues and Decision Memorandum for the Final Affirmative Determination in the Less than Fair Value Investigation of Certain Oil Country Tubular Goods From the Republic of Korea, page 21.

10. In Turkey's view, setting a profit cap based on the actual experience of other exporters or producers under Article 2.2.2(iii) intends to prevent the investigating authorities to calculate the profit subjectively which would have reflections on the normal value and an impact on the fair comparison requirement of Article 2.4 of the AD Agreement.

11. Turkey understands that, by stipulating this legal discipline, the drafters of the AD Agreement have aimed to keep the calculation basis of the profit of the merchandise in question as close as possible to the home market experience of exporters or producers subject to investigation. Thus, the context of the adjective "reasonable" as used Article 2.2.2 of the AD Agreement displays this very rationale.

12. In light of these explanations Turkey doubts whether the use of a non-Korean corporation's profit amount, that had neither production nor sales in the Korean market, satisfies the primary legal expectation of Article 2.2.2(iii) of the AD Agreement which requires the presence of a profit cap based initially on the home market experience of exporters or producers subject to investigation.

III. CONCLUSION

13. With these comments, Turkey expects to contribute to the legal debate in this case, and would like to express again its appreciation for this opportunity to share its points of views.

ANNEX E

PROCEDURAL RULING

ANNEX E-1

PROCEDURAL RULING ON THE UNITED STATES' REQUEST TO PARTIALLY OPEN THE SUBSTANTIVE MEETINGS FOR PUBLIC OBSERVATION

1 INTRODUCTION

1.1. In our communication of 30 October 2015 to the parties we noted that Korea and the United States were not in agreement on whether to make the substantive meetings in this dispute open to public observation. We stated that in no case would we require a party or a third party to make its statements in public should it choose not to do so. However, we said that we would consider adopting procedures that would allow a party or third party that wished to make its statements in public to do so, without impinging on the rights of a party or third party that wished to make its statements in closed session.

1.2. On 14 July 2016, we received a letter from the United States requesting that we adopt such additional procedures before the first substantive meeting scheduled for 21-22 July 2016, so that the United States and third parties who chose to do so could make their statements in public. Korea opposed this request.

1.3. Among the third parties, the European Union agreed to make its statements in public at the third party session while Canada indicated that if it did decide to make a statement at the third party session, it would make it in public. India, China, the Russian Federation, and Mexico did not wish to make their statements in this dispute in public. In addition, India and Mexico submitted comments opposing the United States' request.

1.4. After considering the parties' and third parties' submissions on this matter, we informed them on 19 July 2016 that we were denying the United States' request, and would not make the substantive meetings open to public observation. We provide, through this ruling, our reasons for denying this request.

2 MAIN SUBMISSIONS OF THE PARTIES AND THIRD PARTIES

2.1. The United States argues that it has a right under Article 18.2 of the DSU to disclose its statements to the public, and Korea's choice to maintain the confidentiality of its own statements should not be a basis for denying the United States its right under this provision. In terms of modalities, the United States submits that the Panel could arrange for the public viewing of the meeting through closed-circuit television (CCTV). This would allow the Panel to switch off the CCTV signal when statements are made by Korea or third parties who choose not to make their statements in public, thereby protecting their wish not to make their statements in public while at the same time, allowing the United States and third parties willing to make their statements in public to do so. The United States also suggests that if this is not feasible, the Panel could record the statements and play them back at a later date to the public.

2.2. Korea insists that the Panel does not have the authority to open the meeting to the public in the absence of agreement between the parties to do so, arguing that Articles 14.1 and 18.2 of the DSU require confidentiality of the panel proceedings. Korea notes that when open panel meetings have been held in the past, it has been with the consent of all parties to the dispute. Korea asserts that allowing public observation of the panel meeting without Korea's consent creates a substantial risk that information considered to be confidential by Korea, including business confidential information, will be publicly disclosed. Korea argues that opening of panel meetings without the consent of the disputing parties raises serious systemic issues, and notes that the issue of open hearings is a matter of debate and disagreement among Members in the DSU reform negotiations. In Korea's opinion, the Panel cannot make a decision that modifies the DSU.

2.3. India submits that considering one of the parties, namely, Korea opposes the request to make the substantive meetings open to public observation, it would be inconsistent with the DSU to do so. Noting that opening substantive meetings to the public is a matter of systemic concern for the WTO Members, Mexico submits that the United States has the right to disclose its own positions and statements to the public but that right does not have to be exercised through a public hearing.

3 RULING

3.1. In this dispute, we have decided not to partially open the substantive meetings to the public, as requested by the United States. We have reached this decision based on a number of considerations.

3.2. We note first that the United States made its request only one week before the scheduled dates of the first substantive meeting. Thus, there was very limited time available to address the request, and make necessary logistical arrangements. We were informed that there was limited experience and in-house capacity for recording partially open panel meetings for later public observation.[1]

3.3. In addition, we share Korea's concern that making the substantive meetings partially open to public observation creates a substantial risk that information that is confidential, whether because it is business confidential, or because it is considered confidential to the dispute by a party, may be publicly disclosed. We consider that this concern is even greater in this particular case in view of the large amount of record evidence that has been designated as business confidential by the parties. In order to ensure that business confidential information or arguments or statements of Korea and the third parties who choose not to make their statements in public are not inadvertently disclosed, either by the Panel, or by the United States or third parties who make their statements in public, extreme vigilance would be needed. Adequate time was not available to make the necessary logistical arrangements for cutting the video feed in real time, or arranging for video-recording and review by the parties, to ensure that no information was wrongly disclosed.

3.4. Moreover, we are concerned in principle with the prospect of public observation of the statements and responses of the United States and certain third parties to Panel questions in a case where the statements and responses of Korea and other third parties are not made in public. In our view, such partially public proceedings affect the ability of the viewing public to understand the substance being discussed by the Panel, parties and third parties, given that some statements, as well as some questions and answers, would not be public, while others would. In addition, the very fact that some statements and responses were not made in public might raise unwarranted implications as to reasons why some parties or third parties did not make statements or responses in public, as well as regarding the merits of their positions.[2] We recall that no third party to this dispute expressly supported the United States' position that the substantive meetings may be partially opened to public observation when one party objects to it. Further, as Korea and some third parties observed, Article 18.2 of the DSU provides that nothing in that agreement precludes a party to a dispute from disclosing statements of its own positions to the public. Thus, the United States, and any third party who so wishes, may disclose their oral statements and responses to Panel questions to the public should they choose to do so. Indeed, we understand that is routinely done by the United States.

[1] WTO panels, with one exception at the time of our decision, had conducted open hearings only with the consent of all the parties. The exception is the simultaneous compliance panels in DS381 – *US – Tuna II (Mexico) (Article 21.5 – Mexico II)* and *US – Tuna II (Mexico) (Article 21.5 – US),* which decided to partially open their substantive meetings to the public. As we understand it, the procedures adopted allowed the United States and third parties who chose to make their statements in public to do so by video-recording their statements and screening the recording at a later date, after ensuring that the statements did not disclose the statements of Mexico and third parties, who chose not to make their statements in public. We understand that an outside contractor was used for the recording. As the proceedings in this dispute are still on-going, the reasons for the panels' decision in this regard are not available to us.

[2] One panelist does not share the views expressed in the first two sentences of this paragraph. However, he considers that the Panel's conclusion is fully supported and adequately explained by the views set forth in paragraphs 3.2 and 3.3, and therefore joins in that conclusion.

3.5. Based on the foregoing, we denied the United States' request to allow the United States, and the third parties who choose to make their statements in public, to do so at the substantive meetings in this dispute.

ANNEX F

INTERIM REVIEW

ANNEX F-1

INTERIM REVIEW

1 INTRODUCTION

1.1. In accordance with Article 15.3 of the DSU, this Annex sets out the Panel's discussion of the arguments made at the interim review stage. We have revised certain aspects of the Report in light of the parties' comments, where we found it appropriate. We have also made a number of changes of an editorial nature to improve the clarity and accuracy of this Report, or to correct typographical and non-substantive errors, including those suggested by the parties. Due to changes made in the Report, the numbering of footnotes in the Final Report has changed from the Interim Report. References to footnotes pertain to that in the Final Report.

2 SPECIFIC REQUESTS FOR REVIEW SUBMITTED BY THE PARTIES

2.1 Paragraph 1.8

2.1. Korea requests the Panel to make certain modifications to reflect the summary of events leading to the adoption of the timetable, as well as the parties' correspondence on this matter.[1] Opposing this request, the United States submits that the modifications proposed are not an accurate reflection of the events, and other panel reports it is aware of do not provide such a summary.[2]

2.2. Korea presents no reasons in support of its request to modify this descriptive section of the Report, and we find no rationale for making them. Therefore, we deny Korea's request. We also observe that this descriptive section was issued to the parties prior to the issuance of the Interim Report, and Korea did not provide these comments at that stage.

2.2 Paragraph 7.8

2.3. Korea asks the Panel to revise this paragraph to more closely reflect its arguments.[3] The United States does not comment on Korea's request.

2.4. We consider that the language used in this paragraph represents Korea's position accurately. We therefore decline Korea's request.

2.3 Paragraph 7.11

2.5. Korea makes two requests in regard to this paragraph. First, Korea asks the Panel to revise this paragraph to more fully reflect its arguments. Second, Korea asks the Panel to include certain additional arguments it has made.[4] The United States objects to Korea's request, noting the Panel's express focus on the "main" arguments of the parties and suggesting that to the extent these ancillary arguments are not pertinent to the Panel's analysis, they are better made in the sections of the Report summarizing Korea's arguments. The United States also maintains that the final sentence of Korea's proposed addition to paragraph 7.11 is already summarized in the first sentence of that paragraph.[5]

2.6. As regards Korea's first request, we consider that this paragraph already references the arguments that Korea asks us to include.[6] We therefore decline Korea's request. We also decline Korea's second request, because the additional arguments that Korea asks us to include are not integral to our evaluation and findings.

[1] Korea's request for interim review, para. 3.
[2] United States' comments on Korea's request for interim review, para. 4.
[3] Korea's request for interim review, para. 4.
[4] Korea's request for interim review, para. 5.
[5] United States' comments on Korea's request for interim review, para. 6.
[6] See para. 7.11 and fn 35.

2.4 Paragraph 7.14

2.7. Korea asks the Panel to add certain language to this paragraph to improve clarity.[7] The United States objects to Korea's request arguing that the additional language proposed by Korea would inappropriately insert an interpretive argument made by Korea into the paragraph.[8]

2.8. Korea's request is, in our view, unwarranted, as the change it asks us to make to this paragraph is itself contested in this dispute. We therefore decline Korea's request.

2.5 Paragraph 7.17

2.9. Korea asks the Panel to revise this paragraph to more accurately reflect its arguments.[9] The United States objects to Korea's request, arguing that Korea's proposed modification does not accurately reflect the interpretive arguments made by Korea in these proceedings. Further the United States contends that the argument that Korea asks the Panel to add to this paragraph is unrelated to the issues of treaty interpretation that are relevant to the Panel's discussion in this section.[10]

2.10. We consider that Korea's arguments have been accurately reflected in this paragraph.[11] We therefore, decline Korea's request.

2.11. Korea also asks the Panel to delete certain language from a footnote to this paragraph, contending that it did make the arguments which the footnote states it did not.[12] The United States opposes Korea's request arguing that Korea's request has no basis as it does not offer any citations to such arguments.[13]

2.12. We have decided to accommodate Korea's request.

2.6 Paragraph 7.27

2.13. Korea requests the Panel to make certain additions and revisions to more accurately describe the USDOC's remand determination.[14] The United States agrees to Korea's request to specify the date on which this determination was affirmed by the USCIT, but suggests editing the language proposed by Korea.[15] The United States opposes other additions and revisions requested by Korea.[16]

2.14. We have clarified that the remand determination was affirmed in August 2016, albeit not in the language proposed by Korea. We reject Korea's request that we not use the term "methodology" for the reasons set out in paragraph 2.40 below. We also reject Korea's request to add a description of how the USDOC calculated CV profit in the remand determination because it is already reflected in other parts of the Report.

2.7 Paragraph 7.32

2.15. The United States requests the Panel to replace "surrogate company" in the second sentence of paragraph 7.32 with "an OCTG producer" as "surrogate company" could be confused with the term "surrogate values".[17] Korea objects to the United States' request, contending that there is no basis to believe that the Panel's use of the term "surrogate company"

[7] Korea's request for interim review, para. 6.
[8] United States' comments on Korea's request for interim review, para. 7.
[9] Korea's request for interim review, para. 7.
[10] United States' comments on Korea's request for interim review, paras. 8-10.
[11] Para. 7.17 and fn 43.
[12] Korea's request for interim review, para. 8.
[13] United States' comments on Korea's request for interim review, para. 11.
[14] Korea's request for interim review, para. 9.
[15] United States' comments on Korea's request for interim review, para. 9.
[16] United States' comments on Korea's request for interim review, para. 9.
[17] United States' request for interim review, para. 4.

could be confused with the term "surrogate values" and the United States provides no reasons why such confusion should arise.[18]

2.16. We agree with Korea, and therefore decline the United States' request.

2.8 Paragraph 7.34

2.17. Korea asks the Panel to revise this paragraph to more fully reflect its arguments, and to add a footnote to this paragraph referencing certain exhibits.[19] The United States does not comment on Korea's request.

2.18. We have decided to accommodate Korea's request. However, the exhibits that Korea asks us to reference are already cited in the footnote to this paragraph. We therefore decline this aspect of Korea's request.

2.9 Paragraph 7.55

2.19. Korea asks the Panel to add a footnote to this paragraph, setting out certain additional arguments it had made.[20] The United States does not comment on Korea's request.

2.20. We consider that the arguments that Korea asks us to include are not relevant to our evaluation and findings and therefore, decline Korea's request.

2.10 Paragraph 7.65

2.21. Korea asks the Panel to revise this paragraph to more accurately reflect its arguments.[21] The United States does not comment on Korea's request.

2.22. We have decided to accommodate Korea's request.

2.11 Paragraphs 7.69, 7.72, 7.74, 7.75

2.23. The United States submits that the Panel's statement in paragraph 7.72 that "*pipe products* not used for down hole application … fell within the definition of the like product" incorrectly includes non-OCTG pipe products within the definition of the like product.[22] Korea does not comment on this aspect of the United States' request.

2.24. While we disagree with the United States' reading of the last sentence of paragraph 7.72, we have modified that sentence to more clearly express our conclusion.

2.25. The United States further requests that the Panel make two changes to paragraph 7.69. First, it requests that the Panel replace "pipe products" with "OCTG" in the second sentence of paragraph 7.69. Second, it requests that instead of concluding that the same general category of products was subject to the limitation that such products be used for down hole applications, the Panel change its conclusion to state that the same general category of products, as defined by the USDOC, was expanded to incorporate only drill pipe and those non-scope OCTG pipe products that exhibit such a limitation.[23] Korea objects to the United States' request, contending that paragraph 7.69 accurately describes the USDOC's definition of the like product.[24]

2.26. We decline the United States' request to replace "pipe products" with "OCTG" because we consider that it follows from the use of the term "pipe products in question" in paragraph 7.69 that the reference to pipe products in that paragraph does not include all pipe products but only the pipe products covered under the product scope of the underlying investigation. We also decline the

[18] Korea's comments on the United States' request for interim review, para. 2.
[19] Korea's request for interim review, para. 10.
[20] Korea's request for interim review, para. 11.
[21] Korea's request for interim review, para. 12.
[22] United States' request for interim review, para. 6. (emphasis original)
[23] United States' request for interim review, paras. 5-8.
[24] Korea's comments on the United States' request for interim review, paras. 4-10.

United States' second request because it is not consistent with arguments that the United States has made in these proceedings.[25]

2.27. The United States requests that the Panel reconsider the conclusions reached in paragraphs 7.72, 7.74, and 7.75 that the same general category of products identified by the USDOC was narrower than the like product. It requests that, based on this reconsideration, the Panel find that Korea has failed to demonstrate that the USDOC's definition of the "general category of products" in the underlying investigation was inconsistent with Articles 2.2.2(i) and 2.2.2(iii) of the Anti-Dumping Agreement.[26] Korea agrees with the Panel's conclusions and therefore objects to the United States' request.[27]

2.28. We decline the United States' request because the reasons the United States presents for this request are not consistent with its arguments in these proceedings.[28] We have, however, added a citation to paragraph 7.69 to further clarify the basis for the Panel's conclusions.

2.12 Paragraph 7.76

2.29. Korea makes two requests in regard to this paragraph. First, Korea asks the Panel to revise paragraph 7.76(d) to more fully reflect its arguments. Second, it asks the Panel to add a sub-paragraph "e" to this paragraph to reflect certain additional arguments.[29] The United States considers that Korea has a basis for its request to add a new sub-paragraph 'e' but not for its request to modify paragraph 7.76(d).[30]

2.30. We consider that paragraph 7.76(d) and its footnote already cites the arguments that Korea asks us to include. We also note that paragraph 7.76(a) already reflects the argument that Korea asks us to include in a new sub-paragraph "e". We therefore decline both requests.

2.13 Paragraphs 7.101, 7.102, and 7.108(a)

2.31. The United States requests the Panel to revise the first sentence of paragraph 7.101 of the Report to state that the text of Article 2.2.2(iii) makes it clear that the determination of the profit cap is mandatory when data pertaining to sales of products of the same general category in the domestic market exist in the record of the proceeding. The United States further requests that paragraphs 7.102 and 7.108(a) be deleted in their entirety.[31] Korea objects to the United States' requests, contending that the Panel's reasoning does not provide any basis to conclude that the mandatory requirement to calculate a profit cap would be removed if data is lacking.[32]

2.32. We agree with Korea and decline the United States' requests.

2.14 Paragraphs 7.104, 7.107, 7.108(b), and 7.109

2.33. The United States makes two requests: First, the Panel should reconsider its findings in paragraphs 7.104, 7.107, and 7.108(b) regarding the USDOC's ability to calculate a profit cap to the extent they rely on the Panel's conclusions with respect to the same general category of products. Second, the Panel should reconsider its finding under paragraph 7.109 regarding whether the USDOC's inability to calculate a profit cap was inconsistent with its obligations under Article 2.2 of the Anti-Dumping Agreement.[33] Korea opposes the United States' first request, contending that it is premised on the erroneous view that the Panel incorrectly found that the USDOC's definition of the "same general category of products" is improper.[34] Korea also objects to the United States' second request, arguing that the USDOC had before it ample information with

[25] United States' response to Panel question No. 49, para. 22.
[26] United States' request for interim review, para. 9.
[27] Korea's comments on the United States' request for interim review, para. 11.
[28] United States' response to Panel question No. 49, para. 22.
[29] Korea's request for interim review, para. 13.
[30] United States' comments on Korea's request for interim review, para. 15.
[31] United States' request for interim review, para. 10.
[32] Korea's comments on the United States' request for interim review, paras. 13 and 14.
[33] United States' request for interim review, para. 11.
[34] Korea's comments on the United States' request for interim review, para. 17.

which it could have calculated a profit cap as required under Article 2.2.2(iii) and that, in any case, the Panel recognized the mandatory nature of the obligation to calculate a profit cap under that provision.[35]

2.34. As we have decided to decline the United States' request to reconsider our conclusions with respect to the same general category of products, we have no reason to reconsider our findings in paragraphs 7.104, 7.107, and 7.108(b), which are premised on those conclusions. We therefore decline the United States' first request. Given that we have decided not to modify our conclusions with respect to the USDOC's failure to calculate and apply a profit cap, we have no reason to reconsider our finding in paragraph 7.109. We therefore reject the United States' second request.

2.15 Paragraph 7.121

2.35. Korea requests certain revisions as well as additions to more accurately and fully reflect its arguments with respect to the USDOC's remand determination.[36] The United States opposes this request.[37]

2.36. We have made the revisions requested by Korea to more accurately reflect its arguments, and made changes in paragraph 7.133 to ensure consistency with this paragraph. We decline to make the additions proposed by Korea, because they affect the clarity of the Report. The parties are free to reflect their arguments in their executive summaries, annexed to the Final Report, as they deem fit. We see no need to specify these particular arguments in the Report itself.

2.16 Paragraph 7.122

2.37. The United States requests certain revisions to more accurately characterize the US proceedings at issue.[38] Korea does not oppose this request.[39] We have made the revisions requested by the United States but for consistency purposes, replaced the reference to "underlying" investigation with "final determination".

2.17 Footnote 161 to paragraph 7.125

2.38. Korea requests the Panel to add certain references to its submissions.[40] The United States opposes this request.[41] In the sentence referred to by Korea, we were setting out the issues that we considered in our analysis, and not reflecting the parties' arguments. The additions requested may create confusion between our understanding of the issues and the parties' arguments, and we decline to make them.

2.18 Paragraph 7.130(a)

2.39. Noting the panel's comment that the USDOC used a different "methodology" to determine the CV profit in the remand determination, Korea states that neither the remand determination, nor the United States, uses the term "methodology" and argues that the USDOC did not, in fact, use a different methodology in this determination.[42] Thus, Korea opposes the use of this term, and asks the Panel to revise this paragraph. The United States opposes this request, commenting that the USDOC did use a different method to determine CV profit in the remand determination.[43]

2.40. The Report makes it clear that we used the term "methodology" here to describe the manner in which the USDOC determined the CV profit in the final determination, and in the remand determination. Thus, we reject Korea's request, and do not revise this paragraph.

[35] Korea's comments on the United States' request for interim review, para. 18.
[36] Korea's request for interim review, para. 14.
[37] United States' comments on Korea's request for interim review, para. 16.
[38] United States' request for interim review, para. 12.
[39] Korea's comments on the United States' request for interim review, para. 19.
[40] Korea's request for interim review, para. 16
[41] United States' comments on Korea's request for interim review, para. 17.
[42] Korea's request for interim review, paras. 17 and 17(a).
[43] United States' comments on Korea's request for interim review, para. 18.

2.19 Paragraph 7.130(b)

2.41. Korea asks the Panel to provide additional explanation on the USDOC's alleged application of a profit cap.[44] The United States opposes this request.[45]

2.42. We reject Korea's request, as we consider the requested additions affect the clarity of the Report, and are unnecessary.

2.20 Paragraph 7.130(c)

2.43. Korea asks the Panel to make certain changes to precisely reflect what was done by the USDOC in the remand determination.[46] The United States does not comment on this request. We have made the changes requested by Korea.

2.21 Paragraphs 7.131(b) and (c)

2.44. Korea asks the Panel to make certain revisions in this paragraph consistent with the changes it proposes in paragraphs 7.130(b) and (c).[47] The United States takes no position on Korea's request.[48]

2.45. We have modified paragraph 7.131(c) to reflect the changes made in paragraph 7.130(c). Since we rejected Korea's request with respect to paragraph 7.130(b), we do not make changes in paragraph 7.131(b).

2.22 Footnote 178 to paragraph 7.134

2.46. Korea requests several revisions and additions in this footnote, which the United States opposes.[49]

2.47. Korea asks the Panel to specify the claims that it presented in its second written submission. Considering that these are already set out in paragraph 7.119, we decline Korea's request. Korea also asks us to modify this footnote to state that the opening statement at the second substantive meeting was the "first opportunity" Korea had to make specific claims challenging the remand determination, as this determination was affirmed by the USCIT in August 2016. Korea raised some of these specific claims in its second written submission that was filed before Korea made its opening statement. We do not understand how this opening statement could be considered the "first opportunity" to present these claims when Korea did avail itself of an opportunity to make such claims prior to this statement. Hence, we deny Korea's request. Korea asks us to delete certain observations. Considering this request is based on Korea's view, with which we disagree, that the opening statement was the first opportunity to present specific claims, we reject this request.

2.23 Paragraph 7.136

2.48. Korea disagrees that it accepted that through its conclusion of affiliation under US law, the USDOC in effect found "association" within the meaning of Article 2.3 of the Anti-Dumping Agreement.[50] Rather, it agreed that the USDOC "sought to find" association on this basis. The United States does not comment on Korea's statement. We have modified this paragraph to more accurately reflect Korea's position.

[44] Korea's request for interim review, paras. 17 and 17(b).
[45] United States' comments on Korea's request for interim review, para. 19.
[46] Korea's request for interim review, paras. 17 and 17(c).
[47] Korea's request for interim review, para. 18.
[48] United States' comments on Korea's request for interim review, para. 21.
[49] Korea's request for interim review, para. 19; and United States' comments on Korea's request for interim review, para. 22.
[50] Korea's request for interim review, para. 20.

2.24 Paragraph 7.137

2.49. Korea requests several revisions in this paragraph to more accurately reflect its arguments under Article 2.3 of the Anti-Dumping Agreement.[51] The United States does not comment on this request.

2.50. In our view, this paragraph accurately and adequately reflects Korea's arguments in these proceedings. However, we have added an additional citation to this paragraph.

2.25 Paragraph 7.150

2.51. Korea asks the Panel to add a citation to a sentence setting out our understanding of "association", based on the dictionary definitions.[52] The United States does not comment on this request. Considering that the sentence at issue sets out our own understanding, we do not add a citation in this regard.

2.26 Paragraph 7.158

2.52. The United States requests certain modifications to avoid conveying the impression that the Panel reviewed the USDOC's actions under US law, rather than under the Anti-Dumping Agreement, including replacing the reference to "decisions of" the USDOC, with "factual determinations made by" the USDOC.[53] Korea opposes the use of the word "factual" here to modify "determinations", but does not object to other aspects of the United States' request.[54] Considering the United States has not explained why the use of the word "factual" is necessary in this context, while accommodating other aspects of its request in order to clarify that the Panel did not review the USDOC's actions under US law, we have not added the word "factual".

2.27 Footnote 219 to paragraph 7.159

2.53. Korea asks the Panel to make certain additions to more accurately reflect its arguments.[55] The United States does not comment on this request. The additions requested by Korea are already reflected in paragraph 7.157. Hence, we deny its request.

2.28 Paragraph 7.165

2.54. Korea states that the Panel mischaracterizes its argument that evidence of marketing and technology collaboration between NEXTEEL and POSCO had little probative value considering POSCO engaged in the same types of activities with hundreds of companies, by stating that Korea essentially argues that evidence of such types of collaboration would have probative value only if they were exclusive between NEXTEEL and POSCO.[56] Korea asks the Panel to make changes to correctly reflect its argument. The United States does not comment on this request.

2.55. We note that contrary to its comment here, Korea did repeatedly emphasize the lack of an exclusive relationship between NEXTEEL and POSCO.[57] Therefore, we disagree that we mischaracterized its arguments in this regard. In any case, the first sentence of this paragraph reflects the Panel's understanding of Korea's argument, and we do not consider any revisions to be necessary in this regard.

2.29 Paragraph 7.175

2.56. Noting the Panel's statement that "the USDOC's conclusions of affiliation based on control under US law were supported by evidence", the United States asks us to modify this statement so

[51] Korea's request for interim review, para. 21.
[52] Korea's request for interim review, para. 22.
[53] United States' request for interim review, para. 13.
[54] Korea's comments on the United States' request for interim review, para. 20.
[55] Korea's request for interim review, para. 23.
[56] Korea's request for interim review, para. 24.
[57] Korea's first written submission, para. 180; response to Panel question No. 64, para. 71.

as to not convey the impression that the Panel was making substantive findings under US law.[58] Korea opposes this request.[59]

2.57. The Interim Report, including paragraphs 7.158 and 7.159, makes it clear that the Panel was reviewing the USDOC's overall conclusion regarding affiliation under Article 2.3 of the Anti-Dumping Agreement, and not US law. Nonetheless, to avoid confusion, we have decided to accommodate the United States' request.

2.30 Footnote 244 to paragraph 7.179

2.58. Korea requests the Panel to make certain revisions to more accurately reflect Korea's arguments under Article 2.3 of the Anti-Dumping Agreement.[60] The United States does not comment on this request. We have made the revisions requested by Korea.

2.31 Paragraph 7.191

2.59. Korea requests certain modifications to better reflect Korea's arguments under Article 2.2.1.1 of the Anti-Dumping Agreement.[61] The United States does not comment on this request. We have made the revisions requested by Korea, albeit not in the precise language suggested.

2.32 Paragraph 7.192

2.60. Korea requests certain modifications to better reflect Korea's arguments under Article 2.2.1.1 of the Anti-Dumping Agreement.[62] The United States does not comment on this request. We have made the modifications requested by Korea.

2.33 Paragraph 7.198

2.61. Korea requests the Panel to make certain additions to better reflect Korea's overall argumentation under Article 2.2.1.1 of the Anti-Dumping Agreement.[63] The United States opposes this request.[64]

2.62. The additions requested by Korea pertain to our analysis rather than the main arguments of the parties, and Korea does not explain how inclusion of this argument enhances the analysis. In our view, the additions requested would affect the clarity of the analysis presented in this paragraph, and hence, we deny Korea's request.

2.34 Paragraph 7.207

2.63. Korea asks the Panel to revise paragraph 7.207(a) to more fully reflect its arguments. The United States opposes this request, arguing that Korea fails to identify which of its written or oral submissions support its contention that the changes it requests reflect the arguments it made during this dispute. Korea also asks the Panel to delete Korea's argument in the last sentence of paragraph 7.207(c).[65] The United States does not comment on this request.

2.64. We have decided to accommodate Korea's request with regard to revising paragraph 7.207(a), albeit with certain modifications. As regards Korea's request to delete its argument in the last sentence of paragraph 7.207(c), considering that Korea made this argument in its first written submission, and that the Panel has addressed it in its evaluation, we decline this request.[66]

[58] United States' request for interim review, para. 14.
[59] Korea's comments on the United States' request for interim review, paras. 21-23.
[60] Korea's request for interim review, para. 24.
[61] Korea's request for interim review, para. 26.
[62] Korea's request for interim review, para. 27.
[63] Korea's request for interim review, para. 28.
[64] United States' comments on Korea's request for interim review, para. 23.
[65] Korea's request for interim review, para. 29.
[66] Korea's first written submission, para. 212.

2.35 Paragraph 7.213

2.65. Korea asks the Panel to revise this paragraph to more accurately reflect its arguments.[67] In particular, Korea asks us to replace the reference in this paragraph to the USDOC's failure to "notify its acceptance" of the Tenaris financial statements on the record with a reference to the USDOC's failure to "resolve the question of whether" the Tenaris financial statements "were properly" on the record. The United States opposes this request, arguing that Korea fails to identify which of its written or oral submissions support its contention that the changes it requests reflect the arguments it made during this dispute. The United States further contends that Korea's request misrepresents its arguments during these proceedings because it did make the arguments that it asks the Panel to modify.[68]

2.66. We note that Korea argues in these proceedings that the USDOC violated several requirements under the Anti-Dumping Agreement *by failing to resolve the question of whether* the Tenaris financial statements were properly on the record until its final determination.[69] Korea also argues that *by failing to render a decision* regarding the placement of the Tenaris financial statements on the record until its final determination, the USDOC denied the Korean respondents an opportunity to submit information rebutting the contents of the Tenaris financial statements.[70] However, Korea also argues that "without knowing that the USDOC had actually accepted the Tenaris financial statements, the respondents could not reasonably launch a full-scale argument against the use of Tenaris's financial statements, including the submission of rebuttal or clarification information against the information contained in the financial statements submitted by the petitioner".[71] We therefore understand Korea to argue that the Korean respondents were prevented from making rebuttal submissions because *they did not know*, until the final determination, that the USDOC had actually accepted those statements on the record. Considering that the Korean respondents could not formally know about the USDOC's decision to accept the Tenaris financial statements on the record unless the USDOC notified them of it, we understand Korea to effectively argue that it was the USDOC's failure to notify them of its acceptance of the Tenaris financial statements on the record that prevented them from making rebuttal submissions. This understanding is in keeping with the formulation of Korea's claim in its panel request which, in relevant part, states that the USDOC acted inconsistently with Articles 6.2, 6.4, and 6.9 because *it did not inform* interested parties of its decision to accept the petitioners' submission of the Tenaris financial statements on the record. This understanding is also consistent with Korea's argument that "without any guidance from the USDOC, the Korean respondents were unable to protect their interests as there was no reason to believe that information submitted by petitioners two months past the statutory deadline was properly on the record".[72] We therefore consider that paragraph 7.213 accurately reflects Korea's arguments and decline Korea's request to modify this paragraph. We have, however, included additional references in this paragraph to more fully reflect Korea's arguments.

2.36 Paragraph 7.221

2.67. Korea asks the Panel to revise this paragraph to more fully reflect its arguments.[73] The United States does not comment on Korea's request.

2.68. We have decided to accommodate Korea's request.

2.37 Paragraph 7.222

2.69. Korea asks the Panel to revise this paragraph to more closely reflect its arguments.[74] The United States opposes this request, arguing that Korea fails to identify which of its written or oral submissions support its contention that the changes it requests reflect the arguments it made

[67] Korea's request for interim review, para. 30.
[68] United States' comments on Korea's request for interim review, para. 24.
[69] Korea's opening statement at the first meeting of the Panel, para. 115.
[70] Korea's second written submission, para. 293.
[71] Korea's second written submission, para. 285; opening statement at the first meeting of the Panel, para. 115.
[72] Korea's first written submission, para. 204.
[73] Korea's request for interim review, para. 31.
[74] Korea's request for interim review, para. 32.

during this dispute. The United States further notes that Korea's request misrepresents its arguments during these proceedings.[75]

2.70. We decline Korea's request to modify this paragraph for the same reason that we rejected its request to amend paragraph 7.213.

2.38 Paragraph 7.227

2.71. Korea asks the Panel to revise this paragraph to more closely reflect its arguments.[76] The United States opposes this request, arguing that Korea fails to identify which of its written or oral submissions support its contention that the changes it requests reflect the arguments it made during this dispute. The United States further notes that Korea's request misrepresents its arguments during these proceedings.[77]

2.72. We decline Korea's request to modify this paragraph for the same reason that we rejected its request to amend paragraph 7.213.

2.39 Paragraph 7.236

2.73. Korea asks the Panel to revise this paragraph to more closely reflect its arguments.[78] The United States opposes this request, arguing that Korea fails to identify which of its written or oral submissions support its contention that the changes it requests reflect the arguments it made during this dispute.[79]

2.74. We have decided to accommodate Korea's request, albeit with certain modifications.

2.40 Paragraph 7.253

2.75. Korea asks the Panel to revise this paragraph to more closely reflect its arguments.[80] The United States opposes this request, arguing that Korea fails to identify which of its written or oral submissions support its contention that the changes it requests reflect the arguments it made during these proceedings.[81]

2.76. We have decided to accommodate Korea's request.

2.41 Paragraph 7.259

2.77. Korea requests certain revisions to provide a more comprehensive summary of the relevant facts at issue under Article 6.10.2 of the Anti-Dumping Agreement.[82] The United States does not comment on this request.

2.78. The factual background section of the Interim Report presents the necessary facts, and the additions proposed by Korea are more detailed than is necessary in this regard. Hence, we reject Korea's request.

2.42 Paragraph 7.268

2.79. Korea requests certain revisions to more accurately reflect its arguments.[83] The United States opposes Korea's request.[84] The revisions requested pertain to the section containing the Panel's analysis rather than the parties' arguments, would affect the clarity of our analysis, and delete some of our conclusions. Hence, we deny Korea's request.

[75] United States' comments on Korea's request for interim review, para. 24.
[76] Korea's request for interim review, para. 33.
[77] United States' comments on Korea's request for interim review, para. 24.
[78] Korea's request for interim review, para. 34.
[79] United States' comments on Korea's request for interim review, para. 24.
[80] Korea's request for interim review, para. 35.
[81] United States' comments on Korea's request for interim review, para. 24.
[82] Korea's request for interim review, para. 36.
[83] Korea's request for interim review, para. 37.
[84] United States' comments on Korea's request for interim review, para. 25.

2.43 Paragraph 7.283

2.80. Korea requests that the Panel reflect two of its arguments in this paragraph.[85] The United States does not comment on this request.

2.81. We have modified this paragraph to reflect the first argument made by Korea, albeit in different language from that proposed by Korea. We have also made certain changes in paragraph 7.284. The second argument is already reflected in paragraph 7.284 of our Report, and thus we do not find it necessary to reflect it in this paragraph as well.

2.44 Paragraph 7.293(b)

2.82. Korea requests the Panel to make a revision to more accurately reflect the facts of the underlying investigation.[86] The United States does not comment on Korea's request. We have made the revision requested by Korea.

2.45 Paragraph 7.313(a)

2.83. Korea requests the Panel to make certain additions to more accurately reflect Korea's arguments under Article X:3(a) of the GATT 1994.[87] The United States opposes this request.[88] The additions requested by Korea are set out in paragraph 260 of its first written submission, and do add clarity on Korea's position on this issue. Hence, we have made the additions requested by Korea, citing this paragraph of its first written submission.

2.46 Paragraph 7.326

2.84. Korea requests certain additions in the first sentence of this paragraph to more accurately reflect Korea's arguments under Article X:3(a) of the GATT 1994.[89] The United States opposes this request.[90]

2.85. The first sentence accurately reflects Korea's view that since Tenaris's financial statements were not on the record of the underlying investigation, the Korean respondents could not avail themselves of the opportunity to submit rebuttal facts.[91] The second and third sentences of this paragraph already reflect the additions requested by Korea where we note its view that the Korean respondents were prohibited from submitting rebuttal facts until the USDOC "conveyed a formal decision" placing the Tenaris's financial statement on the record of the underlying investigation, and that the USDOC denied these respondents an opportunity to submit such facts. The additions requested would be repetitive, and hence, we reject Korea's request.

2.47 Paragraph 7.330

2.86. Korea requests the Panel to add a summary of Korea's argument under Article X:3(a) of the GATT 1994 in a footnote to paragraph 7.330.[92] The United States opposes this request.[93] We have added a sentence in paragraph 7.331 to reflect Korea's submission in this regard, along with our views regarding this submission.

2.48 USDOC's remand determination

2.87. Korea requests the Panel to reconsider its conclusion that the USDOC's remand determination is outside the terms of reference. In support of its view, Korea presents new evidence (Exhibits KOR-98 and KOR-99), relating to the first administrative review initiated by the USDOC on imports of OCTG from Korea, which allegedly shows the high degree of political

[85] Korea's request for interim review, para. 38.
[86] Korea's request for interim review, para. 39.
[87] Korea's request for interim review, para. 40.
[88] United States' comments on Korea's request for interim review, para. 26.
[89] Korea's request for interim review, para. 41.
[90] United States' comments on Korea's request for interim review, para. 26.
[91] Korea's comments on United States' response to Panel question No. 70(a), para. 102.
[92] Korea's request for interim review, para. 31.
[93] United States' comments on Korea's request for interim review, para. 27.

intervention in this domestic proceeding.[94] These allegedly show how the USDOC can circumvent its implementation obligations in the future.[95] The United States opposes Korea's request, noting in particular that Korea's submission of new evidence is untimely and must be rejected.[96]

2.88. Article 15.2 of the DSU permits parties to submit a written request for the panel to review "precise aspects of the interim report" before issuance of the Final Report. The Appellate Body and past panels have held that Article 15.2 does not permit parties to introduce new evidence during this review process.[97] Consistent with these findings, we decline to accept the new evidence filed by Korea, and do not consider it in our interim review. Insofar as Korea raises due process concerns regarding our conclusion on our terms of reference, the Report already addresses those concerns. Thus, we have not changed our conclusion that the USDOC's remand determination falls outside our terms of reference.

[94] Korea's request for interim review, para. 43.
[95] Korea's request for interim review, para. 45.
[96] United States' comments on Korea's request for interim review, para. 28.
[97] Appellate Body Reports, *EC – Sardines*, para. 301; and *EC – Selected Customs Matters*, para. 259; and Panel Report, *EC – IT Products*, para. 6.48.

WORLD TRADE ORGANIZATION

WT/DS488/R/Add.1

14 November 2017

(17-6130)

Original: English

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

REPORT OF THE PANEL

Addendum

*BCI deleted, as indicated **[[***]]***

This *addendum* contains Annexes A to F to the Report of the Panel to be found in document WT/DS488/R.

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WORKING PROCEDURES OF THE PANEL

ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 30 October 2015

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The parties and third parties shall treat business confidential information in accordance with the procedures set forth in the Additional Working Procedures of the Panel Concerning Business Confidential Information adopted by the Panel.

4. The Panel may open its meetings with the parties and third parties to the public, either in whole or in part, subject to appropriate procedures to be adopted by the Panel after consulting with the parties and third parties. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

5. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

6. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

7. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If Korea requests such a ruling, the United States shall submit its response to the request in its first written submission. If the United States requests such a ruling, Korea shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

8. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

9. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

10. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. For example, exhibits submitted by Korea could be numbered KOR-1, KOR-2, etc. If the last exhibit in connection with the first submission was numbered KOR-5, the first exhibit of the next submission thus would be numbered KOR-6.

Questions

11. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

Substantive meetings

12. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

13. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite Korea to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party a final written version of its opening statement, as well as of its closing statement if possible, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Korea presenting its statement first.

14. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask the United States if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite the United States to present its opening statement, followed by Korea. If the United States chooses not to avail itself of that right, the Panel shall invite Korea to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party a final written version of its opening statement, as well as of its closing statement if possible, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

15. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

16. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

17. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

18. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

19. Each party shall submit executive summaries of the facts and arguments as presented to the Panel in its written submissions, other than responses to questions, and its oral statements, in accordance with the timetable adopted by the Panel. Each executive summary of a written submission shall be limited to no more than 10 pages, and each summary submitted by each party of both opening and closing statements presented at a substantive meeting shall be limited to no more than 5 pages. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions.

20. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

21. The Panel reserves the right to request the parties and third parties to provide executive summaries of facts and arguments presented by a party or a third party in any other submissions to the Panel for which a deadline may not be specified in the timetable.

Interim review

22. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

23. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

24. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

25. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file 2 paper copies of all documents it submits to the Panel. Two paper copies of all exhibits shall be filed. If Exhibits are submitted on CD-ROM or DVD, 2 copies shall be filed. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide one electronic copy of all documents, other than exhibits submitted on CD-ROM or DVD, it submits to the Panel at the same time as

the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy to xxxxx@wto.org and xxxxx@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

26. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING BUSINESS CONFIDENTIAL INFORMATION

Adopted 30 October 2015

These procedures apply to any business confidential information (BCI) that a party wishes to submit to the Panel in the course of the Panel proceedings in DS488.

1. For the purposes of these Panel proceedings, BCI is any information that has been designated as such by the party submitting the information and that was previously treated as confidential within the meaning of Article 6.5 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 by the U.S. Department of Commerce in the course of the anti-dumping proceeding at issue in this dispute, entitled Certain Oil Country Tubular Goods from the Republic of Korea (A-580-870). However, these procedures do not apply to any information that is available in the public domain. In addition, these procedures do not apply to any BCI if the entity which provided the information in the course of the aforementioned investigation agrees in writing to make the information publicly available.

2. If a party considers it necessary to submit to the Panel BCI as defined above from an entity that submitted that information in the investigation at issue, the party shall, at the earliest possible date, obtain an authorizing letter from the entity and provide such authorizing letter to the Panel, with a copy to the other party. The authorizing letter from the entity shall authorize both Korea and the United States to submit in this dispute, in accordance with these procedures, any confidential information submitted by that entity in the course of the investigation.

3. No person may have access to BCI except a member of the Secretariat or the Panel, an employee of a party or third party, and an outside advisor for the purposes of this dispute to a party or third party. However, an outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the products that were the subject of the investigation at issue in this dispute or an officer or employee of an association of such enterprises. All third party access to BCI shall be subject to the terms of these working procedures.

4. Each party shall, at the request of the other party, facilitate the communication to an entity in its territory of any request to provide an authorization letter referred to in paragraph 2. Each party shall encourage any entity in its territory that is requested to grant the authorization referred to in paragraph 2 to grant such authorization. If an entity refuses to grant the authorization referred to in paragraph 2, a party may bring the situation to the attention of the Panel.

5. A party or third party having access to BCI shall treat it as confidential, i.e., shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Each party and third party shall have responsibility in this regard for its employees as well as any outside advisors used for the purposes of this dispute. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose.

6. The party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains Business Confidential Information", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page.

7. Where a party submits a document containing BCI to the Panel, the other party or any third party referring to that BCI in its documents, including written submissions and oral statements, shall clearly identify all such information in those documents. All such documents shall be marked

as described in paragraph 6. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement. The written versions of any such oral statements submitted to the Panel shall be marked as provided for in paragraph 6.

8. Any BCI that is submitted in binary-encoded form shall be clearly marked with the statement "Contains Business Confidential Information" on a label of the storage medium, and be clearly marked with the statement "Contains Business Confidential Information" in the binary-encoded files.

9. If a party or third party considers that information submitted by the other party or a third party contains information which should have been designated as BCI and objects to such submission without BCI designation, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties. The Panel shall deal with the objection as appropriate. Similarly, if a party or third party considers that the other party or a third party submitted information designated as BCI which should not be so designated, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, and the Panel shall deal with the objection as appropriate.

10. Any person authorized to have access to BCI under the terms of these procedures shall treat it as confidential and shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. All documents and electronic storage media containing BCI shall be stored in such a manner as to prevent unauthorized access to such information.

11. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not contain any information that the party has designated as BCI.

12. Submissions containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel's Report.

ANNEX B

ARGUMENTS OF KOREA

ANNEX B-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN
SUBMISSION OF KOREA

I. INTRODUCTION

1. This dispute concerns anti-dumping measures imposed by the United States on oil country tubular goods ("OCTG") imported from the Republic of Korea ("Korea"). The U.S. Department of Commerce ("USDOC") found in its Preliminary Determination that no dumping margin existed for the Korean exporters of OCTG. However, the USDOC ultimately reversed its finding in the Final Determination, having completely shifted its approach on calculating constructed normal value, and, in particular, the constructed value profit rate of the two Korean respondents. The USDOC's determination and its conduct in the investigation are inconsistent with a number of provisions of the Agreement on Implementation of Article IV of the General Agreement on Tariffs and Trade 1994 (the "Anti-Dumping Agreement"), the General Agreement on Tariffs and Trade 1994 (the "GATT 1994"), and the Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement").

2. During the course of the investigation, the USDOC did not allow the Korean respondents to present data on their sales of the merchandise under investigation to third countries, because these sales did not meet the so-called "viability test" under the relevant U.S. law. This viability test violates Article 2.2 of the Anti-Dumping Agreement "as such" and "as applied", because Article 2.2 does not contemplate such a rigid quantitative test for determining the appropriateness of third-country sales.

3. The USDOC's use of constructed value ("CV") in the investigation was also inconsistent with the Anti-Dumping Agreement. First, the USDOC disregarded actual data regarding Korean respondents' home market and third-country market profit rates in violation of the chapeau of Article 2.2.2. Second, the USDOC applied an impermissibly narrow interpretation and application of "same general category of products". Third, the USDOC failed to calculate a "profit cap" as it was required to do under Article 2.2.2(iii). Fourth, the USDOC's use of financial data from Tenaris S.A. ("Tenaris") was not "reasonable" under Article 2.2.2(iii) given that Tenaris had no sales or production in Korea. Fifth, the USDOC's use of Tenaris' financial data violated Article 2.4, as the USDOC failed to make due allowances for differences between Tenaris and the Korean producers that affected price comparability.

4. The USDOC also improperly found an association between NEXTEEL and its raw material supplier, POSCO, based on an erroneous interpretation of Article 2.3, and impermissibly disregarded NEXTEEL's export price to its customer. This erroneous finding of association led the USDOC to improperly disregard POSCO's price of raw materials to NEXTEEL in violation of Article 2.2.1.1.

5. In addition, the USDOC failed to protect the Korean respondents' due process rights in the course of the investigation. In failing to make a ruling regarding the placement of Tenaris' Annual Report on the record despite objections by Korean respondents, the USDOC did not provide Korean respondents a full and ample opportunity to defend their interests before the issuance of the Final Determination, in violation of Articles 6.2, 6.4, and 6.9. Its failure to place records of *ex parte* communications on the administrative record in a timely manner also violates Articles 6.4 and 6.9. Furthermore, the USDOC did not include in its Final Determination and Final Decision Memo all relevant information leading to its imposition of anti-dumping duties as required in Article 12.2.2. The USDOC also failed to protect the interests of other Korean producers by improperly limiting the number of mandatory respondents and failing to examine data submitted by voluntary respondents in violation of Article 6.10.

6. These violations give rise to consequential violations of Articles 1, 9.3, and 18.4 of the Anti-Dumping Agreement, as well as Article VI of the GATT 1994 and Article XVI:4 of the WTO Agreement. Moreover, the USDOC's less favorable treatment of Korean OCTG as compared to OCTG from other Members subject to parallel anti-dumping investigations is inconsistent with

Article I:1 of the GATT 1994. Finally, the USDOC did not administer its laws and regulations in a uniform, impartial, and reasonable manner as required under Article X:3(a) of the GATT 1994 as its decisions were influenced by extreme political pressure, and it failed to provide any other rationale for its sudden change in practice.

II. STATEMENT OF FACTS

7. On 22 July 2014, the USDOC initiated an anti-dumping duty investigation on OCTG from Korea based on a petition filed by petitioners representing the U.S. domestic steel industry, and subsequently selected NEXTEEL and HYSCO as the two mandatory respondents in the investigation. Because the USDOC considered that neither NEXTEEL nor HYSCO had sufficient sales of the merchandise under consideration in the country of export ("home market") or in a third country to use in the calculation of normal value, the USDOC resorted to the calculation of a "constructed value" ("CV").

8. On February 14, 2014, the USDOC issued its Preliminary Determination, in which it determined that OCTG from Korea was not being, and was not likely to be, dumped in the United States. In particular, the USDOC declined to use profit information for Tenaris as argued by petitioners, as the report submitted by petitioners on Tenaris showed that it was a non-Korean corporation that had "neither production nor sales in the market under consideration". Instead, the USDOC calculated HYSCO's CV profit rate based on HYSCO's own sales of the same general category of products − i.e., line pipe and standard pipe − in Korea. For NEXTEEL, the USDOC used the weighted average profit rate of all Korean respondents for home market sales of the same general category of products. The USDOC also addressed allegations by petitioners that NEXTEEL was associated with its raw materials supplier, POSCO, and that a Korean trading company was involved in most of NEXTEEL's sales of OCTG in the United States. Acknowledging that it had not yet reached a decision on the issue of affiliation, the USDOC stated that it would be seeking additional clarification from NEXTEEL about its relationships with these companies.

9. The USDOC issued supplemental questionnaires to the Korean respondents, including a supplemental questionnaire to NEXTEEL relating to its cost of production. Petitioner U.S. Steel submitted as "rebuttal" information the 2012 Annual Report of Tenaris. U.S. Steel's submission, however, did not bear any relation to the factual information submitted by NEXTEEL in the questionnaire response. NEXTEEL immediately requested that the USDOC reject U.S. Steel's untimely submission, as it did not rebut, clarify, or correct NEXTEEL's questionnaire response, but rather, was clearly intended to offer unsolicited CV profit source data past the USDOC's deadline. The USDOC did not rule on, or even acknowledge, NEXTEEL's objection to the placement of the Annual Report on the record until the Final Determination, where it concluded that the petitioner had properly submitted Tenaris' Annual Report.

10. After the Preliminary Determination's negative findings, the U.S. industry and its allies escalated their political activities to unprecedented levels. Notably, among the numerous records of meetings and phone calls by lawmakers and industry representatives to the U.S. Secretary of Commerce on behalf of the U.S. industry, 57 U.S. Senators signed a letter addressed to the Secretary complaining specifically of the USDOC's calculation of profit in its Preliminary Determination.

11. In its Final Determination, the USDOC drastically departed from its Preliminary Determination, calculating a dumping margin of 9.89% for NEXTEEL and 15.75 for HYSCO. To reach this result, the USDOC reversed course and recalculated CV profit for both NEXTEEL and HYSCO, improperly using the 26.11% profit rate of Tenaris as depicted in the financial statements that U.S. Steel had untimely submitted.

III. ARGUMENTS

A. The U.S. Viability Test is Inconsistent with Article 2.2 of the Anti-Dumping Agreement

12. When there are no sales or low volume sales in the ordinary course of trade in the domestic market of the exporting country, or when such sales do not permit a proper comparison because of the particular market situation, Article 2.2 of the Anti-Dumping Agreement permits an

investigating authority to calculate normal value based on third country sales, "provided that this price is representative".

13. The conditions for using third-country sales to calculate normal value under United States law is embodied in the "viability test" pursuant to which the USDOC may use sales prices in a third country to calculate normal value when it is unable to use sales in the country of export, provided three separate and cumulative criteria are met: (1) the price is "representative"; (2) the quantity or value of sales to the third country meets or exceeds five percent of the company's sales to the United States; and (3) no "particular market situation" exists that would make third country market sales prices inappropriate.

14. As explained above, Article 2.2 requires that the price to the third country market be "representative", but does not contemplate a mechanistic minimum threshold as applied by the United States. In particular, Article 2.2 provides "low volume sales" as a factor for excluding the domestic market sales as the basis of normal value, but it does not apply such a standard to third-country sales, demonstrating that the drafters of the Agreement did not intend for the quantitative threshold that may be applied to domestic market sales to be applied to third-country sales.

15. Thus, the U.S. viability test as it applies to third-country market sales is "as such" inconsistent with Article 2.2, as it applies a rigid quantitative test not permitted under the Article. It is also "as applied" inconsistent with Article 2.2, insofar as the Korean respondents were precluded from presenting third-country market data pursuant to the USDOC's application of the viability test in the underlying investigation.

B. The USDOC's Use of Constructed Value in the OCTG Investigation is Inconsistent with the Anti-Dumping Agreement

16. First, the USDOC failed to comply with the Article 2.2.2 requirement to use "actual data" as a CV profit source when available. Article 2.2.2 provides in its chapeau that, when calculating normal value using constructed value, "the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation". The Appellate Body in *EC – Tube or Pipe Fittings* confirmed that it is only when SG&A and profits cannot be calculated based on "actual data" that an investigating authority is permitted to proceed to employ one of the other three methods provided in subparagraphs (i)-(iii). The Appellate Body further confirmed that "low-volume sales" that have failed to meet the five percent threshold for the purposes of determining the viability of the domestic market as a comparison market are not excluded from the "actual data" that must be used to calculate the profit rate under the Article 2.2.2 chapeau.

17. In the underlying investigation, the USDOC refused to use HYSCO's or NEXTEEL's actual data to calculate profit rate, simply stating that it was unable to use the "preferred method", i.e., use of actual data, "absent a viable home or third-country market". Based on requirements of Article 2.2.2 and the guidance provided by the Appellate Body, even if the USDOC had properly disregarded the respondents' sales in the country of export for the purpose of determining an appropriate comparison market due to their "low volume", it was nonetheless obligated to use the actual profit rates for these sales for the purpose of calculating CV profit. The chapeau of Article 2.2.2 does not require that the "actual data" must derive from sales of the like product in the home market. HYSCO and NEXTEEL indicated early in the investigation in their initial questionnaire responses that they both had sales of the like product to third-country markets, and the USDOC had on the record actual profit data for both respondents' OCTG sales in the home market and third-country markets. Because the USDOC disregarded NEXTEEL's and HYSCO's "actual data" pertaining to the respondents' profit rates in the home market and third-country market based on the determination that sales to these markets were of "low volume", the USDOC failed to act consistently with its obligations under the chapeau of Article 2.2.2.

18. Second, the USDOC's decision to rely on Article 2.2.2(iii) and reject other viable options was premised on an impermissibly narrow interpretation and application of the "same general category of products". As the *Thailand – H-Beams* panel clarified, using information from "same general category of products" is meant to provide for the "database to be broadened" in instances where actual data pertaining to "like products" is not available.

19. Rather than broadening the database, the USDOC's Final Determination rested on an overly-narrow interpretation of the "same general category" of products. In its Final Determination, the USDOC reversed course from its Preliminary Determination and found that OCTG was not in the "same general category" of products as non-OCTG pipe products manufactured by the Korean producers, such as line pipe and standard pipe. The USDOC stated that the same *general* category of OCTG would only include "subject OCTG, non-scope OCTG such as stainless steel tubular products, and drill pipes."

20. Having found in its Final Determination that OCTG was not in the "same general category" of products as non-OCTG pipe products, the USDOC determined that it did not have data to calculate the CV profit rate using actual amounts incurred by the producer in the country of origin for the production and sale of the "same general category of merchandise" under Article 2.2.2(i). The USDOC further found that, it was also unable to calculate "the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin", i.e., a "profit cap", as required under Article 2.2.2(iii).

21. By including only one product outside of OCTG – i.e., drill pipe – within the "same general category of products", the USDOC applied a definition of "same general category" that was effectively limited to the "like product". In fact, the USDOC has considered drill pipe to be a "like product" in defining the product scope of OCTG in both the underlying investigation as well as its previous investigations involving OCTG. At the same time, the USDOC has recognized non-OCTG pipe products such as line pipe and standard pipe to be within the "same general category of products" as OCTG in its previous investigations involving OCTG.

22. In sum, the USDOC's definition of the "same general category" in this case resulted in a database that was identical to that containing only "like products", and also contravened its own prior determinations that non-OCTG pipe products such as line pipe and standard pipe fell within the "same general category of products" as OCTG. Thus, the USDOC violated Article 2.2.2 by applying an incorrect standard in its analysis of CV profit calculation methods under the subparagraphs of Article 2.2.2.

23. Third, the USDOC's failure to apply a profit cap is inconsistent with Article 2.2.2(iii). Article 2.2.2(iii) permits the investigating authority to calculate CV profit based on "any other reasonable method, *provided that* the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin", i.e., the "profit cap".

24. The obligation in Article 2.2.2(iii) to calculate a profit cap is unqualified, and there is no indication in the text to suggest that there may be circumstances in which an investigating authority is excused from calculating and applying a profit cap. Indeed, the panel in *Thailand H – Beams* found that the profit cap is in effect a separate reasonability test. The obligatory nature of calculating a profit cap was further confirmed in *EU – Footwear*, where the panel held that the unavailability of relevant data did not excuse a Member from complying with the requirements of Article 2.2.2(iii). Thus, calculation and application of a profit cap is a mandatory requirement when an investigation authority opts to rely on Article 2.2.2(iii), and failure to calculate and apply a profit cap constitutes a *per se* violation of Article 2.2.2(iii).

25. Moreover, Article 2.2 requires that, when relying on constructed value to calculate normal value, the constructed value is to comprise of the cost of production in the country of origin plus a "reasonable" amount for profit. Because the USDOC did not ensure that its calculation of CV profit was "reasonable" by failing to calculate a profit cap, the USDOC also failed to calculate a "reasonable" amount for profit under Article 2.2.

26. In addition, as discussed above, the USDOC determined that it was unable to calculate a profit cap based on an erroneous determination that the administrative record did not contain data regarding the "same general category of products". Thus, because the USDOC did not calculate a profit cap based on an erroneous interpretation of "same general category", the USDOC violated Article 2.2.2(iii).

27. Fourth, the USDOC's construction of profit on the basis of Tenaris' financial statement is inconsistent with the "reasonable method" requirement of Article 2.2.2(iii). While the Anti-

Dumping Agreement does not delineate the exact ambit of what constitutes a "reasonable method" for purposes of Article 2.2.2(iii), if a specific method of constructing SG&A and CV profit is to satisfy this "reasonableness test", it must, at the minimum, be consistent with the central principles of the anti-dumping mechanism enshrined in the Anti-Dumping Agreement, including Article 2.1.

28. According to Article 2.1, "dumping" means introduction of a product "into the commerce of *another country*" at less than the "comparable price" for the like product "when destined for consumption in the *exporting country*". Therefore, in calculating a normal value under the alternative methods, the investigating authority must approximate the actual data that companies under investigation would achieve *in the domestic country of manufacture*.

29. The USDOC relied on the profit rate of Tenaris, despite the existence on the record of various CV profit sources that originated from the country of export, Korea. Tenaris is a multinational company based in Argentina and incorporated under the laws of Luxembourg that has no record of sales of production in Korea. No reasonable basis exists to conclude that Tenaris' 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. Indeed, the only rationale the USDOC provided in its Final Determination to justify its reliance on Tenaris' profit is that Tenaris realizes profit primarily on the basis of OCTG sales from across the globe. Yet, the USDOC never explained why the profits of Tenaris in other geographic market would reasonably reflect the level of profits obtained by producers or exporters in the *Korean* market. Because the profit used by the USDOC to construct the normal value in the underlying investigation was not representative of the profits obtained by producers or exporters in the Korean market and not comparable with the export prices of the Korean exporters, the method used by the USDOC's use of Tenaris' financial data to calculate CV for the Korean exporters does not constitute a "reasonable method" under Article 2.2.2(iii).

30. Fifth, the USDOC failed to make a fair comparison as required by Article 2.4 of the Anti-Dumping Agreement. Article 2.4 requires an investigating authority to conduct a "fair comparison" between the export price and normal price. In doing so, "{d}ue allowance shall be made in each case, on its merits, for differences which affect price comparability". The Appellate Body in *US – Hot-Rolled Steel* interpreted these "differences" broadly, stating that "Article 2.4 expressly requires that allowances be made for *any other differences* that are demonstrated to affect price comparability, and that there are no differences affecting price comparability that would be precluded, as such from being the object of an 'allowance'."

31. The USDOC failed to make a fair comparison because it did not take into account substantial differences between Tenaris and the Korean respondents that affected the price comparability between the Korean respondents' export price and the normal values derived using the profit rate of Tenaris. For example, Tenaris focused on specialized and premium products designed to generate a high profit margin, compared to the low-end products manufactured by Korean respondents. The scale of Tenaris' business operations grossly overshadowed that of Korean respondents, as demonstrated by its production and sales volume, as well as its workforce and facilities. Importantly, because Tenaris sold directly to end users, it was able to retain the entirety of the profits generated between manufacture and retail sale. The Korean respondents, on the other hand, sold OCTG products through resellers at wholesale prices. These factors directly impacted the calculation of the normal value using Tenaris' financial data, and therefore, also affected the comparability between the normal value and the Korean respondents' export price. Because USDOC did not ensure the price comparability between the export price and normal value despite several differentiating factors identified by the Korean respondents, the USDOC failed to comply with Article 2.4.

C. The USDOC's Finding of Association is Inconsistent with Article 2.3 of the Anti-Dumping Agreement

32. As a general rule, an investigating authority must make a dumping determination based on the normal value and the export price of the product exported from one country to another. Article 2.3 permits the investigating authority to disregard export prices when: (i) an association or compensatory arrangement exists between the exporter and the importer/third party; and (ii) it appears to the investigating authority that the export prices are unreliable because of that association or compensatory arrangement.

33. The USDOC improperly disregarded NEXTEEL's sales prices to its customer, a Korean trading company ("Customer"), and instead constructed an export price based on the Customer's price to its own U.S. customer. The USDOC's decision was based on an erroneous determination that NEXTEEL was "associated" with its supplier, POSCO, because it was reliant on POSCO, giving POSCO "control" over NEXTEEL. The USDOC found that POSCO was "operationally in a position to exercise restraint or direction over NEXTEEL in a manner that affects the pricing, production, and sale of OCTG". However, in conducting its analysis, the USDOC replaced the requirement to find "control" based on "restraint or direction" with a much less stringent standard. Furthermore, realizing that POSCO, as a raw materials supplier, could only affect NEXTEEL's costs and not its sales prices, the USDOC reasoned that POSCO exercised control over NEXTEEL's sales prices based on the "combination of {POSCO's} involvement on both the production and sales side" by virtue of POSCO's affiliation with the Customer. However, the USDOC did not find that NEXTEEL was "reliant" on the Customer for its U.S. sales. Rather, the USDOC simply noted that a majority of NEXTEEL's sales were made to the Customer, and automatically assumed that POSCO and the Customer were in a position to control NEXTEEL's export price based on the Customer's relationship with POSCO. Thus, the USDOC's conclusion that POSCO controlled NEXTEEL's export price was not based on an objective assessment of whether either POSCO or the Customer was *in fact* in a position to control NEXTEEL's pricing.

34. Finally, the USDOC ignored evidence on the record demonstrating that NEXTEEL was not reliant on POSCO for its raw material supply, and did not even conduct any meaningful analysis of whether NEXTEEL's sales price to the Customer was "unreliable," as it was required to do before it could disregard NEXTEEL's export prices under Article 2.3. Rather, the USDOC assumed that the export price was unreliable simply by virtue of the Customer's relationship with POSCO. Therefore, the USDOC's disregard of NEXTEEL's export price is inconsistent with Article 2.3 of the Anti-Dumping Agreement.

D. The USDOC Improperly Disregarded NEXTEEL's Costs in Violation of Article 2.2.1.1 of the Anti-Dumping Agreement

35. Article 2.2.1.1 requires that, in calculating a producer's cost of production, "costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation", provided that: (1) such records are in accordance with the generally accepted accounting principles of the exporting country; and (2) reasonably reflect the costs associated with the production and sale of the product under consideration.

36. Having improperly found that NEXTEEL was affiliated with POSCO, the USDOC disregarded NEXTEEL's own records with respect to the price it paid POSCO for raw materials and applied calculated prices for these raw materials. However, the record demonstrates that NEXTEEL kept its records in accordance with the generally accepted accounting principles of Korea. Moreover, the USDOC's decision to disregard NEXTEEL's own cost data was based on an erroneous determination that NEXTEEL was affiliated with POSCO, as explained above.

37. Because the USDOC's determination of affiliation was improper and such determination was the sole basis provided by the USDOC to disregard NEXTEEL's costs, it follows that the USDOC acted inconsistently with its obligation under Article 2.2.1.1.

E. Procedural Claims

38. Article 6.2 of the Anti-Dumping Agreement requires investigating authorities to ensure that "all interested parties shall have a full opportunity for the defence of their interests," while Article 6.4 requires investigating authorities to provide "timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases … and to prepare presentations on the basis of this information". The Appellate Body in *EC – Tube or Pipe Fittings* clarified that whether certain information is "relevant" is not determined by the investigating authority. Moreover, the panel in *EC – Salmon (Norway)* explained that information that the investigating authority considers during the course of the anti-dumping investigation presumptively falls within the scope of Article 6.4. Finally, Article 6.9 requires investigating authorities to, "before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures".

39. Tenaris' Annual Report constituted "relevant" information under Article 6.4 as the USDOC did, in fact, use the data to calculate the Korean respondents' dumping margins. By failing to address the Korean respondents' objections and delaying a ruling on the matter until the Final Determination, the USDOC failed to provide respondents with a full opportunity to defend their interests and prepare presentations based on relevant information, as required under Articles 6.2 and 6.4. Furthermore, whether the USDOC would accept the placement of the Tenaris financial statements on the record constituted an "essential fact" under Article 6.9. The financial statements were clearly "under consideration" and an "essential fact" that formed the basis of the USDOC's determination, as evidenced by the USDOC's decision to rely on the financial data to impose anti-dumping duties on Korean respondents. Therefore, the USDOC was obligated to disclose the fact that it was accepting Tenaris' Annual Report on the record before the Final Determination, in accordance with Article 6.9.

40. The USDOC also failed to comply with its obligations under Articles 6.4 and 6.9 with respect to the disclosure of several *ex parte* communications on the administrative record. It was not until the Korean respondents demanded that USDOC provide the correspondence that USDOC disclosed a large amount of correspondence between USDOC officials and representatives from the U.S. government and domestic industry on behalf of petitioners. These documents included a letter addressed to the Secretary of Commerce signed by 57 U.S. Senators, and a separate letter addressed to the Secretary signed by 155 House Representatives, evidencing extreme political pressure focusing specifically on the issue of CV profit.

41. The various letters sent to the Secretary of Commerce by prominent members of the U.S. Congress and by industry leaders constituted "relevant" information used by the investigating authorities under Article 6.4, as well as "essential facts under consideration" that formed the basis for the USDOC's decisions under Article 6.9. Because the USDOC did not disclose these *ex parte* communications in sufficient time before the Final Determination for respondents to defend their interests, it violated Articles 6.4 and 6.9.

42. Finally, the USDOC failed to comply with its obligations under Article 12.2.2, which requires public notices of the conclusion of an investigation to contain "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures". These public notices must include "the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers". As described above, the USDOC failed to address the Korean respondents' arguments regarding the inappropriateness of using Tenaris' financial data to calculate the Korean respondents CV profit rate in light of the substantial differences between the companies. In addition, the USDOC's determination regarding the "same general category of products" focused only on the differences in physical characteristics between OCTG, line pipe, and standard pipe, and failed to address the arguments raised by the Korean respondents. Finally, the USDOC analysis regarding the alleged association between NEXTEEL and POSCO simply ignored extensive arguments presented by NEXTEEL contradicting allegations by petitioners, in violation of Article 12.2.2.

F. The USDOC's Limitation of Mandatory Respondents and Failure to Consider Information Submitted by Voluntary Respondents is Inconsistent with Article 6.10 of the Anti-Dumping Agreement

43. Article 6.10 requires that investigating authorities determine an individual dumping margin for each known exporter or producer of the subject merchandise, and only permits deviation from this rule when the number of exporters/producers is so large that individual determination would be "impracticable". Even when limiting its investigation, Article 6.10.2 obligates the investigating authority to determine individual dumping margins for voluntary respondents that provide timely information. The investigating authority is relieved of this obligation only when "the number of exporters or producers is so large that individual examinations would be unduly burdensome to the authorities and prevent the timely completion of the investigation".

44. Although the USDOC discussed at length its limitations in examining all identified exports, it failed to provide any explanation of why it considered only two respondents to be a "reasonable number", or why it would not be reasonable to examine any additional respondents. Moreover, although Husteel, ILJIN, and SeAH timely submitted voluntary responses to the USDOC's questionnaire, the USDOC declined to consider these responses citing to various resource constraints not limited to the immediate investigation. Because the USDOC did not adequately

explain why it could not consider additional mandatory or voluntary responses, it failed to comply with its obligations under Article 6.10.

G. The United States' Measures are Inconsistent with Articles 1, 9.3, and 18.4 of the Anti-Dumping Agreement

45. As discussed above, the anti-dumping duties calculated by the USDOC in this case derived from an erroneous and impermissible application of Article 2 that resulted in an artificially high dumping margin, in violation of Article 9.3. Moreover, the panel in *China – HP-SSST (Japan)/China – HP-SSST (EU)* confirmed that a violation of a substantive claim will consequentially result in a violation of Article 1. Finally, the U.S. viability test constitutes a law or regulation that is not in conformity with the Anti-Dumping Agreement, demonstrating that the United States has failed to take all necessary measures to ensure conformity of its measures with the Antidumping Agreement, thereby acting inconsistently with Article 18.4.

H. The United States' Measures are Inconsistent with Article VI of the GATT 1994 and Article XVI:4 of the WTO Agreement

46. The panel in *China – HP-SSST (Japan)/China – HP-SSST (EU)* likewise found that violation of other provisions of the Anti-Dumping Agreement consequentially resulted in a violation of Article VI. Accordingly, this Panel should find that, in violating its obligations under the Anti-Dumping Agreement, the USDOC also failed to comply with its obligations under Article VI of the GATT 1994. Furthermore, to the extent the challenged measures are inconsistent with the Anti-Dumping Agreement and Article VI of the GATT 1994, the United States has failed to comply with Article XVI:4 of the WTO Agreement.

I. The United States Failed to Comply with Fundamental Obligations of the GATT 1994

47. Article I:1 of the GATT 1994 requires that "any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties". The USDOC's relatively lenient treatment of the products from other country respondents in parallel investigations of OCTG imports compared to its treatment of products from Korean respondents resulted in an "advantage, favour, privilege, or immunity" that was not granted to OCTG products originating in Korea. Moreover, the USDOC discriminated against the products from Korean respondents in the underlying investigation by providing an opportunity for respondents in the Turkey investigation to provide comments on the Tenaris financial statements, while no such opportunity was afforded to Korean respondents.

48. The USDOC's conduct is also inconsistent with Article X:3(a) of the GATT 1994, which requires WTO Members to administer laws, regulations, decisions, and rulings in a "uniform, impartial, and reasonable manner". The USDOC's administration of its laws and regulations was not uniform because it reversed decades of past practice with no justification for its departure, and also afforded inconsistent treatment of the Tenaris Annual Report between its anti-dumping investigations of Korea and Turkey. In its Final Determination, the USDOC dramatically and inexplicably changed its approach to CV from past practice as well as the Preliminary Determination after unprecedented political pressure from the U.S. domestic industry and U.S. Congress that specifically focused on the use CV profit, thereby suggesting that the USDOC's administration of its laws and regulations was not impartial. Finally, the use of Tenaris' financial data as a CV profit source required a drastic departure from USDOC's past practices and no rational justification was provided for the sudden change in practice, which indicates that the USDOC's administration of its laws and regulations was not reasonable.

IV. CONCLUSION

49. For the reasons set forth above, Korea requests that the Panel recommend that the United States bring its measures into compliance with the Anti-Dumping Agreement, the GATT 1994, and the WTO Agreement.

ANNEX B-2

EXECUTIVE SUMMARY OF THE ORAL STATEMENTS OF KOREA
AT THE FIRST PANEL MEETING

EXECUTIVE SUMMARY OF KOREA'S OPENING STATEMENT

I. INTRODUCTION

1. There was no basis in this case to apply anti-dumping duties on imports of oil country tubular goods, or "OCTG," from Korea. This was indeed the conclusion of the United States Department of Commerce ("USDOC") in its Preliminary Determination, before it was put under tremendous political pressure from members of the U.S. Congress and the domestic industry to change its conclusion in its Final Determination.

2. What followed after the Preliminary Determination was a politically-motivated, results-oriented investigation, in which USDOC deviated from its own practices, violated respondents' due process rights, and ignored the obligations of the AD Agreement, in an effort to find the positive dumping margin required to impose anti-dumping measures.

3. The USDOC achieved the result demanded by members of the U.S. Congress and the domestic industry by relying on an improperly high constructed value profit rate, or "CV profit". The CV profit source that the USDOC used did not reflect profits in the exporting country and was derived from a company—Tenaris—that sells premium products with a profit margin three times higher than the profit margin initially alleged by petitioners.

4. However, the USDOC could not simply use the Tenaris data. Instead, it had to reason backward and first lay the groundwork to use such data. USDOC did so by adopting an excessively narrow definition of the "same general category of products" that precluded from consideration other data source on the record. The USDOC's overly narrow definition of the "same general category of products" in this case, its improper dismissal of other data, and its ultimate use of the Tenaris data are all actions that were inconsistent with the United States' obligations under the AD Agreement.

5. Korea also challenges, in these proceedings, the "U.S. Viability Test", which imposes an overly rigid threshold that is not permissible under Article 2.2 of the AD Agreement.

II. THE U.S. VIABILITY TEST IS INCONSISTENT WITH ARTICLE 2.2 OF THE AD AGREEMENT

6. The U.S. Viability Test for third-country markets is "as such" inconsistent with Article 2.2 of the AD Agreement. Article 2.2 sets out the circumstances under which the sales price in the home market may not be an appropriate option for normal value. When these circumstances are met, the AD Agreement permits an investigating authority to calculate normal value based on either: (1) the comparable price of the like product exported to an *appropriate* third country, provided that this price is *representative*, or (2) the constructed normal value.

7. Under U.S. law, the USDOC may use third-country sales only where three cumulative requirements are met: (i) the third-country sales price is representative; (ii) the quantity or value of sales to the third-country market meets a five percent threshold; and (iii) no "particular market situation" exists.

8. As should be immediately apparent, the requirement in U.S. law that the quantity or value of sales to the third-country market must meet a five percent threshold is not found in Article 2.2 or elsewhere in the AD Agreement. The establishment in U.S. law of this additional requirement is inconsistent with Article 2.2 of the AD Agreement, which does not contemplate such a rigid quantitative rule to determine whether third-country sales should be used to calculate normal value.

9. Korea also challenges the U.S. Viability Test for third-country markets "as applied" in the OCTG investigation. The application of the Viability Test in the underlying antidumping proceeding is shown clearly in the Section A questionnaire that the USDOC issued to the mandatory respondents. The Section A questionnaire specifically instructed the Korean respondents not to report third-country market sales if those sales were "less than five percent of the volume of your sales to the United States". Thus, the USDOC applied the rigid U.S. Viability Test through its questionnaire and precluded respondents from submitting third-country market data that did not meet the strict five percent threshold..

III. THE OCTG INVESTIGATION

A. The USDOC's Use of Constructed Value in the OCTG Investigation is Inconsistent with the Anti-Dumping Agreement

10. In its Final Determination, the USDOC used the profit rate of Tenaris to calculate the CV profit rate applicable to the Korean respondents. This was inconsistent with the United States' obligations because the USDOC: (1) impermissibly disregarded the respondents' actual data for calculating profits under the preferred method provided in the chapeau of Article 2.2.2; (2) applied an overly narrow definition of "same general category" of products under Articles 2.2.2(i) and 2.2.2(iii); (3) disregarded its obligation to calculate a "profit cap" under Article 2.2.2(iii); (4) failed to comply with the "reasonable method" requirement of Article 2.2.2(iii); and (5) ignored the differences between Tenaris and the Korean respondents, thereby failing to ensure a fair comparison between the export price and constructed normal value under Article 2.4.

B. The USDOC's Finding of Association is Inconsistent with Article 2.3 of the AD Agreement

11. Article 2.3 permits the investigating authority to disregard export prices if the investigating authority finds an "association" between the exporter and importer or a third party. Although the AD Agreement does not directly define the term "association," the definition of "relationship" enshrined in footnote 11 of the Agreement provides interpretive guidance. An examination of the U.S. statute shows that the United States itself has adopted the definition of "relationship" contained in footnote 11 to define "affiliation" in the context of an anti-dumping proceeding.

12. The USDOC's determination of affiliation in its Final Determination was erroneous because the USDOC did not examine whether POSCO was in a position to "exercise restraint" over NEXTEEL, but rather determined only that POSCO was in a position to **[[***]]** NEXTEEL. Because the USDOC used an erroneous standard for determining association, its decision must be rejected.

13. The USDOC's assessment of the facts was also flawed. While the USDOC relied on arguments that NEXTEEL maintained a robust business relationship with POSCO, and that NEXTEEL purchased a large portion of its raw material input from POSCO, these facts do not establish that POSCO was in a position, legally or operationally, to exercise restraint or direction over NEXTEEL's pricing of exported OCTG as required to find an "association" under Article 2.3. Rather, they demonstrate relationships that are common among suppliers and customers that seek to maintain positive business relations.

14. Moreover, even assuming that footnote 11 did not apply under Article 2.3, the USDOC's decision to disregard NEXTEEL's export price to its Customer is still inconsistent with the requirements of the latter provision. In this case, the USDOC's analysis of "association" focused on the relationship between NEXTEEL and its supplier, POSCO. The USDOC then automatically deemed the export price to be unreliable, not because of NEXTEEL's association with "the importer or a third party," but based on *POSCO's relationship with NEXTEEL's Customer.* Finally, Korea notes that the USDOC's determinations were based on a static analysis.

C. The USDOC Improperly Disregarded NEXTEEL's Costs in Violation of Article 2.2.1.1

15. The USDOC also acted inconsistently with Article 2.2.1.1 of the AD Agreement by improperly disregarding NEXTEEL's own cost data and relying, instead, on POSCO's cost data to calculate constructed value. The record demonstrates that NEXTEEL kept its records in accordance with the generally accepted accounting principles of Korea, as required under Article 2.2.1.1. Moreover, the

USDOC did not make any finding that NEXTEEL's costs did not reasonably reflect the costs associated with the production and sale of the product under consideration.

D. Procedural Claims

16. The USDOC only accepted Tenaris's financial statements into the administrative record when it issued its Final Determination, thereby denying respondents an ample and full opportunity to defend their interests contrary to Article 6.2 of the AD Agreement. Second, in contravention of Article 6.4, the USDOC failed to "provide timely opportunities to … see the information … that is used by the authorities … and to prepare presentations on the basis of this information". Third, the USDOC did not comply with the requirements of Article 6.9. Whether the Tenaris financial statements were properly on the record was an "essential fact" in that it defined the universe of sources that the USDOC was considering for its determination of CV profit. Because the USDOC did not disclose this fact until the Final Determination, the respondents did not have a complete view of the "facts" that the USDOC considered relevant in its CV profit determination, and were unable to fully formulate arguments against its use.

17. The USDOC also improperly withheld from the Korean respondents various *ex parte* communications received between the Preliminary and the Final Determinations in violation of Articles 6.4 and 6.9. In addition, several aspects of the USDOC's determinations and disclosures did not meet the AD Agreement's requirement for disclosure of all relevant information leading to the imposition of final measures, as required under Article 12.2.2.

E. The USDOC's Limitation of Mandatory Respondents and Failure to Consider Information Submitted by Voluntary Respondents is Inconsistent with Article 6.10

18. The USDOC's Respondent Selection Memo did not establish why it would be impracticable to examine all known producers and exporters or to consider any of the voluntary responses on the record submitted by non-selected respondents. Also, the USDOC failed to explain why selecting only two mandatory respondents was "reasonable".

F. The USDOC's Conduct is Inconsistent with Article X:3(a) of the GATT 1994

19. The USDOC acted inconsistently with Article X:3(a) of the GATT 1994 because it failed to administer its laws and regulations in a uniform, impartial, and reasonable manner.

EXECUTIVE SUMMARY OF KOREA'S CLOSING STATEMENT

20. The United States has failed both in its written submission and in its presentations over the last two days to demonstrate that its laws allow the USDOC to do anything other than automatically apply a 5 percent threshold, the so-called Viability Test, to third country sales. U.S. law only permits the USDOC to use third-country sales prices to calculate normal value when the aggregate quantity or value of the foreign like product sold by the exporter or producer in the third country is *5% or more* of the aggregate quantity or value of the subject merchandise sold to the United States. Therefore, as a rule, U.S. law requires the USDOC to disregard third country sales when they do not meet the Viability Test.

21. Turning now to the USDOC's use of constructed value, the United States' interpretation applies a viability test that does not exist in the first sentence of Article 2.2.2, as a precondition to using actual data under the preferred method. Further, the United States argues that the Korean exporters did not sell any OCTG in their home market. This statement is contradicted by the record, which clearly shows that the Korean exporters sold non-prime OCTG.

22. The USDOC adopted an overly narrow definition of "same general category of products". The USDOC defined the "same general category of products" more narrowly than even the scope of the investigation, which includes products that cannot be used for down-hole applications. As the United States has admitted, this is not permissible – the "same general category" must be broader than the like product.

23. Despite the plain text of Article 2.2.2(iii) of the AD Agreement, which states that "the amount for profit so established *shall* not exceed the profit normally realized by other exporters or

producers on sales of products of the same general category in the domestic market of the country of origin", the United States argues that the USDOC's decision not to apply a profit cap was consistent with Article 2.2.2(iii). However, the United States again is effectively deleting an entire phrase from the Agreement. The United States admits that the USDOC failed to apply a profit cap, but claims that it was justified in doing so because the necessary data to calculate a profit cap was not on the record. This is factually incorrect, as the Korean exporters provided all the necessary data with which USDOC could calculate the profit cap.

24. The USDOC's reliance on the Tenaris financial statement was inconsistent with Article 6.9. The USDOC's actual use of the Tenaris financial statements as a CV profit source was also inconsistent with the purpose of the subparagraphs of Article 2.2.2 because the Tenaris financial statements do not reflect products in the same general category of the "domestic market of the country of origin". The United States cannot point to any evidence that Tenaris had any meaningful activity in Korea, nor does it consider whether Tenaris had any connection with Korea as relevant.

25. Article 2.3 prescribes two separate requirements, namely, a finding of association and a finding of unreliability of the export price. Meeting the first requirement does not automatically satisfy the second requirement, as the United States argues. In this case, the USDOC did not conduct any assessment of whether the export price was unreliable. Second, Article 2.2.1.1 is concerned with the reliability of the *records* examined, not the appropriateness of the *costs* that those records reflect. There is nothing on the record to indicate that NEXTEEL's actual records associated with raw materials used to produce OCTG were inaccurate or unreliable.

26. Finally, Korea respectfully requests that the Panel rule on the Remand Redetermination as part of this dispute, as the USDOC's Remand Redetermination is inconsistent with the United States' obligations under the AD Agreement. Korea notes that a WTO panel has previously found it appropriate to include in its examination the USDOC's remand redetermination.

ANNEX B-3

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF KOREA

I. INTRODUCTION

1. By adopting the Anti-Dumping Agreement, the United States made a commitment to refrain from imposing anti-dumping measures except when the existence of dumping and its injurious effects are properly demonstrated after an unbiased investigation in which the due process rights of exporters are respected. In this case, the United States did not abide by this commitment. After the negative preliminary determination, the investigation turned into a politically-motivated, results-driven process in which the obligations of the Anti-Dumping Agreement were set aside in the interest of arriving at an affirmative dumping determination and the highest margins possible.

2. In its submissions, Korea has demonstrated that the USDOC made a 180 degree turn as to the usefulness of Tenaris's profit rate and how it withheld this decision from the respondents until the very end of its investigation. Moreover, the USDOC reasoned backwards using an arbitrary definition of "same general category of products" in order to improperly discard other sources of constructed value ("CV") profit. Remarkably, the USDOC went so far as to define the "same general category of products" more narrowly than the product scope of the investigation.

3. Article 2.1 of the Anti-Dumping Agreement provides that a product is "dumped" when it is "introduced into the commerce of another country at less than its normal value," that is, "if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country". This definition of dumping is unrecognizable in the USDOC's final determination in this case. Rather than comparing prices in the United States to prices in Korea, the USDOC compared prices in the United States to the prices of Tenaris, a producer organized under the laws of Luxembourg, with no demonstrated production or sales of OCTG in Korea, and with ties to one of the U.S. petitioners. The determination made by the USDOC therefore is not a determination of "dumping", at least as this concept is defined in the Anti-Dumping Agreement.

II. THE U.S. VIABILITY TEST IS INCONSISTENT "AS SUCH" AND "AS APPLIED" WITH ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT

4. U.S. law-particularly, Title 19, section 1677b(a)(1)(B) of the United States Code-only permits the USDOC to use third-country sales to calculate normal value if the aggregate quantity or value of the foreign like product sold by the exporter or producer in the third country *is 5% or more* of the aggregate quantity (or value) of the subject merchandise sold in the United States or for export to the United States. This five percent threshold, which Korea has referred to as the "U.S. Viability Test", is "as such" inconsistent with Article 2.2 of the Anti-Dumping Agreement, because no such rigid, quantitative threshold is contemplated for third-country sales in the Anti-Dumping Agreement.

5. The United States does not dispute that its statute imposes a strict five percent threshold for third party sales. Instead, the United States has argued that the use of the term "normally" in the regulations implementing the statute overrides the statute and permits the USDOC to use third-country sales that do not meet the five percent threshold.

6. Under U.S. law, however, statutes are hierarchically superior to regulations adopted by administering agencies. Moreover, the term "normally" in the regulations only pertain to the use of home market sales. In contrast, the regulations pertaining to the use of third-country sales reference the statute, confirming that the regulations are subject to the strict five percent threshold established by the statute.

7. The United States also fails in its attempt to rely on the Statement of Administrative Action ("SAA"). The SAA is an interpretive tool that cannot change the meaning of, or override, the statute. Moreover, the text of the SAA confirms that sales to the third country *must not be less*

than five percent of sales to the United States, and it distinguishes the viability requirements for the home market from the viability requirement for third-country markets.

8. Korea has further demonstrated that the USDOC's practice confirms its own understanding that third-country sales must meet a five percent threshold. The USDOC has never deviated from the five percent threshold in the past sixteen years, and the instructions contained in the USDOC's standard questionnaire template do not permit respondents to submit third-country sales data unless these sales meet the strict five percent threshold.

9. The United States has also suggested that Article 2.2 does not prohibit Members from considering the volume of sales in assessing the appropriateness of third-country sales. Nonetheless, the term "appropriate" in Article 2.2 qualifies the *third country* to which a like product is exported, not the *volume* of exports to that third country. Thus, the volume of sales to a third country does not determine whether the third country itself is an "appropriate" comparison market.

10. Nor is the United States correct in that the U.S. Viability Test is justified by the fact that Article 2.2 does not require the use of third-country sales, but rather, presents the use of third-country sales as one of two options. Under the United States' theory, statutes or regulations implementing alternative approaches set out in the Anti-Dumping Agreement could never be challenged "as such" regardless of how far they deviate from a Member's obligations under the Anti-Dumping Agreement. Such a situation cannot be reconciled with the obligation in Article 18.4 of the Anti-Dumping Agreement that "[e]ach Member shall take all necessary steps, of a general or particular character, to ensure … the conformity of its laws, regulations and administrative procedures". 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. Like Article 2.2, Article 2.4.2 does not establish a hierarchy between the first two options. Despite the existence of a choice of methodologies and the absence of a hierarchy between the first two options, the use of zeroing has been found to be "as such" inconsistent with Article 2.4.2.[1]

11. For these reasons, the U.S. Viability Test is "as such" inconsistent with Article 2.2 of the Anti-Dumping Agreement. Korea has demonstrated that the U.S. Viability Test was applied in the investigation of OCTG from Korea. As a result, its application by the USDOC in the investigation of OCTG from Korea also violates Article 2.2 of the Anti-Dumping Agreement.

III. THE USDOC'S FAILURE TO USE ACTUAL DATA IN THE CALCULATION OF CONSTRUCTED VALUE IS INCONSISTENT WITH THE CHAPEAU OF ARTICLE 2.2.2

12. The use of the term "shall" in the chapeau of Article 2.2.2 makes clear that, when constructing normal value, authorities must use the producer/exporter's actual data for SG&A and profit, whenever such data is available. The United States does not dispute that the USDOC did not use actual profit data, but it argues that the USDOC was not required to do so.

13. First, the United States incorrectly argues that the chapeau only applies in situations where the home market is viable but does not contain "like" products that are identical or similar to the exporter merchandise. However, the Appellate Body in *EC – Tube or Pipe Fittings* confirmed that low-volume sales that are dismissed as a basis for calculating normal value under Article 2.2 cannot be dismissed as a source of actual data for the purposes of calculating constructed value under the chapeau of Article 2.2.2. Moreover, the United States is not permitted to unilaterally limit the utility of the chapeau to an arbitrarily defined subset of a "like product" that is neither identical nor similar to the product under consideration.

14. Second, the United States erroneously argues that it did not have information on the record from which it could derive actual profit data for the Korean respondents, because the home market profit data provided by both respondents derived from non-prime OCTG, which the United States argues is not a "like product". The United States' position is undermined by the USDOC's determination in its parallel investigation of *OCTG from Ukraine* that "rejects", which are equivalent to "non-prime" OCTG, were "like" products as defined by the scope of the investigation.

[1] See Appellate Body Report, *US – Zeroing (EC)*, para. 222; Appellate Body Report, *US – Zeroing (Japan)*, paras. 137-138.

As scope definitions apply equally to all investigations initiated based on the same petition (application), the USDOC's scope determination in the Ukraine case applies to the Korea case.

15. Third, the United States mistakenly claims that the Article 2.2.2 chapeau does not contemplate the use of third-country profit data, as this would render the "preferred" method under the chapeau broader than the "alternative" methods under Article 2.2.2(i) and (ii). However, the subparagraphs of Article 2.2.2 operate to encompass certain data sources *in addition to* the data source available under the preferred method, *not to substitute for* the chapeau's data scope. Therefore, the use of the alternative methods inevitably results in a broadening of the data in comparison to the preferred method of the chapeau.

16. The United States' also grossly exaggerates the administrative burden of using third-country data. In any event, the USDOC in the underlying investigation did not decline to use the chapeau because it would be too burdensome but because it found that no viable home or third-country market was available. Moreover, an investigating authority cannot be discharged of its duties under the Anti-Dumping Agreement simply because it is faced with certain practical difficulties.

17. Fourth, the United States' claim that **[[***]]** profit rates cannot be used as a source of CV profit under the Article 2.2.2 chapeau is incorrect. Constructed value calculated under Article 2.2.2 is intended to approximate sales of the like product in the domestic market or third country market under Article 2.2. There may be situations where actual sales data in a domestic market or third country market show that the exporter has sold products at a **[[***]]**. Article 2.2.1, on which the United States relies to support its argument, does not stand for the proposition that **[[***]]** sales should be disregarded. Rather, Article 2.2.1 provides that **[[***]]** sales may only be disregarded in limited instances where several other requirements are met.

18. Fifth, the United States fails to explain the basis for using the Korean respondents' actual data for SG&A while declining to use actual data to calculate profit. Article 2.2.2 does not provide for differential treatment between SG&A and profit, but rather, requires that the investigating authority use actual data with respect to both. Furthermore, even though certain aspects of SG&A may appear not to be specific to a particular product, such non-specific costs must eventually be allocated to a particular product for the purpose of calculating the amount of constructed value for that specific product. In this sense, all SG&A, as well as profit, are specific to particular products.

IV. THE USDOC'S USE OF CV PROFIT IS INCONSISTENT WITH ARTICLE 2.2.2 BECAUSE ITS DEFINITION OF THE "SAME GENERAL CATEGORY OF PRODUCTS" WAS IMPERMISSIBLY NARROW

19. Korea has demonstrated that the USDOC's decision to use Tenaris's financial statements as a CV profit source was based on an impermissibly narrow interpretation of the "same general category of products" under Article 2.2.2. The United States tries to defend the USDOC's determination by interpreting the "same general category of products" to mean that products must have the same characteristics as those of the subject merchandise. However, the term "same" modifies "general category" and not "products," requiring two products to both belong to a "general category," but not requiring these products to be the "same". Thus, the USDOC applied an incorrect standard in defining the scope of the "same general category" of products.

20. The USDOC's decision to exclude line and standard pipe from OCTG's "same general category" also relies on its misplaced distinction between the purposes of OCTG pipes and non-OCTG pipes. The USDOC improperly found that non-OCTG pipes such as line and standard pipes cannot fall within the "same general category" as OCTG because line and standard pipes are "primarily intended for the conveyance of fluids and gases", whereas OCTG is intended for "down hole application". However, "conveyance of fluids and gases" is the purpose of not only line pipe and standard pipe, but also of OCTG.

21. The USDOC's determination is also flawed because the definition of the "same general category of products" in this case is even narrower than the definition of "like products" used in the scope language. In defining the "same general category of products", the USDOC improperly focused on whether the products could be used for down hole applications. However, as described above, the "like product" also included "rejects," *i.e.*, pipes that could not be used for down hole applications.

22. Furthermore, even under the United States' overly-narrow definition (which includes "limited service" OCTG that can be used in some down hole applications), line pipe should be included in the same general category of products as OCTG as it can be used for some down hole applications.

23. Finally, the United States refers to the panel report in *Thailand – H-Beams*, which allegedly relied on Article 3.6 of the Anti-Dumping Agreement for contextual support to conclude that use of a narrower rather than a broader category is permitted. Article 3.6 states that, when "like product" data is not available, the authority may assess the effects of the dumped imports by an examination of "the narrowest group or range of products, which includes the like product, *for which the necessary information can be provided*". Thus, even under the "narrowest group or range of products" standard, the database must still be broadened so that "the necessary information can be provided". By expanding the "same general category" to include only non-subject OCTG and drill pipe, the USDOC did not expand the database *at all*.

V. THE USDOC'S USE OF TENARIS'S FINANCIAL STATEMENTS TO CALCULATE CV PROFIT IS INCONSISTENT WITH ARTICLE 2.2.2(iii)

24. Article 2.2.2(iii) permits the investigating authority to calculate CV profit based on "any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin, *i.e.*, "the profit cap". The United States acted inconsistently with its obligations under Article 2.2.2(iii) because the USDOC did not calculate a profit cap and did not ensure the reasonableness of its method of calculating CV profit.

25. First, as confirmed by the panel in *EU – Footwear*, the calculation of a profit cap is mandatory. The USDOC acted inconsistently with Article 2.2.2(iii) in the underlying investigation by failing to calculate a profit cap.

26. Second, in using Tenaris's financial statements, the USDOC failed to ensure that its method for calculating CV profit was reasonable under Article 2.2.2(iii). As the Korean respondents pointed out in the underlying investigation, there are various differences between Tenaris and the Korean respondents that render the profit rates incomparable, including differences in products and business model, scale of production, and position in the distribution chain. In addition, Tenaris's profit rates reflected revenue generated from its sale of *services*, as opposed to *goods*, as well as Tenaris's sales of non-tubular products.

27. Third, the USDOC's use of Tenaris's financial statements was not rationally directed at approximating what the Korean respondents' profit margin for the like product would have been in Korea, as required to constitute a "reasonable method" according to the panel in *EU – Biodiesel*. Rather, the USDOC chose to only satisfy the requirement to approximate the "like product", while disregarding the requirement to approximate the profit margin as if the products had been sold in the ordinary course of trade in Korea.

28. In addition, Korea requests that this Panel find that the remand redetermination issued by the USDOC in the underlying investigation is inconsistent with the United States' WTO obligations not only because it did not rectify the inconsistencies identified above by Korea, but also because it calculates and applies a profit cap that is in itself inconsistent with Articles 2.2 and 2.2.2(iii) of the Anti-Dumping Agreement.

VI. THE USDOC FAILED TO CONDUCT A FAIR COMPARISON UNDER ARTICLE 2.4

29. Korea has provided extensive explanations of the differences between Tenaris and the Korean respondents that affected price comparability between the normal value incorporating Tenaris's profit rate and the export price incorporating the Korean respondents' own data. The USDOC did not make due allowances for these differences, thus failing to conduct a "fair comparison" under Article 2.4. The USDOC simply dismissed these differences once it determined that "the merchandise produced and sold by Tenaris is predominantly the same as the merchandise under consideration". Thus, rather than examining price comparability in light of the differences raised by the Korean respondents, the USDOC found it *unnecessary to do so* once it had reached its erroneous determination that approximating the "like product" was sufficient to fulfill its obligations in selecting a CV profit source.

VII. THE USDOC'S FINDING OF ASSOCIATION UNDER ARTICLE 2.3 WAS IMPROPER

30. The USDOC's determination that NEXTEEL and POSCO were affiliated was not in accordance with Article 2.3 because it was not based on a proper assessment of whether POSCO was in a position to control, *i.e.*, exercise restraint or direction over, NEXTEEL. Rather, the USDOC applied an incorrect, looser standard to determine whether NEXTEEL and POSCO were associated. Moreover, based on an erroneous finding that NEXTEEL was affiliated with POSCO (and with the Customer through POSCO's relationship with the Customer), the USDOC automatically disregarded NEXTEEL's export price without conducting a separate assessment of the reliability of NEXTEEL's export price to the Customer.

31. The United States incorrectly argues that Article 2.3 only requires a finding of association, and does not require a separate assessment as to the reliability of the export price in order for an authority to construct export price. The United States' interpretation reads out an explicit requirement in Article 2.3 that the "export price is unreliable because of association ... between the exporter and the importer or a third party". The term "appear" in Article 2.3 does not leave the determination of unreliability completely up to the subjective perception of the authority. Such unfettered discretion would be contrary to the requirement stemming from Article 17.6(i) of the Anti-Dumping Agreement that investigating authorities' determination be based on positive evidence and a reasoned and adequate explanation.

32. Furthermore, contrary to the United States' assertion that "NEXTEEL did not present evidence in support of an argument that NEXTEEL's export prices were reliable despite the existence of an association", NEXTEEL submitted abundant evidence that its export prices to the Customer were, in fact reliable, and simply a continuation of a pre-existing business relationship between NEXTEEL and the Customer that pre-dated any affiliation between POSCO and the Customer.

VIII. THE USDOC DID NOT EXAMINE THE RELIABILITY OF NEXTEEL'S COST RECORDS AS REQUIRED UNDER ARTICLE 2.2.1.1

33. Article 2.2.1.1 of the Anti-Dumping Agreement requires investigating authorities to calculate costs on the basis of records kept by the exporter or producer under investigation, where such records: (1) are in accordance with the generally accepted accounting principles of the exporting country; and (2) reasonably reflect the costs associated with the production and sale of the product under consideration. The two conditions set forth in Article 2.2.1.1 are modified by the term "such records," demonstrating that the purpose of the Article is to ensure the reliability of the *cost records*, and not the reliability of the *cost data*.

34. The USDOC's decision to disregard NEXTEEL's cost data is inconsistent with Article 2.2.1.1 because it is premised on an improper finding of affiliation between NEXTEEL and POSCO. Furthermore, even setting aside the USDOC's affiliation determination, the USDOC's decision to disregard NEXTEEL's actual cost data is impermissible under Article 2.2.1.1 because NEXTEEL kept its records in accordance with generally accepted accounting practices, and NEXTEEL provided the actual costs that it paid to POSCO for its purchases of raw materials used in the production of OCTG, ensuring that its cost records reflected the costs associated with the production and sale of the product under consideration. While the United States argues that the use of the term "normally" in Article 2.2.1.1 permits the investigating authority to deviate from the use of actual costs under circumstances beyond those described in Article 2.2.1.1, the panel in *EU – Biodiesel* has already rejected the approach proposed by the United States.

IX. THE USDOC'S LIMITED EXAMINATION OF MANDATORY AND VOLUNTARY RESPONDENTS IS INCONSISTENT WITH ARTICLE 6.10

35. Article 6.10 requires the authority to examine all known exporters and producers of the merchandise under investigation and only permits the authority to limit its investigation when the number of exporters/producers is "so large" that individual determination would be "impracticable". Moreover, Article 6.10 affords the authority only two methods of limiting its examination: (1) *a reasonable number* of interested parties or producers using statistically valid samples, or (2) *the largest percentage* of the volume of exports from the country in question

which can reasonably be investigated. In the underlying investigation, the USDOC improperly limited its investigation and improperly declined to examine voluntary responses.

36. In defending the USDOC's determination to limit its investigation, the United States relies on the USDOC's Respondent Selection Memorandum, which simply concludes that the number of potential respondents (ten) is "large relative to the resources available", but does not explain why the number is "so large" as to render individual examination impracticable. In particular, the USDOC's Respondent Selection Memorandum does not provide a reasonable explanation for its decision that it could only examine *two* mandatory respondents.

37. The USDOC's determination is flawed also because it applied an impermissible method in limiting its examination. While the United States claims that the USDOC limited its examination to the "largest *percentage* of the volume of the exports from Korea", the USDOC arbitrarily determined that it was only able to examine two respondents that accounted for the largest volume of imports of the subject merchandise. Thus, the USDOC selected what it determined to be the appropriate *number of respondents* that it was able to examine and selected these respondents in the order of import volume, rather than determining what the *largest percentage* of volume of exports that can reasonably be investigated would be.

38. Even when it justifiably limits its examination of mandatory respondents, Article 6.10.2 requires the investigating authority to calculate individual dumping margins for respondents not initially selected, as long as the respondents provide the necessary information to do so in a timely manner. The USDOC acted inconsistently with Article 6.10.2 by failing to examine any of the voluntary responses.

X. PROCEDURAL CLAIMS

A. The USDOC's Failure to Render a Decision on the Placement of Tenaris's Financial Statements on the Record Until the Final Determination Violated Articles 6.2, 6.4, and 6.9

39. The USDOC failed to protect the Korean respondents' due process rights under Articles 6.2, 6.4, and 6.9 because it did not render a decision on the placement of Tenaris's financial statements on the record until its final determination. The Korean respondents were not "on notice" that the USDOC could use Tenaris's financial data to calculate CV profit based on a separate student report about Tenaris submitted earlier by a petitioner. The Tenaris financial statements were submitted as a separate submission that petitioners did not claim had any relation to the student report, but rather, purported to rebut NEXTEEL's supplemental questionnaire response. Moreover, the financial statements were untimely, and therefore, not properly placed on the record.

40. The USDOC's failure to render a decision regarding the placement of Tenaris's financial statements on the record denied the Korean respondents an opportunity to submit information rebutting the contents of the Tenaris financial statements. The USDOC has strict deadlines for the submission of factual information, and absent an affirmative decision by the USDOC, the Korean respondents were not permitted to submit information upon which they could rely to defend their position.

41. In addition, the Tenaris profit data constitutes "essential facts" that the USDOC failed to disclose under Article 6.9. The United States errs in suggesting that it constitutes "reasoning or conclusion", because the acceptance of Tenaris's profit data defined the universe of sources that the USDOC was considering for its determination of CV profit.

B. The USDOC Failed to Protect the Korean Respondents' Due Process Rights Under Article 6.4 and 6.9 by Withholding Various *Ex Parte* Communications

42. The USDOC also failed to protect Korean respondents' due process rights under Articles 6.4 and 6.9 because it withheld numerous *ex parte* phone calls and meeting memos until long after the meetings and phone calls took place. The United States does not dispute that the memos were not disclosed in a timely manner, but questions why the letters were "relevant" to the presentation of the respondents' cases, and how they would have been "used" by the Department under

Article 6.4. The *ex parte* letters reflect the political pressure that the USDOC faced after calculating negative margins for the Korean respondents in the Preliminary Determination, and they also constitute the only factual element that has changed between the Preliminary Determination and the Final Determination that could explain the USDOC's about-face. The *ex parte* communications urged the USDOC to reconsider its decision on CV profit, the single issue that could convert the negative preliminary margin into a positive margin. Therefore, the *ex parte* memos constituted information that was relevant to the presentation of the respondents' cases and that would have been "used" by the USDOC under Article 6.4. The *ex parte* memos also constituted "essential facts" that the USDOC failed to disclose under Article 6.9, because they constituted information on the record that the USDOC considered in its decision to reverse its Preliminary Determination and find high affirmative margins in the Final Determination.

C. The USDOC's Final Determination Failed to Include All Relevant Information As Required Under Article 12.2.2

43. Article 12.2.2 of the Anti-Dumping Agreement requires an investigating authority to provide in a public notice all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures, including the reasons why it accepted or rejected arguments and claims made by the exporters in the investigation. Korea has demonstrated that the USDOC failed to comply with Article 12.2.2 because it did not provide the reasons for rejecting the Korean respondents' arguments regarding the inappropriateness of using Tenaris's financial statements as a CV profit source, and NEXTEEL's arguments that it was not affiliated with POSCO or the Customer. The United States points to two documents to argue that the USDOC did provide reasons for rejecting these arguments – the USDOC's Issues and Decision Memorandum and Affiliation Memo. However, the United States does not identify where in these documents it addressed the specific arguments advanced by the Korean respondents.

XI. VIOLATIONS OF THE GATT 1994

A. The USDOC Acted Inconsistently With Article I:1 of the GATT 1994

44. The USDOC treated OCTG from Korea less favorably than OCTG products from the territory of other Members subject to its parallel investigations, contrary to Article I:1 of the GATT. The United States does not contest that Korean OCTG products were treated differently by the USDOC. Rather, the United States attempts to relegate such differential treatment to simple "procedural differences between the parallel OCTG investigations" based on "different facts that arise in antidumping proceedings...". The United States' response is insufficient to rebut the *prima facie* case established by Korea. Specifically, the United States has failed to point to a single factual difference that explains the different treatment. Instead, the United States merely speculates that "several factors *may* have contributed to the treatment accorded to Korean companies and other foreign companies, which resulted in their particular antidumping rates". Such speculation is insufficient to meet the United States' burden to establish any "factual differences" that explained the differential treatment.

B. The USDOC Administered its Laws, Regulations, Decisions, and Rulings In a Manner that was Inconsistent with Article X:3(a) of the GATT 1994

45. The USDOC's conduct is also inconsistent with Article X:3(a) of the GATT 1994. Article X:3(a) seeks to ensure transparency and procedural fairness by requiring WTO Members to "administer in a uniform, impartial, and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article". Article X:1, in turn, covers "[l]aws, regulations, judicial decisions and administrative rulings of general application...". Korea has established a *prima facie* case that the USDOC failed to meet the requirements of Article X:3(a).

46. The United States does not rebut Korea's claim that the USDOC's application of its laws and regulations with respect to the Korean and Turkish respondents was not uniform, impartial or reasonable. Rather, the United States incorrectly argues that Korea's claim falls outside the scope of Article X:3(a) because Korea challenges the contents of the USDOC's determinations and because Korea allegedly did not identify the specific measures being administered. However, Korea's claim concerns the way that the USDOC has *administered* its anti-dumping laws and regulations, which are of general application. Korea has also identified the specific laws and

regulations that were improperly administered by the USDOC including the regulations relating to the submission and acceptance of new factual information, the laws and regulations governing the calculation of an anti-dumping duty margin, and the laws and regulations relating to the calculation of CV profit.

XII. CONSEQUENTIAL CLAIMS

47. The USDOC's failure to comply with the substantive and procedural requirements of the Anti-Dumping Agreement discussed above gives rise to consequential violations of the United States' obligations under Articles 1, 9.3, and 18.4 of the Anti-Dumping Agreement. The United States' violations of the Anti-Dumping Agreement also result in a violation of Article VI of the GATT 1994 and Article XVI:4 of the WTO Agreement. The United States does not dispute that these consequential findings would flow directly from the Panel's findings of inconsistency with respect to Korea's other claims.

XIII. CONCLUSION

48. For the reasons set out in this submission and in previous submissions, Korea respectfully requests that the Panel recommend that the United States bring its measures, including the USDOC's remand redetermination, into compliance with the Anti-Dumping Agreement, the GATT 1994, and the WTO Agreement.

ANNEX B-4

EXECUTIVE SUMMARY OF THE ORAL STATEMENTS OF
KOREA AT THE SECOND PANEL MEETING

EXECUTIVE SUMMARY OF KOREA'S OPENING STATEMENT

I. INTRODUCTION

1. In its previous submissions, Korea demonstrated that the U.S. Viability Test and the USDOC's imposition of anti-dumping duties with respect to OCTG from Korea are inconsistent with the United States' WTO obligations. In its Second Written Submission, the United States repeats many of the same arguments that it presented in its previous submissions, but fails to rebut Korea's arguments.

II. THE U.S. VIABILITY TEST IS "AS SUCH" AND "AS APPLIED" INCONSISTENT WITH ARTICLE 2.2 OF THE AD AGREEMENT

2. The U.S. Viability Test is inconsistent "as such" because it imposes a condition on the use of third-country sales as a basis for calculating normal value that is not allowed under Article 2.2 of the AD Agreement. It is also inconsistent "as applied" with Article 2.2 insofar as the USDOC applied the U.S. Viability Test in the underlying investigation.

3. The term "appropriate" in Article 2.2 does not justify the rigid volume test, as the term directly qualifies the "third country". Thus, Article 2.2 requires that the third country market itself be appropriate, which is distinct from the reference in Article 2.2 to the "volume of sales" as the relevant factor for determining whether to use the "sales" in the home market to calculate normal value. Article 2.2.1 of the AD Agreement also does not support the United States' argument because it does not relate to the appropriateness of a market, but addresses whether specific sales within a market may be excluded from the calculation of normal value. Similarly, any indices used to determine appropriateness of a market would have to relate to the market itself. In any event, the term "appropriate" implies a balancing test, and requires an assessment to be made on a case-by-case basis, as opposed to a rigid bright line rule.

4. The case at hand is analogous to *Mexico – Anti-Dumping Duties on Rice* and to previous challenges to the use of zeroing. Just as the authority imposed additional conditions on a respondent's right to an administrative review in *Mexico – Anti-Dumping Measures on Rice*, the U.S. Viability Test infringes on a respondent's right under Article 18.1 of the AD Agreement to be subject only to measures that are consistent with the AD Agreement. Also, as in the zeroing cases, the authority had a choice between two methodologies that were not subject to any hierarchy.

5. The United States also argues that the U.S. Viability Test is not mandatory. However, the plain language of the U.S. statute forbids the use of third-country sales to calculate normal value when these sales do not meet the five percent threshold. The USDOC's regulations cross-reference the statute, and the requirements contained therein for using sales in the "exporting country" are distinct from the requirements for using sales to the "third country".

6. Finally, the application of the U.S. Viability Test by the USDOC in the investigation of OCTG from Korea also violates Article 2.2.

III. THE USDOC'S FAILURE TO USE ACTUAL DATA IN THE CALCULATION OF CV PROFIT IS INCONSISTENT WITH THE ARTICLE 2.2.2 CHAPEAU

7. The USDOC's failure to use actual data in the calculation of constructed value is inconsistent with the chapeau of Article 2.2.2 of the AD Agreement. The use of the term "shall" in the chapeau of Article 2.2.2 makes clear that, when constructing normal value, authorities *must* use the producer or exporter's actual data for SG&A and profit, whenever such data is available.

8. The United States insists that Article 2.2.2 is primarily intended for situations where normal value is based on home market sales, but where a certain subset of those sales cannot be used because they are outside the ordinary course of trade or do not include sales of products that are identical or similar to those sold in the relevant export market. The United States provides no support for its assertion and fails to explain how products that are neither "identical" nor "similar" could constitute "like products" under Article 2.6 of the AD Agreement. In any case, these scenarios present at most only one possible situation where Article 2.2.2 may apply. With respect to the situation at hand, the Appellate Body has confirmed that "low volume" sales rejected under Article 2.2 can be an appropriate source of CV profit.

9. Furthermore, the Article 2.2.2 chapeau does not preclude the use of third country profit data to construct normal value. As a textual matter, the chapeau contains no prohibition on the use of actual data from third-country sales. As a practical matter, the USDOC had readily available to it actual profit data for each market, and did not even attempt to examine whether the respondents' third country sales were made in the ordinary course of trade.

10. The United States is incorrect that Article 2.2.2 prohibits the use of negative profit margins. The purpose of Article 2.2.2 is to approximate the profit rates that would have been achieved through the sale of like product in the home market. If evidence shows that the profit margin in the home market would have been negative, the CV profit must reflect such profit experience unless the authorities specifically determine that the sales were outside the ordinary course of trade. Finally, the use of the term "plus" in Article 2.2.2 merely instructs the inclusion of SG&A and profit and does not indicate the actual values of these factors.

IV. THE USDOC'S DEFINITION OF THE "SAME GENERAL CATEGORY OF PRODUCTS" WAS IMPERMISSIBLY NARROW UNDER ARTICLE 2.2.2

11. The USDOC's use of CV profit is inconsistent with Article 2.2.2 because its definition of the "same general category of products" was impermissibly narrow and, in many respects, even narrower than its definition of the "like product". The "same general category" of products should be broader than the "like product". While the USDOC concluded in the Korea investigation that products that fall within the "same general category of products" as OCTG must have the ability for use in down-hole applications, the USDOC itself confirmed in its concurrent investigation of OCTG from Ukraine that the like product includes products that cannot be used in such applications, including non-prime and "reject" pipes used for structural purposes or to transport water − the same purposes for which line pipe and standard pipe are used. The USDOC's scope definitions apply equally in all investigations subject to the same petition, including its investigations of Ukraine and Korea.

V. THE USDOC'S CALCULATION OF CV PROFIT IS INCONSISTENT WITH ARTICLE 2.2.2(iii)

12. The USDOC's use of Tenaris's profit data to calculate the CV profit for the Korean respondents is inconsistent with Article 2.2.2(iii) of the AD Agreement. The purpose of Article 2.2.2 is to approximate 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 country of export. The use of Tenaris's financial statements to calculate CV profit was not "reasonable" under Article 2.2.2(iii) because the USDOC did not even attempt to approximate the profit rate in the home market, finding it sufficient to only approximate the "like product". Moreover, the USDOC even failed to properly approximate the *like product* in calculating the CV profit because Tenaris's profit rate included revenues generated from Tenaris's sales of non-tubular products and Tenaris's sales of services.

13. The USDOC also violated Article 2.2.2(iii) because it disregarded the requirement to calculate a profit cap. The plain text confirms that the application of a profit cap is mandatory, and several WTO panels have confirmed the same. The USDOC's failure to calculate a profit cap renders its use of Tenaris's financial data to calculate CV profit *per se* inconsistent with Article 2.2.2(iii).

VI. THE USDOC'S REMAND REDETERMINATION IS ALSO INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT

14. Korea reiterates its request that the Panel find that the USDOC's Remand Redetermination is inconsistent with the United States' WTO obligations because: (1) the USDOC failed to use the Korean respondents' actual profit data as required under Article 2.2.2; (2) the USDOC's calculation of CV profit was unreasonable under Article 2.2.2(iii) because it continued to adhere to its impermissibly narrow definition of the "same general category of products" and calculated the CV profit as an average of profit rates of Tenaris and OAO TMK, a company that bears many of the same flaws as Tenaris as a CV profit source; and (3) the USDOC continued to find that it was not able to calculate a profit cap and that it was not required to calculate a profit cap based on the home market profit data, in contravention of Article 2.2.2(iii).

VII. THE USDOC FAILED TO MAKE A FAIR COMPARISON BETWEEN EXPORT PRICE AND NORMAL VALUE UNDER ARTICLE 2.4

15. The United States also violated Article 2.4 of the AD Agreement because the USDOC did not conduct a "fair comparison" between the export price and normal value by making due allowances for differences that affect price comparability, despite extensive evidence on the record regarding the differences between Tenaris and the Korean respondents. Furthermore, the USDOC continued to commit the same error in its Remand Redetermination by failing to make due allowances for differences that affected price comparability between the normal value based on Tenaris and TMK's profit rates and the Korean respondents' export prices.

VIII. THE USDOC'S FINDING OF ASSOCIATION UNDER ARTICLE 2.3 WAS IMPROPER

16. The USDOC's findings of association, or affiliation, between NEXTEEL and POSCO, and NEXTEEL and its customer, were inconsistent with Article 2.3 of the AD Agreement. The United States has incorporated footnote 11 of the AD Agreement into its own laws, requiring a finding of "control" among parties in order to find that affiliation, or association, exists. In the underlying investigation, however, the USDOC arbitrarily replaced its statutory requirement of "control" with a much less rigid standard. The USDOC also did not make a separate assessment as to the reliability of the export price as required under Article 2.3.

IX. THE USDOC DID NOT EXAMINE THE RELIABILITY OF NEXTEEL'S COST RECORDS AS REQUIRED UNDER ARTICLE 2.2.1.1

17. Article 2.2.1.1 of the AD Agreement requires investigating authorities to calculate costs on the basis of records kept by the exporter or producer under investigation when certain conditions are met. NEXTEEL kept its records in accordance with GAAP, and its cost records reasonably reflected its actual costs of purchases of hot-rolled coil, as required under Article 2.2.1.1. However, after improperly finding that NEXTEEL was affiliated with POSCO, the USDOC disregarded NEXTEEL's actual cost records, and instead, relied on POSCO's sales price of hot-rolled coil to its *other* customers.

X. THE USDOC'S DECISION TO LIMIT ITS EXAMINATION WAS INCONSISTENT WITH ARTICLE 6.10

18. The United States concedes that the USDOC's examination was limited to a "certain number of respondents". However, it did not use statistically valid samples as required under Article 6.10 of the AD Agreement when limiting its examination by the number of respondents. The United States also claims that, in deciding it could not examine any voluntary respondents, the USDOC conducted a separate analysis of its available resources. However, the USDOC did not conduct a separate analysis, but instead relied on the same set of circumstances upon which it relied in order to limit its examination of mandatory respondents.

XI. ADDITIONAL CLAIMS

19. The United States failed to protect the due process rights of the Korean respondents as required under Article 6 of the AD Agreement and failed to comply with the requirements of Article 12 of the AD Agreement. The USDOC also failed to administer its regulations in a uniform,

impartial, and reasonable manner in accordance with Article X:3(a) of the GATT 1994, and failed to provide non-discriminatory treatment to OCTG from Korea as required under Article I:1 of the GATT 1994. Finally, the USDOC's failure to comply with Articles 2, 6, and 12 of the AD Agreement results in consequential violations of Articles 1 and 18.4 of the AD Agreement, as well as Article VI of the GATT 1994 and Article XVI:4 of the WTO Agreement.

EXECUTIVE SUMMARY OF KOREA'S CLOSING STATEMENT

20. The administrative record in this case shows that the Korean respondents have not engaged in dumping. After making a negative dumping determination for both Korean respondents in the preliminary determination, the USDOC was bombarded with letters and communications from the U.S. Congress and industry representatives calling for a reconsideration of its calculation, and in particular, its decision on CV profit. Faced with political pressure, the USDOC accepted and used Tenaris's financial statements to calculate CV profit even though the financial statements had been submitted two months past the deadline. This was the only way for the USDOC to revise its analysis in a way that would increase the Korean respondents' dumping margins. The results-oriented approach adopted by the USDOC has led to inconsistencies and illogical results that go against United States' WTO obligations.

21. The USDOC ignored its obligations under the chapeau of Article 2.2.2 of the AD Agreement to use the Korean respondents' actual profit data as a CV profit source, arguing that these profit data are derived from "low volume" sales. However, the Appellate Body has already confirmed that profit data derived from low volume sales *are* an appropriate CV profit source under the Article 2.2.2 chapeau. With respect to the use of actual third country market profit data, the "doomsday" scenario presented by the United States in which the authority would have to collect and examine large amounts of data simply did not exist here.

22. The USDOC adopted an overly narrow interpretation of "same general category of products" that is narrower than its definition of "like product." The United States does not dispute that such narrow interpretation would be impermissible under Article 2.2.2 of the AD Agreement, but claims that the USDOC's own scope definition, as clarified in the *OCTG from Ukraine* investigation, does not extend to the Korea investigation. Korea has shown that scope definitions apply to all concurrent investigations covered under the same petition.

23. The United States agrees with Korea that the purpose of Article 2.2.2 is to approximate what the profit rate of the like product would have been had the product been sold in the domestic market of the exporter, but it argues that USDOC's use of Tenaris's financial data was "reasonable" under Article 2.2.2(iii) because the data approximated the "like product". Even setting aside the fact that the USDOC did not even attempt to approximate the home market, it even failed to properly approximate the "like product."

24. The United States also continues to ignore the plain text of Article 2.2.2(iii) and argues that it was not required to calculate or apply a profit cap. However, this alleged inability to calculate a profit cap was brought about by the USDOC's own impermissible interpretation of the "same general category of products". Also, even accepting the USDOC's definition, this does not provide a valid justification for circumventing the explicit requirement of calculating a profit cap that the drafters included in Article 2.2.2(iii).

25. The United States concedes that there was substantial evidence on the record addressing the differences between Tenaris and the Korean respondents that affected their profitability and, as a result, the price comparability between the constructed normal value using Tenaris's profit and the export price. Nonetheless, the USDOC failed to fulfill its obligation to make due allowances for such differences, as required under Article 2.4.

26. The United States infringed on the Korean respondents' due process rights and prevented the Korean respondents from defending their interests under Article 6 by accepting the untimely submission of Tenaris's financial statements and failing to inform interested parties of its decision to accept the submission until its final determination.

27. The USDOC could have calculated normal value based on the Korean respondents' sales to an appropriate third-country market under the alternative method of Article 2.2. However, it was

precluded from doing so because the U.S. Viability Test imposes a strict quantitative threshold for the use of third-country markets that is not contemplated under Article 2.2. To be clear, Korea is not requesting that the Panel determine whether the U.S. regulation is in accordance with U.S. domestic law but rather that the U.S. law is inconsistent with Article 2.2.

28. In disregarding NEXTEEL's sales price to its customer, the United States reads out a key requirement of Article 2.3 by failing to determine or examine the reliability of the sales price. The USDOC also failed to properly determine the existence of an "association" between NEXTEEL and its customer. The USDOC did not find that NEXTEEL was affiliated with POSCO based on the absence of an arm's-length relationship. It was only after the USDOC had concluded that the parties were affiliated that it even conducted the major input test. Based on this erroneous affiliation finding, the USDOC also disregarded NEXTEEL's actual cost data for raw material input, despite the fact that NEXTEEL's cost records were maintained in accordance with GAAP and reasonably reflected its actual cost of production of the merchandise under investigation as required under Article 2.2.1.1.

29. Korea reiterates its request that the Panel find that the USDOC's Remand Redetermination is also inconsistent with the United States' obligations under Articles 2.2.2 and 2.4 of the AD Agreement. The United States now claims that the Korea should have raised a claim under Article 6.8 with respect to its arguments relating to the calculation of CV profit in the Remand Redetermination. It is not for the United States to decide the provision under which Korea should bring a claim. Rather, Korea's claim continues to be premised on the requirements of Article 2.2.2(iii), which require that the method employed by the authority must be "reasonable", and subject to a profit cap, however calculated.

ANNEX C

ARGUMENTS OF THE UNITED STATES

ANNEX C-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN
SUBMISSION OF THE UNITED STATES

1. The Republic of Korea challenges U.S. antidumping (AD) duties imposed on oil country tubular goods (OCTG) from Korea. Korea's claims are without merit. As the record establishes and this submission explains, USDOC provided a reasoned and adequate explanation as to how the evidence on the record supported its factual findings and how those factual findings support its overall determination. And as this submission demonstrates, the arguments advanced by Korea otherwise fail to provide plausible alternative explanations of the record evidence before USDOC.

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

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

2. Korea's claim rests on a fundamental misunderstanding of the applicable obligations. First, as acknowledged by Korea, Article 2.2 does not state a preferred alternative method to calculate normal value. Rather, the provision's use of "or" makes clear that an authority may choose to use either of the two available methods.

3. Second, the text of Article 2.2 does not impose an obligation on an authority to consider or analyze both of the two alternative methods before choosing one. Therefore, there is no basis for Korea to contend that application of a "viability test" could lead to an impermissible prohibition on consideration of third-country sales.

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

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

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

6. The focus of the examination in evaluating an "as such" challenge is to ascertain the meaning of the measure itself, and not whether any particular instance of application was inconsistent with the provision. To make such a demonstration, Korea therefore must present to the Panel evidence and legal argument sufficient to show that application of U.S. law necessarily results in an inconsistency with Article 2.2 of the AD Agreement – that is, that the measure necessarily requires WTO-inconsistent action or precludes WTO-consistent action.

7. The U.S. regulation at issue states that USDOC will consider the home market or third-country to be a "viable market" if sales are of a "sufficient quantity". The regulation's use of "normally" indicates that USDOC may define "sufficient quantity" based on the facts of a particular proceeding. The dictionary definition of "normally" is "under normal or ordinary conditions; as a rule, ordinarily". This definition suggests a preference, not a requirement, as distinguished from the use of "shall" or "in all cases".

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

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

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

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

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

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

11. The chapeau of Article 2.2.2 does not require that an investigating authority "use" actual data from the production and sale of the like product. Rather, the chapeau requires that the amount for profits "shall be *based on*" actual data. An obligation that something be "based on" something else does not create an obligation to "use" something else. Thus the obligation of Article 2.2.2 that "profit shall be based on actual data" cannot be read as a strict requirement to *use* actual data in every circumstance.

12. The text of Article 2.2.2, understood in its context, does not require an investigating authority to use data from low-volume domestic sales to calculate CV profit. Therefore, Korea has failed to show that the United States acted inconsistently with Article 2.2.2 of the AD Agreement when USDOC determined that CV profit could not be calculated based on the chapeau because neither HYSCO nor NEXTEEL had sufficient home market sales during the period of investigation. In addition, contrary to Korea's assertion, USDOC did not have access to actual data pertaining to production and sales in the ordinary course of trade of the like product by HYSCO or by NEXTEEL in the home market during the period of investigation.

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

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

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

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

16. USDOC set out in its final determination a reasoned and adequate explanation as to why it decided to exclude line, structural and standard, and downgraded pipe products from the definition of "same general category of products". USDOC found that "[t]he record shows that OCTG and non-OCTG are sold to different end users for use in different applications, and that these different end users have distinct forces which drive prices, demand, and profitability". The evidence in the record thus supports USDOC's final determination that "[t]he performance measures, production processes, alloys, and physical and mechanical characteristics of OCTG casing and tubing products differ in such significant ways from those of standard pipe and line pipe that these products should not be considered to be of the same general category of products as OCTG. The United States thus provided a reasoned and adequate explanation for its findings on the definition of the "same general category of products" as it employed a "reasonable method" consistent with Article 2.2.2(iii).

17. Because the record evidence contradicts Korea's contentions, Korea finds itself in the tenuous position of advocating that calculations concerning normal value of OCTG should be based on profit from non-OCTG products instead of the OCTG-specific data that USDOC used. Korea has failed to show any support in the AD Agreement for its position. Most important, Korea has failed to show that USDOC's interpretation and application in the OCTG investigation is inconsistent with Article 2.2.2.

18. In the instant case, the record and decision memoranda demonstrate that that USDOC engaged in an extensive analysis of the like product and general category of products. Korea, meanwhile, fails to engage the substantive issue, but instead implies that USDOC must be held to the scope definitions for other AD proceedings, preliminary statements in initial questionnaires, or different decisions made in other AD proceedings pursuant to unrelated evidentiary records. The arguments advanced by Korea with respect to the definition of "same general category" of products as understood for the purpose of alternatives (i) and (iii) thus do not provide plausible alternative explanations of the record evidence before USDOC. Therefore, the United States respectfully requests that the Panel find USDOC's definition of the "general category of products" in the Korea OCTG investigation was not inconsistent with Articles 2.2.2(i) and 2.2.2(iii) of the AD Agreement.

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

19. Korea argues that USDOC otherwise had "abundant data" to calculate a profit cap from allegedly dumped OCTG in the United States or sales of non-OCTG products in Korea, but this argument serves to further confirm the soundness of USDOC's decision. First, there is no support in alternative (iii), or anywhere else in the AD Agreement, for the proposition that normal value should be determined on the basis of profit from the allegedly dumped sales. Indeed, the use of allegedly dumped sales in the export market to calculate normal value runs contrary to the concept of determining a dumping margin, which under Article 2.1 is a comparison of normal value with the export price.

20. Korea's other argument, that "the unavailability of data does not excuse a Member from complying with the requirements of the Anti-Dumping Agreement", simply does not address the fact that its proffered information is not relevant to the calculation of a cap under alternative (iii). Korea has failed to demonstrate that USDOC's calculation of amounts of profit for constructed value is inconsistent with the positive obligation imposed by Articles 2.2 and 2.2.2 to determine amounts for profit on the basis of another "reasonable method". The evidence proffered by the Korean companies was not relevant to the profit cap calculation, and there was no other evidence in the record that would permit USDOC to calculate a profit cap. In that circumstance, the United States used a "reasonable method" as the basis to determine the amounts of profit and therefore did not act inconsistently with Articles 2.2 and 2.2.2.

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

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

22. Korea does not identify any flaw, mistake, or inaccuracy in Tenaris's audited financial statement. Nor does Korea explain why profit from sales of OCTG does not reasonably reflect constructed profit for the same product.

23. Instead, according to Korea, Article 2.1 defines dumping in a manner that prohibits an investigating authority from calculating a dumping margin "by comparing an export price to a normal value that, for the most part, represents the international market (as opposed to the single domestic market of the exporting country)". Korea's interpretation is flawed. As an initial matter, Article 2.1 is a definitional provision that, "read in isolation, do[es] not impose independent obligations". Although the Article 2.1 provides when "a product is to be considered as being dumped", it does not specify how the normal value is to be determined. The determination of normal value is governed by Article 2.2 instead.

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

25. Korea asserts that "no reasonable basis exists to conclude that Tenaris's profit rate is reflective of the profit rate that the Korean producers would have achieved if they had sold OCTG in the country of export", but Korea itself acknowledges that Tenaris produces and sells a broad range of OCTG products around the world. As such, Korea has not demonstrated any flaw or inaccuracy in the audited financial statements of Tenaris, nor has it demonstrated that the global prices of OCTG are unrepresentative. Absent evidence to the contrary, there is nothing unreasonable about using the average profit from a broad range of OCTG products sold by a company that operates around the globe, including in Korea, as a reasonable proxy for the profit expected to be made from a sale of OCTG in a specific market.

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

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

27. Article 2.4 obligates an investigating authority to make a "fair comparison" between the export price and the normal value when determining the existence of dumping and calculating a dumping margin. The essential requirement for any adjustment under Article 2.4 is that a factor for which adjustment is requested must affect price comparability. The use of constructed normal value does not preclude the need for due allowances or adjustments *between* the export price and the normal value. However, the construction of normal value through the selection of costs pursuant to Article 2.2.1, or profit pursuant to Article 2.2.2, is not a relevant difference *between* the export value and the normal value, because these selections do not relate to a difference between the export and domestic transactions being compared.

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

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

29. Article 2.3 permits an authority to disregard export prices based on "association". The term "association" does not indicate a limitation to only those entities that may be "related" to the exporter. The nature of the relationship between the exporter and the importer, rather than actual pricing information, are what inform an authority's consideration of whether prices "appear" to be unreliable under Article 2.3.

30. Korea attempts to equate the term "association" with the term "related", as defined in footnote 11, and Korea devotes considerable discussion to interpreting footnote 11. However, footnote 11 defines a different term in a different article of the AD Agreement. Because Korea's claim is premised on its erroneous understanding of "association" in Article 2.3, its claim can be rejected on this basis alone.

31. USDOC properly found NEXTEEL to be associated with the Customer, and therefore did not act inconsistently with Article 2.3 in disregarding export price. USDOC's analysis considered two relationships: (1) POSCO and NEXTEEL and (2) NEXTEEL and Customer. USDOC's finding of association between NEXTEEL and POSCO was based on the unique and remarkably close relationship in which POSCO was positioned to "affect[] the pricing, production, and sale of OCTG" by NEXTEEL. As USDOC concluded in its final determination, NEXTEEL and POSCO coordinated closely in the production, marketing, and sale of OCTG.

32. During the relevant period, USDOC found that POSCO supplied NEXTEEL HRC used for the production of OCTG. HRC accounts for an overwhelming percentage of the cost of producing OCTG. The volume of HRC purchased and consumed by NEXTEEL from POSCO was a key basis of USDOC's finding of association. USDOC concluded that the nature of this supplier relationship extended beyond that of an independent buyer-seller transaction.

33. USDOC's final determination referred to public acknowledgements by POSCO that it "took charge of NEXTEEL's overseas {public relations} campaign for its global launch". USDOC found that the two companies shared technology and market information pertaining to OCTG.

34. USDOC concluded that NEXTEEL worked closely with POSCO at every step of the process: production, marketing, and sale of OCTG. USDOC explained that POSCO has a history of working closely with on-sight NEXTEEL departments and providing marketing assistance and other promotional activities for the benefit of NEXTEEL. USDOC's final determination demonstrates NEXTEEL's close association with POSCO. Accordingly, so too must NEXTEEL be associated with Customer.

35. USDOC concluded that NEXTEEL was associated with Customer, a relationship that, by its very nature, prevented an arm's length transaction of OCTG. USDOC appropriately utilized the first sale to an independent buyer of OCTG in the United States. Accordingly, Korea's claim fails because, in these circumstances, USDOC's use of a constructed export price was not inconsistent with Article 2.3.

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

36. Korea's argument would appear to accept that a proper finding of association justifies deviation from a respondent's books and records in the cost calculation. As demonstrated above, USDOC's final determination properly found an association to exist between NEXTEEL and POSCO. Accordingly, Korea's claim is without merit.

37. Article 2.2.1.1 of the AD Agreement permits an authority to depart from a respondent's books and records in calculating constructed value where the authority provides a rationale for doing so. Where an authority provides a reasoned explanation for why it was required to use market prices for a cost calculation − as here − the authority has not acted inconsistently with Article 2.2.1.1. The obligation of Article 2.2.1.1 to use the books and records of the exporter under investigation is qualified by the use of "normally". The term 'normally' in conjunction with the two conditions ('provided that') in Article 2.2.1.1 indicates that use of a producer's or exporter's books or records is not necessary in every case and the investigating authority has the ability to consider other available evidence in limited instances.

38. USDOC's final determination explained the reasons justifying deviation from NEXTEEL's reported costs. This decision was based on the interconnected business relationship between NEXTEEL and POSCO. USDOC provided a thorough and reasoned explanation for its decision to deviate from NEXTEEL's books and records. USDOC's actions are not inconsistent with Article 2.2.1.1 of the AD Agreement.

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

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

40. Article 6.10 of the AD Agreement allows Members to determine individual margins of dumping for a reasonable number of exporters and producers, and does not require the determination of an individual margin of dumping for all exporters and producers where a large number of exporters and producers is involved. 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". USDOC's decision to limits its examination to two mandatory respondents fully complied with this requirement. Korea has presented no evidence to argue that USDOC's actions were unreasonable, and the Panel therefore should reject Korea's claims that the United States breached Article 6.10.

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

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

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

42. Throughout the Korea OCTG investigation, USDOC provided Korean respondents ample opportunity for the defense of their interests. Before the preliminary determination, respondents were on notice that USDOC might rely on Tenaris's financial data for its dumping calculations. Respondents argued against the use of the Tenaris profit margin through several written submissions before the preliminary determination. Subsequently, after petitioners submitted comments arguing that USDOC should base its calculations on Tenaris's profit information, respondents addressed the Tenaris profit margin extensively in their pre-preliminary determination rebuttal comments.

43. Following the preliminary determination, NEXTEEL and HYSCO had the opportunity to provide views on the Tenaris financial statements that U.S. Steel placed on the record in response to NEXTEEL's Section D Questionnaire. NEXTEEL did so at least three times in writing − once in its

request that USDOC reject the document, and twice more in its brief and rebuttal brief. Similarly, HYSCO, AJU Besteel, and Husteel used the opportunity to challenge Tenaris's profit data, including the data in the financial statements, by providing written arguments against the use of the underlying data.

44. Korea's submission fails to acknowledge that in their written submissions made before and after the preliminary determination, as well as during oral arguments at USDOC's hearing, Korean respondents extensively argued that the information in Tenaris's financial data was not a proper CV profit source. Korea has failed to establish that USDOC did not provide Korean respondents a full opportunity to defend their interests. Therefore, the panel should reject Korea's claim under Article 6.2 of the AD Agreement.

45. Korea also does not explain why the opportunities provided to respondents in the Korea OCTG investigation did not comply with Article 6.4. The Korean respondents were aware that the evidence had been submitted by petitioners, respondents did "see" that information which was evidently relevant to the presentation of their case, and they not only had but utilized numerous opportunities to prepare presentations responding to the evidence. Therefore, Korea has failed to establish that USDOC did not provide Korean respondents timely opportunities to see the Tenaris financial statements and to provide presentations on the basis of information in those statements. Accordingly, Korea's claims that the United States acted inconsistently with Article 6.4 of the AD Agreement must fail.

46. Finally, Korea's claim under Article 6.9 is without merit because Korea fails to correctly identify the "essential facts" that are subject to the disclosure obligation of that provision. As is clear from the record, all interested parties to the investigation had access to Tenaris's financial data and were aware that USDOC was considering that data in its investigation. Korea has failed to establish otherwise. Therefore, Korea has failed to establish that the information contained in the Tenaris financial statements was not disclosed to all interested parties in a manner consistent with Article 6.9 of the AD Agreement.

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

47. Korea argues that the United States breached Articles 6.4 and 6.9 because USDOC "delay[ed] in disclosing" certain *ex parte* communications, particularly several letters, to Korean respondents. Korea fails to explain why the communications referenced constituted information that was "relevant" to the presentation of the respondents' cases, or how the information would have been "used" by USDOC in its investigation. Korea also fails to demonstrate that the relevant correspondences were "essential facts" under consideration that formed the basis for USDOC's decision to apply definitive measures. Further, the record demonstrates that the Korean respondents had ample opportunity to respond to the relevant communications. Therefore, Korea has failed to make a *prima facie* case under Articles 6.4 and 6.9 of the AD Agreement because USDOC was not required to disclose the referenced communications under Articles 6.4 and 6.9 and because USDOC made the letters available to Korean respondents in a timely manner.

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

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

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

data was the best available option, in light of Tenaris's OCTG production, volume of sales, and customer base.

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

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

51. Korea argues that procedural differences constitute an "advantage". But Korea's argument fails to take into account that differences do exist in antidumping proceedings − even investigations involving like products − including differences among the companies under investigation.

52. USDOC made procedural decisions through the course of these proceedings that were based on the specific circumstances of the Korea OCTG investigation and the other OCTG investigations. Unlike in *EU − Footwear*, in which the measure at issue granted an advantage based solely on the country of origin of the products, several factors may have contributed to the treatment accorded to Korean companies and other foreign companies, which resulted in their particular antidumping rates. Korea has failed to demonstrate that any different treatment was not explained by the facts immediately before the investigating authority, here, including the characteristics of the companies participating in the investigation.

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

53. All of Korea's claims under Article X:3(a) of the GATT 1994 must fail because Korea challenges the substance of USDOC's final determination, rather than the United States' administration of relevant laws, regulations, rulings or decisions. Even aside from the fact that Korea has not identified any measure of general application for its claim to fall within the scope of Article X:3(a), Korea has failed to demonstrate that the United States did not administer any laws, regulations, decisions or rulings in a uniform, impartial, and reasonable manner, inconsistent with Article X:3(a).

54. With respect to uniformity, Korea has not shown, nor could it, that the factual circumstances underlying an investigation regarding imports of OCTG produced in Korea required the same procedures as an investigation regarding the imports of OCTG produced in Turkey. Therefore, Korea has failed to establish that the United States did not administer its anti-dumping laws and regulations in a uniform manner.

55. With respect to impartiality, Korea merely concludes that "in the absence of any other reasonable explanation", these letters and meetings "suggest" that "political pressure" impacted the final determination. However, as demonstrated at length, the USDOC provided a reasoned and adequate explanation for its calculation of CV profit, consistent the requirements of the AD Agreement. Therefore, Korea cannot succeed in its claim that USDOC failed to act in an impartial manner as required under Article X:3(a).

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

X. CONCLUSION

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

ANNEX C-2

EXECUTIVE SUMMARY OF THE ORAL STATEMENTS OF THE UNITED STATES
AT THE FIRST PANEL MEETING

EXECUTIVE SUMMARY OF U.S. OPENING STATEMENT

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

1. Korea's challenges of what it refers to as a "viability test" are based on a flawed interpretation of Article 2.2 and a misunderstanding of U.S. law. Where the preferred home-market sales cannot be used, Article 2.2 sets no hierarchy as between the secondary sources for calculating normal value: third-country sales or constructed normal value. Indeed, under Article 2.2, an authority is not required to consider an alternative it will not employ. Rather, because Article 2.2 permits an authority to choose between the alternative methodologies, an investigating authority could simply choose to use constructed normal value to calculate normal value in a given investigation. In such a case, the authority need not even collect third-country sales data.

2. Where an authority considers the use of third-country sales, Article 2.2 permits their use only where the sale is made "to an appropriate third country, provided that the price is representative". An authority would not breach Article 2.2 if it disregards sales to a third country found not to be "appropriate", and the text does not require an authority to consider any one factor.

3. Footnote 2 of the AD Agreement provides relevant context to the phrase "appropriate third country". The general rule of footnote 2 is intended to ensure that sales prices used for normal value are representative, and not an aberration. The reference in footnote 2 to volume thus provides useful guidance to an authority if it is evaluating what constitutes an "appropriate third country". The arguments raised in Korea's submission confuse the relevance of footnote 2 in interpreting Article 2.2. Under Korea's logic, under the general rule of Article 2, an authority would be required *not* to use the preferred home-market sales if those sales constitute less than 5% of total sales, but the authority would be *required* to use third-country market sales of less than 5%. Korea's interpretation is supported by neither logic nor the AD Agreement. Just as the volume of sales may be considered pursuant to footnote 2 to determine whether to use the preferred data source of home-market sales, volume can be considered when evaluating whether third-country sales are "appropriate" within the meaning of Article 2.2.

4. Even aside from Korea's flawed interpretation of Article 2.2, its "as such" claim also fails because it is premised on a misinterpretation of U.S. law. Contrary to Korea's argument, through the use of the term "normally", the regulation does *not* require Commerce to disqualify third-country sales that constitute less than five percent of sales to the United States. Commerce under its regulation is free to consider the complete factual record when determining whether a third country is appropriate for the calculation of normal value, even where third-country sales constitute less than 5% of sales to the United States. Korea has not established that U.S. law requires action that would, even under its theory, result in a breach of Article 2.2.

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

5. Article 2.2.2 lists four methods for the calculation of constructed value ("CV") profit – a preferred method and three alternative methods. The preferred method is to calculate CV profit based on actual data pertaining to production and sales in the ordinary course of trade of the like product by a respondent. When CV profit cannot be calculated using the preferred method, an investigating authority may use one of three alternative methods.

6. In this investigation, Commerce found that, "absent a viable home or third-country market", it could not calculate CV profit based on the preferred method and had to determine CV profit based on an alternative method.

7. Commerce's conclusion was consistent with the requirements of Article 2.2, including Article 2.2.2, because when sales data do not permit a proper comparison under Article 2.2 for purposes of calculating normal value, such data should not be considered under Article 2.2.2 for purposes of calculating profit for constructed normal value.

8. For this reason, the United States did not act inconsistently with the obligations of Articles 2.2 and 2.2.2 when Commerce determined that CV profit could not be calculated based on the preferred method given neither HYSCO nor NEXTEEL had a viable domestic or third-country market during the period of investigation.

9. When an investigating authority cannot calculate CV profit based on the preferred method, the alternative method for CV profit provided for in Article 2.2.2, subparagraph (i), indicates that profit may be determined on the basis of the actual amounts incurred and realized by respondents in respect of production and sales in the domestic market of the "same general category of products".

10. Commerce in its final determination provided an extensive explanation of the reasons why it defined the "same general category of products" in this manner as well as a reasoned and adequate explanation as to why it decided to exclude line pipe and standard pipe, the pipe that Korea believes should be included in this definition.

11. Because Korea has failed to make out its claims, the Panel should find that the United States did not act inconsistently with Article 2.2.2, subparagraph (i), with respect to Commerce's definition of the "general category of products" in the Korea OCTG investigation.

12. Since the information in this investigation did not otherwise permit Commerce to calculate CV profit on the basis of the preferred method, or the alternative methods provided for in Article 2.2.2, subparagraphs (i) or (ii), Commerce had just one option left: It had to calculate CV profit on the basis of an alternative method as provided for in Article 2.2.2, subparagraph (iii), or "any other reasonable method".

13. Korea argues that when an investigating authority opts to base CV profit on "any other reasonable method", it must calculate and apply a profit cap. But there did not exist in the record of this investigation information that would allow Commerce to calculate and apply such a cap.

14. Korea argues that the lack of necessary information does not matter; Commerce still has to cap any profit amounts it calculates pursuant to subparagraph (iii). But Korea does not explain *how* Commerce should calculate this cap other than to assert that Commerce should have used profit data for products *not* included in the "products of the same general category".

15. In point of fact, the answer lies in the ordinary meaning of Article 2.2.2, subparagraph (iii), when read in context with the obligations in Article 2.2; namely, when an investigating authority constructs normal value, it shall include "a reasonable amount for ... profits".

16. When the only alternative method available is the "other reasonable method" provided for under subparagraph (iii), the inability to separately calculate a profit cap because of an absence of information does not, as a consequence, lead to the conclusion that a reasonable method cannot be used. Where data exists to calculate the cap, the amount determined by a reasonable method is limited. But where data does not exist to calculate the cap, the proviso is simply not operative; the investigating authority is still bound to use a reasonable method to calculate a reasonable amount for profits.

17. In the underlying investigation, Commerce reviewed the information in the record and correctly concluded that it did not include data that would allow the calculation of a profit cap. On that basis, Commerce correctly calculated the amounts for profit based on the information before it.

18. After an extensive analysis of this information, Commerce chose to calculate CV profit based on Tenaris's financial statement. Commerce provided a reasoned and adequate explanation why the use of the profit margin from Tenaris's financial statement constituted the most reasonable

method for the calculation of CV profit, as well as the most appropriate of the three options available.

19. The arguments advanced by Korea simply do not provide plausible alternative explanations as to why the use of the Tenaris information does not constitute a reasonable method by which to calculate CV profit. Given Commerce provided a reasoned and adequate explanation for why the use of the Tenaris information constitutes a reasonable method to calculate CV profit, the Panel should find that Korea has failed to establish that the United States acted inconsistently with Article 2.2.2 in its determination of CV profit.

III. Commerce's Decision to Disregard NEXTEEL's Export Price

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

21. Further interpretive guidance is provided by the term "independent buyer". Under Article 2.3, where a price is unreliable "because of association," an authority may construct an export price based on the price to an "independent buyer". An associated buyer is thus informed by what it is not: an independent buyer. An independent buyer has an objective of maximizing profits, a fundamentally different objective than exists in a transaction between two associated entities working towards a "common purpose".

22. Korea's interpretive arguments are unavailing. First, Korea's interpretation of "association" relies heavily on the definition of the term "related" found in footnote 11. Article 2.3 refers to an "association" between the exporter and importer, while footnote 11 defines the term "related", which does not appear in Article 2.3. Second, Article 2.3 does not require an independent assessment or determination of price reliability. Rather, the article requires only that such prices appear to be unreliable on the basis of the nature of the relationship. The phrase "unreliable *because of* association" draws a direct link between the relationship of the entities and the reliability of the prices. The authority can understand the prices to be unreliable as a consequence of the relationship; under Article 2.3, it is the relationship that provides the appearance of the unreliable nature of the prices.

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

23. We turn next to Korea's claim that Commerce's use of calculated costs was inconsistent with Article 2.2.1.1. Article 2.2.1.1 contains a general rule that costs are to be calculated on the basis of the records kept by the producer, but the obligation is qualified by the use of "normally". The inclusion of "normally" allows an authority to depart from costs based on the producer's records where the authority provides a reasoned explanation. The panel in *China – Broiler Products* applied this interpretation to Article 2.2.1.1, properly recognizing that an authority may derogate from the general rule to use a respondent's books and records if the authority justifies its decision on the record of the investigation.

24. Commerce's final determination satisfied the requirements of Article 2.2.1.1. Commerce's final determination and accompanying memos explained in great detail the interconnected relationship between NEXTEEL and its supplier POSCO. Having made a determination of affiliation, Commerce then undertook a comparison between POSCO's transfer prices to NEXTEEL and both POSCO's cost of production and POSCO's prices sold to unaffiliated customers. Based on that analysis, Commerce determined it was appropriate to utilize the weighted average market price of POSCO's sales to unaffiliated customers. Korea has not demonstrated that Commerce's decision to depart from the general rule, which is permissible under the plain language of Article 2.2.1.1, was inconsistent with that provision.

V. Commerce Met All Disclosure and Participatory Requirements

25. Korea argues that Commerce did not do enough to ensure that respondents had ample opportunity to defend their interests; that Commerce did not disclose all the essential facts

forming the basis for its decision to apply definitive measures; or that Commerce's notice did not contain all relevant information on matters of fact and law and the reasons that lead to the imposition of final measures.

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

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

28. It is beyond dispute that the Korean respondents had seen all information concerning Tenaris in a timely manner, made multiple presentations regarding it, and understood that Commerce was considering this information in its investigation.

29. Korea's claims under Articles 6.2, 6.4, 6.9, and 12.2.2 regarding the Tenaris information and Commerce's public notice, which included the reasons for its acceptance of this information and its rejection of the Korean respondents' arguments to the contrary, are without merit.

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

31. But to suggest, as Korea does, that this delay means that the United States failed to comply with Articles 6.4 and 6.9 does not reflect a proper interpretation of the requirements of these provisions, especially since the Korean respondents had an opportunity to address these letters and did so by submitting new information and argument on 18 June 2014, and again on 26 June 2014.

32. In sum, Korea fails to explain why the letters that it complains about in its First Written Submission constituted information that was "relevant" to the presentation of the respondents' cases, or how the information would have been "used" by Commerce in its investigation. Korea also fails to demonstrate that the letters it complains about were "essential facts" under consideration that formed the basis for Commerce's decision to apply definitive measures. Korea thus has failed to establish that the actions of the United States with respect to the identified letters were inconsistent with Articles 6.4 and 6.9.

EXECUTIVE SUMMARY OF U.S. CLOSING STATEMENT

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

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

ANNEX C-3

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES

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.

ANNEX C-4

EXECUTIVE SUMMARY OF THE ORAL STATEMENTS OF THE UNITED STATES AT THE SECOND PANEL MEETING

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

1. The customary rules of treaty interpretation support the U.S. understanding that Article 2.2 permits an authority to consider the volume of sales when determining an "appropriate" third-country. The parties agree that, where home-market sales cannot be used to calculate normal value, Article 2.2 imposes no hierarchy as between the two alternative methods. Under Article 2.2, an interested party is not entitled to direct the use of a particular method. Rather, the authority may determine to use constructed normal value or sales to "an appropriate third country, provided that this price is representative" to calculate normal value. The text of Article 2.2 does not prescribe how an authority is to identify an "appropriate third country", nor does it *preclude* the consideration of volume. Moreover, relevant context supports an understanding that volume may be a relevant consideration.

2. We turn next to Korea's contention that the challenged measure is contrary to U.S. domestic law. It is not the role of a panel to review the legality of a Member's law as within that municipal legal system. Rather, it is the role of the panel to determine, as a matter of fact, the content and meaning of municipal law, and to evaluate its consistency with WTO law. Despite Korea's contentions, Commerce is required to adhere to its regulations. As reflected in the plain language of Commerce's current regulation, the United States has shown that Commerce has the flexibility to consider the use of third-country sales that are less than 5 percent of sales to the United States.

II. Korea's Claims Regarding the Calculation of CV Profit are Without Merit

3. Korea contends that "[t]he fundamental problem with the United States' argument is that the chapeau of Article 2.2.2 is intended to apply precisely in circumstances in which there is no 'viable' home or third-country market under Article 2.2". Korea has it backwards. This is the fundamental problem with Korea's argument because Article 2.2.2 does not just apply when there is no viable home or third-country market. Article 2.2.2 frequently applies when there *is* a viable home or third-country market and yet, for various reasons, an investigating authority must construct normal value for comparison purposes.

4. For example, an authority using home market sales may nevertheless need to construct normal value for certain sales where the home market data set does not contain contemporaneous sales, or does not contain sales of identical or similar like products. This also may occur where the identical or similar like products in the home market data set have to be rejected because they fall below the cost of production or are outside the ordinary course of trade.

5. Recently, the Appellate Body in *EU – Biodiesel* discussed how the introductory phrase "[f]or the purpose of paragraph 2" impacted the interpretation of Article 2.2.1.1, finding that Article 2.2.1.1 must be interpreted in a manner consistent with Article 2.2. The phrase "[f]or the purpose of paragraph 2" also appears at the beginning of Article 2.2.2. The language of the chapeau of Article 2.2.2 thus should also be interpreted in a manner consistent with Article 2.2.

6. The context provided by Article 2.2 suggests that, where an investigating authority determines that sales in the home market are viable, the chapeau of Article 2.2.2 reflects a similar preference and indicates that those same sales should be used for calculating profit amounts.

7. But where an investigating authority determines under Article 2.2 that sales in the home market are not viable, and determines instead to construct normal value, nothing in the chapeau of Article 2.2.2 suggests that an investigating authority must nevertheless collect home market sales that it purposely did not collect under Article 2.2 or third-country sales that it did not collect under Article 2.2. In such a case, Article 2.2.2 provides three alternative methodologies that can be employed instead.

8. Korea persists with the notion that because HYSCO or NEXTEEL may have produced so-called "non-prime" OCTG, sales of this product in Korea constituted sales of the like product. Korea's argument ignores the key determinant in whether a product falls within the scope of the "like product" definition: whether the product in question was sold on the date of sale *as* "like product". The record here is clear: NEXTEEL said the pipes in question "were sold to customers as standard pipes". HYSCO said the pipes in question were "not marketed to the customer as OCTG" but sold "for structural purposes". Thus, as of the date of sale, the relevant pipes were not sold in Korea as "like products".

9. Finally, the so-called domestic market "profit" figures put forward by Korea do not satisfy the definition of profit. The definitions put forward in this dispute, including the one advocated by Korea, define profit as a "financial gain" or a "positive difference". The "profit" figures in question do not correlate with these definitions of profit.

10. Korea argues that the United States has offered no basis under the chapeau of Article 2.2.2 to justify its differential treatment of SG&A and profit. At the outset, we note that the language in Article 2.2.2 does not require an investigating authority to base its calculation of SG&A and profit on the same methodology, or even the same database. SG&A and profit are completely different factors, so it is acceptable for an authority to base the calculation of SG&A on one method and the calculation of profit on another. Furthermore, contrary to Korea's argument, the record indicates that Commerce did *not* base its calculation of SG&A on the preferred method provided for under the chapeau of Article 2.2.2. It based its calculation of SG&A on an alternative method provided for under the subparagraphs of that article.

11. Contrary to Korea's argument, Article 2.2.2(iii) does not require an investigating authority to impose a profit cap whenever the authority calculates CV profit based on "any other reasonable method." By linking the profit cap to "profit normally realized", Article 2.2.2(iii) foresees situations when there may be no information about the profits in question, because there are no other exporters or producers of sales of products of the same general category in the domestic market, or because this information simply does not appear in the record of the proceeding.

12. Article 2.2.2(iii) should be applied as the word "normally" suggests: If information exists to calculate the profit cap, the proviso is operative. If such a calculation is not possible because information does not exist, then the proviso is not operative. In either case, an investigating authority remains bound under Article 2.2 to calculate "a reasonable amount ... for profits".

13. Korea argues that it was unreasonable for Commerce to base CV profit on the Tenaris financial statement because this profit figure ignores the "'domestic market' requirement" of Article 2.2.2. Consistent with the interpretation set out by the United States in this dispute, the panel in *EU – Biodiesel* found that "the structure of Article 2.2.2 indicates a preference for the actual data of the exporter and like product in question, with an incremental progression away from these principles before reaching 'any other reasonable method' in Article 2.2.2(iii)". In this regard, the panel concluded that "[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". So while the chapeau of Article 2.2.2 and subparagraphs (i) and (ii) have a "domestic market requirement", Article 2.2.2(iii) clearly does not contain a similar requirement.

14. Korea requests that the Panel expand the scope of its examination to include Commerce's Final Redetermination Pursuant to Court Remand, issued on February 22, 2016, and find those results inconsistent with the obligations of the United States under Articles 2.2 and 2.2.2. Commerce's redetermination was not the subject of consultations and did not exist at the time the Panel was established. Commerce's redetermination thus is not a measure before the Panel and falls outside its terms of reference. Furthermore, Korea failed to invoke Commerce's redetermination in this dispute in a timely manner, prejudicing the U.S. ability to respond to Korea's claims regarding that redetermination.

III. Commerce's Decision to Construct NEXTEEL's Export Price Was Not Inconsistent with Article 2.3 of the AD Agreement

15. We turn next to Korea's claims regarding Commerce's use of NEXTEEL's constructed export price. The customary rules of treaty interpretation require that a treaty be interpreted based on the ordinary meaning of the terms in their context. Here, the relevant term is "association," which is defined as "the action of joining or uniting for a common purpose", a definition that captures a broad range of commercial relationships. We recall that guidance on the meaning of this term can be drawn from the parallel treatment in Article 2.3 of "association" and "compensatory arrangement". Neither an "association" nor a "compensatory arrangement" relationship conveys an aspect of control within the relationship. Instead, both terms concern relationships in which transactions may not be made on an arm's length basis. It is the nature of these relationships that gives the appearance of unreliable prices, and in turn permits an authority, under Article 2.3, to construct export price.

16. Korea's Second Written Submission asserts that Article 2.3 requires an authority to separately assess the reliability of prices before deciding to use constructed export price. Again, however, Korea has not explained how its interpretation gives meaning to the terms used in the text of Article 2.3, in this case, "appear". As the United States has explained, the word "appear" is defined as "seem to the mind, be perceived as, be considered". Thus, if the relationship between the exporter and the importer is "perceived [by the authority] as" resulting in a price that cannot be trusted, the authority can resort to the use of a constructed export price. The United States has acknowledged that there may be circumstances in which two companies may meet the broad definition of association, yet the nature of the relationship does not give rise to the perception that the prices cannot be trusted. In such cases, there may not be a basis for the authority to reject actual sales prices.

17. That is not the situation here. As we have explained, the nature of the relationship between NEXTEEL and POSCO, in which POSCO was involved in both the production and sale of NEXTEEL's OCTG, called into question the reliability of NEXTEEL's prices. We refer the Panel to the final affiliation memorandum, which demonstrates that Commerce's inquiry considered the nature of the relationship and its potential effect on the pricing, production, and sale of OCTG.

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

18. Korea has failed to establish that the decision to depart from NEXTEEL's books and records to calculate costs was inconsistent with Article 2.2.1.1. In the recently issued Appellate Body report in *EU – Biodiesel*, the Appellate Body recognized that Article 2.2.1.1 permits an authority to depart from a producer's books and records where transactions were not made on an arm's length basis. The Appellate Body observed that records may "not be found to reasonably reflect the costs associated with the production and sale of the product under consideration" under Article 2.2.1.1 "where transactions involving such inputs are not at arm's length".

19. Here, after concluding that an affiliation existed between the producer and supplier, Commerce undertook a line-by-line comparison of prices charged by POSCO to NEXTEEL with prices charged by POSCO to unaffiliated purchasers. This analysis established that the costs recorded in NEXTEEL's books and records for certain grades of hot-rolled coil did not reflect the full "costs associated with the production of" OCTG.

V. Commerce in the Korea OCTG Investigation Met All Disclosure and Participatory Requirements under the AD Agreement

20. Korea argues under Articles 6.2 and 6.4 that once Commerce decided in its preliminary determination not to base CV profit on the Tenaris data, "there was no reason for the Korean respondents to concern themselves" that Commerce may subsequently change its mind in its final determination. Korea also argues that Commerce denied the Korean respondents an opportunity to submit information rebutting the Tenaris data and that the United States failed to protect respondents' procedural rights.

21. As we have said before, a preliminary determination is just that: *preliminary*. It is not credible for any interested party to suggest they need not concern themselves with the fact that a final determination might differ from a preliminary determination, especially in this matter given that Commerce specifically indicated in its preliminary determination that it "intend[ed] to continue to explore other possible options for CV profit for both respondents".

22. The Korean respondents were informed of the additional Tenaris financial data at the same time as Commerce − when the data was placed on the record. As the United States has explained in its prior submissions, respondents had an opportunity to submit factual information rebutting the Tenaris data but declined to do so. The respondents also made multiple arguments before and after Commerce's preliminary determination, through written submissions and at the hearing, regarding whether and how Commerce should use the Tenaris financial data. It is thus clear from the record that the Korean respondents had ample opportunity to defend their interests and to see all information that was used in Commerce's final determination.

VI. Korea Has Failed to Establish that the Korea OCTG Investigation was Inconsistent with Article I:1 and Article X:3(a) of the GATT 1994

23. We turn now to address claims raised by Korea under Article I:1 and Article X:3(a) of the GATT 1994. First, Korea's claim under Article I:1 must fail because the measure does not fall within the scope of Article I:1. In Korea's Second Written Submission, for the first time, Korea asserts that the challenged measure is within the scope of Article I:1 because "'the method of levying such duties and charges' must cover antidumping investigations". But contrary to Korea's argument, "method of levying" duties relates to the administration of duty collection, not the conduct of a single antidumping investigation. Indeed, an investigating authority necessarily must conduct investigations based on the particular circumstances of each case, as reflected in Article VI:1 of the GATT 1994.

24. Second, Korea's Article X:3(a) argument does not state a claim within the scope of that provision. To establish a breach of Article X:3(a), the complainant must: (1) identify a law, regulation, decision or ruling of general application of the responding Member, and (2) demonstrate that the respondent does not administer that law, regulation, decision or ruling in a uniform, impartial, and reasonable manner. Korea has failed to sufficiently identify either the specific measure at issue, or the nature and scope of its claim regarding the administration of that measure.

EXECUTIVE SUMMARY OF U.S. CLOSING STATEMENT

25. Under Article 7.1 of the DSU, the DSB gives a panel authority to examine a matter through the panel's terms of reference. The "matter" is comprised of the measure and claims (i.e., the legal basis of the complaint) identified in the complainant's panel request. As such, a panel can only consider those measures and claims identified in the complainant's request for the establishment of a panel, consistent with Article 6.2 of the DSU. Korea has argued that the Panel's terms of reference include Commerce's remand redetermination. The redetermination, however, is not identified in Korea's Panel Request, and the redetermination therefore falls outside the Panel's terms of reference. Moreover, Korea has failed to claim in its Panel Request that the United States acted inconsistently with Article 6.8 or Annex II. Therefore, the correct basis for the claim Korea now raises with respect to Commerce's calculation of a profit cap in its redetermination would also fall outside the Panel's terms of reference.

26. As noted in Question 16 of the Panel, Korea also failed to include in its Panel Request a claim that Commerce's determination to base CV profit on the Tenaris financial statement did not constitute an "other reasonable method" within the meaning of Article 2.2.2(iii). Therefore, the Panel should find that its terms of reference do not extend to Korea's claim regarding Commerce's determination to base CV profit on the Tenaris financial statement under Article 2.2.2(iii).

ANNEX D

ARGUMENTS OF THE THIRD PARTIES

ANNEX D-1

EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA

I. INTRODUCTION

1. Mr. Chair, Members of the Panel. China welcomes the opportunity to address you today.

2. China wishes to highlight some of the critical issues that arise in relation to the claims made by Korea regarding USDOC's use of the "viability test" and use of constructed normal value in anti-dumping proceedings. China believes that these issues are of systemic importance and should be underscored.

II. ISSUES ARISING IN CONNECTION WITH KOREA'S CLAIMS AGAINST USDOC'S USE OF THE "VIABILITY TEST"

3. Article 2.2 of the *Anti-Dumping Agreement* is the provision governing how an investigating authority may depart from the domestic sales to determine the normal value for fair price comparisons. The departure may arise from three circumstances: when there are no sales in the ordinary course of trade in the domestic market of the exporting country, or particular market situation, or the low volume of the sales in the domestic market of the exporting country, under which the normal value could be determined by either based on third country sales (like product exported to an appropriate third country) or constructed normal value.

4. The only condition provided explicitly in Article 2. 2 of the AD Agreement when the normal value is determined on the basis of the third country sales is "the price is representative", while one of the three criteria to pass the "viability test" that United States uses third country sales to calculate normal value is the quantity or value of the sales to the third country shall meet 5% or more of the company's sales to the Unites States.

5. China is of the view that Article 2.2 does not set up or implies any minimum threshold as applied by the United States in the "viability test". There is no text or context basis to support this "5% or more" criteria in "viability test" and this additional quantitative threshold, besides "representative" requirement, shall not be permitted and its application is *per se* inconsistent with Article 2.2 of Anti-Dumping Agreement.

III. ARTICLE 2.2.2 (III) REQUIRES THE PROFIT CONSTRUCTION BASED ON A REASONABLE METHOD

6. The foundational concept of "dumping", as embodied in the definition of dumping in Article VI:1 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement and reflected throughout the Anti-Dumping Agreement, is endowed with producer or exporter-specific character. This foundational concept of dumping requires the normal value to be calculated on the basis of the sources can reasonably reflect the pricing behavior of an individual exporter or producer in the domestic market of exporting country.

7. Article 2.2.2 (iii) of *Anti-Dumping Agreement* requires that any alternative calculation method used must be "reasonable" that could represent domestic market of the exporting country. The general rules provided in the chapeau of Article 2.2.2 and its paragraphs (i)-(iii) guarantee the normal value reflects the actual SG&A and profit in a reasonable way, especially if the investigating authority chooses to depart from the relevant data provided by the exporter or producer under investigation.

8. With respect to the calculation of profit as one of the important elements for the constructed normal value, the structure and content of Article 2.2.2 clearly shows its preference for a profit source representing the domestic market of the exporting country

IV. ARTICLE 2.4 REQUESTS DUE ALLOWANCE BE MADE FOR ANY OTHER DIFFERENCES AFFECTING PRICE COMPARABILITY

9. China now goes to the issue of due allowance needed for the differences affecting price comparability. Article 2.4 requires that a fair comparison shall be made between the export prices and the normal value, and provides that due allowance shall be made in each case, on its merits, for differences which affect price comparability. The "fair comparison" requirement in Article 2.4 obliges the investigating authority to take into account substantial differences that may affect the price comparability.

10. Appellate Body in EC-Fasteners states that when differences affecting price comparability between the normal value and export price exist, the authorities must make an adjustment.[1] China believes that the interpretation developed and continuously affirmed by the Appellate Body has clarified the obligation that the investigating authorities shall make due allowance accordingly.

11. In the underlying investigation, the factors cause differences presented by Korean enterprises include the types of products sole, scale of business operations, and position in the distribution chain, may substantially affect the proper calculation of profit rate and thus eventually affect the price comparison, and should be adjusted according to Article 2.4 of Anti-Dumping Agreement.

12. Thus, China shares the same view with Korea that USDOC is obliged to take into account the differences that may affect price comparability and make adjustment for the profit rate. Refusing to do so would amount to denying a fair comparison between the normal value and the export price and ultimately is inconsistent with Article 2.4 of the *Anti-Dumping Agreement.*

V. CONCLUSION

13. This concludes China's remarks. China wishes to thank you, and the Secretariat team supporting you, for the work that has been undertaken to date.

[1] Appellate Body Report, *EC – Fasteners (Article 21.5),* para. 5.163.

ANNEX D-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS
OF THE EUROPEAN UNION

1. THE U.S. VIABILITY TEST FOR THIRD-COUNTRY MARKET SALES UNDER ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT

1. Where the domestic price in the exporting country market may not represent an appropriate normal value for the purposes of comparison with the exporting price, the second part of Article 2.2 of the Anti-Dumping Agreement provides that an importing Member may select one of two alternative methods: "third-country sales" and "constructed normal value". No preference or hierarchy between these alternatives is expressed in the Agreement. Article 2.2 allows investigating authorities to opt for one of the two alternatives. The scope of this discretion is contextually informed by footnote 2. Thus, investigating authorities should meet the requirements laid down for the use of each alternative: (1) third-country sales may be used provided that their price is "representative" (taking into account the context of footnote 2); and (2) constructed normal value is based on the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits, calculated in accordance with the relevant provisions of Articles 2.2.1.1 and 2.2.2.

2. Accordingly, the European Union considers that the absence of a sufficient volume of exports of the like product to an appropriate third country could justify a finding that the price of those exports was not representative in the circumstances of the specific proceedings, particularly, as the United States points out, in circumstances where the evidence does not "demonstrate otherwise". Article 2.2 states that it may be "because of … the low volume of sales" that "such sales do not permit a proper comparison". Thus, conceptually, a link is established between the notion of comparability and relatively low volume. Article 2.2 also uses the term "comparable" in connection with the price of the like product when exported to an appropriate third country. The existence of the low volume test reflects the overarching requirement that the export price is to be compared with a proxy or benchmark that is a value that is normal. The Anti-Dumping Agreement expresses that metric in relative terms, by reference to the volume of export sales.

2. THE USDOC'S USE OF CONSTRUCTED VALUE IN THE OCTG INVESTIGATION UNDER ARTICLES 2.2.2 AND 2.4 OF THE ANTI-DUMPING AGREEMENT

3. The European Union recalls that the Appellate Body in *EC — Tube or Pipe Fittings* has clarified that Article 2.2.2 imposes a general obligation on an investigating authority to use "actual data pertaining to production and sales in the ordinary course of trade when determining amounts for administrative, selling and general costs ("SG&A") and profits". The European Union considers that, to the extent that USDOC first ascertained that actual SG&A and profit data for sales in the ordinary course of trade did not exist for the exporters and the like product under investigation, it was entitled to employ one of the other three methods provided in sub-paragraphs (i)-(iii) of Article 2.2.2 of the Anti-Dumping Agreement.

4. In a situation where domestic sales are rejected as a basis for normal value because they are not in the ordinary course of trade by reason of price, it seems that, by definition, there will be no "actual" profit margin that could be used in the construction of normal value. Furthermore, the European Union agrees with the United States that the first sentence of the chapeau of Article 2.2.2 refers to data that pertains, in principle, to the domestic market of the investigated firm. These words do not appear in the first sentence of the chapeau of Article 2.2.2. However, Article 2.2.2 begins with the phrase "For the purpose of paragraph 2". That purpose is to elaborate rules for the determination of a value that is normal, in principle, in the domestic market or in the country of origin. Furthermore, we would point out that the first and second sentences of the chapeau of Article 2.2.2 are closely related. In short, for the purposes of resolving this dispute, the relevant terms of the treaty (as opposed to the context) actually consist of the whole of paragraph 2 and the whole of Article 2.2.2. This is significant because sub-paragraphs (i)-(iii) each also refer to the domestic market of the country of origin.

5. The European Union notes that, while the text of Article 2.2.2 does not provide any elaboration as to the definition of "the same general category of products," its chapeau and overall structure provide certain guidance about "the same general category of products". We agree with both parties that this refers to something broader than "like product". On the other hand, we do not think that the phrase refers to all products capable of being covered by the Anti-Dumping Agreement. Rather, in order to give some reasonable meaning to the phrase, we would tend to think of products where there may be some substitutability on the supply side.

6. While taking no position on the merits, the European Union considers that the application of "profit cap" is a mandatory requirement whenever an investigation authority determines to use "any other reasonable method" under subparagraph (iii) of Article 2.2.2. The presence of the profit cap in subparagraph (iii) and the absence of any cap in subparagraphs (i) and (ii) demonstrate that there is an additional element in subparagraph (iii) that needs to be satisfied.

7. The European Union notes that the Anti-Dumping Agreement does not define the exact scope of what constitutes a "reasonable method" for the purposes of Article 2.2.2 (iii). The panel in *Thailand — H-Beams* held that the intention of subparagraphs under Article 2.2.2 is to obtain results that approximate as closely as possible the price of the like product in the ordinary course of trade in the domestic market of the exporting country. We do not find it easy to envisage a situation in which it is *impossible* to obtain data about the profit normally realised by producers of products of the same general category in the domestic market of the country of origin. It would only be in a truly exceptional situation, in which, despite its best efforts, the investigating authority had been unable to obtain the necessary data, that it would appear justified to fall back on the use of another reasonable method, without the determination or application of the profit cap.

8. The European Union notes that Article 2.4 requires due allowances to be made not only for the differences explicitly mentioned in that Article (i.e. differences in conditions and terms of sale, taxation, levels of trade, etc.) but for any other differences which are also demonstrated to affect price comparability.

9. While taking no position on the merits, the European Union is of the view that, if there were differences between the Korean respondents and Tenaris (i.e. the types of products sold, scale of business operations and position in the distribution chain) that affected price comparability, the failure to make due allowance for these elements is inconsistent with the "fair comparison" requirement under Article 2.4 of the Anti-Dumping Agreement. We agree with the parties that the rules in Article 2.4 of the Anti-Dumping Agreement apply also in the situation in which normal value has been constructed on the basis of costs. However, we would point out that Korea is not comparing a cost item taken from a third country with a cost item pertaining in Korea (and also reflected in the export price). Rather, Korea's complaint is about the amount for profit used in the constructed normal value.

3. CONSTRUCTED EXPORT PRICES IN CASES OF ASSOCIATION UNDER ARTICLE 2.3 OF THE ANTI-DUMPING AGREEMENT

10. Association, for purposes of Article 2.3, may be established directly (that is, between the exporter and the importer) or indirectly, *via* a third party. Unlike Article 4.1, which permits investigating authorities to entirely exclude a "related" producer from the definition of the domestic industry, Article 2.3 merely permits investigating authorities to construct a reliable export price. Therefore, it appears that the requirement of "association" need not be limited to cases of direct or indirect control. Association between the exporter and importer does not necessarily make the export price unreliable. There could, for example, be cases where the price charged to an associated importer is the same as the price charged to independent importers. In such cases, it should be open to the investigating authority to find that the export price is reliable despite the association. Nevertheless, Article 2.3 allows the investigating authority to construct the export price where the actual export price appears to be unreliable *because of* association, i.e. relying solely on the nature of the association.

11. The factual assessment underlying the investigating authority's decision to construct the export price is subject to Article 17.6: it must be unbiased and objective, and the establishment of facts must be proper. The investigating authority should, for example, properly take into account

any evidence on the record that speaks against a finding of association or shows the export price to be reliable despite association.

4. DETERMINATION OF COSTS UNDER ARTICLE 2.2.1.1. OF THE ANTI-DUMPING AGREEMENT

12. Under Article 2.2.1.1, when the records kept by an investigated party (i) are consistent with the generally accepted accounting principles of the exporting country; and (ii) reasonably reflect the costs associated with the production and sale of the product under consideration, an investigating authority will "normally" be required to use them in the calculation of cost of production. The investigating authority may depart from the norm, but is bound to explain why it did so. The calculation of costs in any given investigation must be determined based on the merits, in the light of the particular facts. Assuming that the USDOC departed from the "norm" of using NEXTEEL's own records because of its association with POSCO, the European Union considers that it could have done so as long as it properly and objectively explained and justified this departure from the norm. Naturally, if the finding of association between NEXTEEL and POSCO was itself improper, then there would also be no basis for the USDOC to decline to consider the records of transactions between those enterprises.

5. PROCEDURAL CLAIMS UNDER ARTICLES 6.2, 6.4, 6.9 AND 12.2.2 OF THE ANTI-DUMPING AGREEMENT

5.1. THE PLACEMENT OF TENARIS' ANNUAL REPORT ON THE RECORD

13. Article 6.2 requires liberal opportunities for respondents to defend their interests, but it does not enable respondents to submit relevant evidence or participate in the inquiry as and when they choose, nor does it require the investigating authority to warn an interested party that it intends to use a submission of another interested party in a certain way. A violation of Article 6.2 would take place if an interested party was prevented from commenting on requests made by other interested parties. The right of interested parties to "defend their interests" would not be sufficiently protected if they were only able to *procedurally* object to the acceptance of other parties' submissions, and unable to *substantively* comment on or rebut the newly submitted information.

14. A submission by an interested party could constitute relevant information under Article 6.4, but it is questionable whether an investigating authority's decision to accept that submission into the record could, in itself, be considered as "information" under Article 6.4. The fact that the respondents were able to "see" certain information does not yet necessarily show that Article 6.4 was complied with. Whether the investigating authority provided timely opportunities for the interested parties to prepare presentations on the basis of the information depends on whether, on the facts, the opportunities to respond to the substance of newly submitted information were sufficient.

15. With respect to Article 6.9, it is questionable whether an investigating authority's decisions pertaining to the formation of the record could, in themselves, be considered as "essential facts". On the other hand, it seems clear that a document which served as a basis for the calculation of the profit rate sets out "essential facts". The pertinent question under Article 6.9 therefore appears to be whether the USDOC should have not only made the Tenaris Annual Report available, but also separately, prior to the final determination, disclosed its decision to rely on it in the calculation of normal value. The Appellate Body in *China – GOES* found that Article 6.9 requires that "before a final determination is made, the authority explains, in the light of the substantive obligations of the Anti-Dumping Agreement […] *how the essential facts serve as the basis* for the decision whether to apply definitive measures". On the other hand, Article 6.9 may be complied with in a number of ways, not necessarily by providing all essential facts in a single document entitled "preliminary determination".

16. All essential facts must be disclosed in good time for the interested parties to properly defend their interests. In some circumstances, it may not suffice that an essential fact is on the record of the investigation, but the investigating authority's reliance on that fact may need to be additionally disclosed.

5.2. EX PARTE COMMUNICATIONS

17. The European Union considers that the Panel should tackle Korea's claim by first considering whether the letters at issue fall within the scope of Article 6.4: notably, whether they contain "relevant information … used by the authorities". Information is relevant if it would in fact have been relevant for the presentation of an interested party's case. Whether it has been "used" by the authority should, in turn, be examined by assessing whether it is of a nature and type that relates to a required step in the investigation, such as to the determination of normal value. The next issue is whether the investigating authority allowed "timely opportunities" for the respondents to see the information and prepare presentations.

18. Regarding Korea's parallel claim under Article 6.9, the threshold issue is whether or not the information contained in the letters constitutes "essential facts under consideration which form the basis for the decision to apply definitive measures". In the European Union's view, Article 6.9 could only be relevant if such a letter provided new essential facts which formed the basis of the final determination, but were not disclosed to interested parties in sufficient time.

5.3. THE ADEQUACY OF THE PUBLIC NOTICE

19. The main thrust of Korea's challenge to the use of Tenaris' profit rate and to the finding of association concerns the obligations in Article 2 of the AD Agreement. Both the information used to establish a profit rate, and the determinations on affiliation, seem to be "relevant information" and "material" in the meaning of Article 12.2.2. The crux of the issue is whether the USDOC's reasons for rejecting or accepting the arguments Korea mentions were "set forth in sufficient detail" to allow the Korean respondents to understand why their arguments or claims were treated as they were, and to assess whether or not the investigating authority's treatment of the relevant issue was consistent with domestic law and/or the WTO Agreement."

6. SAMPLING AND INDIVIDUAL DUMPING MARGINS UNDER ARTICLES 6.10 AND 6.10.2 OF THE ANTI-DUMPING AGREEMENT

20. The second sentence of Article 6.10 provides for an exception to the rule that individual dumping margins must be determined. The issue raised by Korea is whether two producers constitute a "reasonable number", i.e. whether USDOC's sample was too small. Whether the number of selected producers is "reasonable" is, in the European Union's view, closely connected to whether samples are "statistically valid". The term "largest percentage of the volume of the exports from the country in question which can reasonably be investigated", is also relevant context. In that context, the *EC – Salmon (Norway)* panel found that "the volume of export sales that may be reasonable for an investigating authority to investigate is a question that must be assessed on a case-by-case basis, taking into account all relevant facts that are before the investigating authority, including the nature and type of interested parties, the products involved and the investigating authority's own investigating capacity and resources". In addition, the Article 17.6 requirement of an unbiased and objective evaluation of the facts would require the investigating authority to provide reasons for its decision to limit the analysis, and for its methodology in doing so.

21. With regard to Article 6.10.2, the European Union considers that the decision not to determine individual dumping margins for voluntary respondents cannot be arbitrary; the authority must explain why the number of voluntary respondents would make it unduly burdensome and prevent the timely completion of the investigation.

7. ARTICLES I AND ARTICLE X:3(A) OF THE GATT 1994

22. Korea appears to claim that a breach of Article I of the GATT 1994 must be preceded by a finding of a breach of Article VI of the GATT 1994, which it argues to have demonstrated. The European Union anticipates that the matters raised by Korea will be resolved, first and foremost, under the provisions of Article VI of the GATT 1994 and the Anti-Dumping Agreement. Similarly, the European Union considers that the position with respect to Tenaris' financial statements will be resolved in the light of the specific provisions of the Anti-Dumping Agreement cited by Korea, and not determinatively on the basis of Article X:3(a) of the GATT 1994.

ANNEX D-3

EXECUTIVE SUMMARY OF THE ARGUMENTS OF TURKEY

I. INTRODUCTION

1. The Republic of Turkey (hereinafter referred to as "Turkey") welcomes the opportunity to present its views as a third party in this case. Turkey is participating in this case because of its systemic interest in correct and consistent interpretation and implementation of the Agreement on the Implementation of Article VI of GATT 1994 (hereinafter referred to as "Anti-Dumping Agreement" or "AD Agreement").

2. Turkey will not elaborate on the particular facts presented by the Parties, rather, underlining its interest, Turkey will share its views on issues addressed by the United States of America (hereinafter referred to as US) and the Republic of Korea (hereinafter referred to as Korea) in their first written submissions pertaining to Article 2.2.2 and Article 2.3 of the AD Agreement.

II. CLAIMS UNDER ARTICLE 2.2.2 OF THE ANTI-DUMPING AGREEMENT

3. The definitive anti-dumping duty on Oil Country Tubular Goods (hereinafter referred to "OCTG") originating in Korea was imposed on July 18, 2014, following the final determination of the U.S. Department of Commerce (hereinafter referred to as "USDOC").[1]

4. Regarding the assessment on the level of profit under the provision of Article 2.2.2 of the AD Agreement, the USDOC determined that the profit calculation is subject to one of the three alternative methods stipulated in Article 2.2.2 of the AD Agreement.

5. USDOC concluded that Article 2.2.2(i) of the AD Agreement was not applicable since the non-OCTG pipe products were not in the "same general category of products" with the OCTG products and that profit rate incurred by the producers in question for the production and sale of the same general category of merchandise cannot be used.

6. The USDOC was equally unable to use profit for other exporters or producers subject to the investigation in line with the Article 2.2.2 (ii) of the AD Agreement, due to the absence of any other respondent subject to the investigation in respect of production and sales of the like product in ordinary course of trade in the domestic market of the country of origin.

7. Consequently, USDOC resorted to any "other reasonable method" under Article 2.2.2(iii) to calculate the level of profit of the product under consideration. Since USDOC determined that Korea does not have a domestic market for merchandise that is in the same general category of products as the subject merchandise, it was not possible for the USDOC to calculate the profit normally realized by Korean OCTG producers.[2] Accordingly, the USDOC reached the decision to use the profit rate of Tenaris, a non-Korean corporation that had neither production nor sales in the Korean market.

8. Considering the facts of the case, Turkey understands that, even though there is no explicit definition of the word "*reasonable*", Article 2.2.2, nevertheless, expects the investigating authorities to determine the "reasonable amount" for profit in light of the rules stressed in Article 2.2 of the AD Agreement which can be considered as a "*chapeau*" to be used in interpretation of Article 2.2.2 of the AD Agreement.

9. The drafters highlighted the importance of "*reasonability*" while evaluating the profit of the product under consideration pursuant to Article 2.2.2(iii) by explicitly including phrase "*any other reasonable method*" in the text of Article 2.2.2(iii). In this context, the "profit cap" is deemed as one of the important instruments to test reasonability of the method.

[1] 79 Federal Register 41983, Certain Oil Country Tubular Goods From the Republic of Korea: Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances.

[2] Final Issues and Decision Memorandum for the Final Affirmative Determination in the Less than Fair Value Investigation of Certain Oil Country Tubular Goods From the Republic of Korea, page 21.

10. In Turkey's view, setting a profit cap based on the actual experience of other exporters or producers under Article 2.2.2(iii) intends to prevent the investigating authorities to calculate the profit subjectively which would have reflections on the normal value and an impact on the fair comparison requirement of Article 2.4 of the AD Agreement.

11. Turkey understands that, by stipulating this legal discipline, the drafters of the AD Agreement have aimed to keep the calculation basis of the profit of the merchandise in question as close as possible to the home market experience of exporters or producers subject to investigation. Thus, the context of the adjective "reasonable" as used Article 2.2.2 of the AD Agreement displays this very rationale.

12. In light of these explanations Turkey doubts whether the use of a non-Korean corporation's profit amount, that had neither production nor sales in the Korean market, satisfies the primary legal expectation of Article 2.2.2(iii) of the AD Agreement which requires the presence of a profit cap based initially on the home market experience of exporters or producers subject to investigation.

III. CONCLUSION

13. With these comments, Turkey expects to contribute to the legal debate in this case, and would like to express again its appreciation for this opportunity to share its points of views.

ANNEX E

PROCEDURAL RULING

ANNEX E-1

PROCEDURAL RULING ON THE UNITED STATES' REQUEST TO PARTIALLY OPEN THE SUBSTANTIVE MEETINGS FOR PUBLIC OBSERVATION

1 INTRODUCTION

1.1. In our communication of 30 October 2015 to the parties we noted that Korea and the United States were not in agreement on whether to make the substantive meetings in this dispute open to public observation. We stated that in no case would we require a party or a third party to make its statements in public should it choose not to do so. However, we said that we would consider adopting procedures that would allow a party or third party that wished to make its statements in public to do so, without impinging on the rights of a party or third party that wished to make its statements in closed session.

1.2. On 14 July 2016, we received a letter from the United States requesting that we adopt such additional procedures before the first substantive meeting scheduled for 21-22 July 2016, so that the United States and third parties who chose to do so could make their statements in public. Korea opposed this request.

1.3. Among the third parties, the European Union agreed to make its statements in public at the third party session while Canada indicated that if it did decide to make a statement at the third party session, it would make it in public. India, China, the Russian Federation, and Mexico did not wish to make their statements in this dispute in public. In addition, India and Mexico submitted comments opposing the United States' request.

1.4. After considering the parties' and third parties' submissions on this matter, we informed them on 19 July 2016 that we were denying the United States' request, and would not make the substantive meetings open to public observation. We provide, through this ruling, our reasons for denying this request.

2 MAIN SUBMISSIONS OF THE PARTIES AND THIRD PARTIES

2.1. The United States argues that it has a right under Article 18.2 of the DSU to disclose its statements to the public, and Korea's choice to maintain the confidentiality of its own statements should not be a basis for denying the United States its right under this provision. In terms of modalities, the United States submits that the Panel could arrange for the public viewing of the meeting through closed-circuit television (CCTV). This would allow the Panel to switch off the CCTV signal when statements are made by Korea or third parties who choose not to make their statements in public, thereby protecting their wish not to make their statements in public while at the same time, allowing the United States and third parties willing to make their statements in public to do so. The United States also suggests that if this is not feasible, the Panel could record the statements and play them back at a later date to the public.

2.2. Korea insists that the Panel does not have the authority to open the meeting to the public in the absence of agreement between the parties to do so, arguing that Articles 14.1 and 18.2 of the DSU require confidentiality of the panel proceedings. Korea notes that when open panel meetings have been held in the past, it has been with the consent of all parties to the dispute. Korea asserts that allowing public observation of the panel meeting without Korea's consent creates a substantial risk that information considered to be confidential by Korea, including business confidential information, will be publicly disclosed. Korea argues that opening of panel meetings without the consent of the disputing parties raises serious systemic issues, and notes that the issue of open hearings is a matter of debate and disagreement among Members in the DSU reform negotiations. In Korea's opinion, the Panel cannot make a decision that modifies the DSU.

2.3. India submits that considering one of the parties, namely, Korea opposes the request to make the substantive meetings open to public observation, it would be inconsistent with the DSU to do so. Noting that opening substantive meetings to the public is a matter of systemic concern for the WTO Members, Mexico submits that the United States has the right to disclose its own positions and statements to the public but that right does not have to be exercised through a public hearing.

3 RULING

3.1. In this dispute, we have decided not to partially open the substantive meetings to the public, as requested by the United States. We have reached this decision based on a number of considerations.

3.2. We note first that the United States made its request only one week before the scheduled dates of the first substantive meeting. Thus, there was very limited time available to address the request, and make necessary logistical arrangements. We were informed that there was limited experience and in-house capacity for recording partially open panel meetings for later public observation.[1]

3.3. In addition, we share Korea's concern that making the substantive meetings partially open to public observation creates a substantial risk that information that is confidential, whether because it is business confidential, or because it is considered confidential to the dispute by a party, may be publicly disclosed. We consider that this concern is even greater in this particular case in view of the large amount of record evidence that has been designated as business confidential by the parties. In order to ensure that business confidential information or arguments or statements of Korea and the third parties who choose not to make their statements in public are not inadvertently disclosed, either by the Panel, or by the United States or third parties who make their statements in public, extreme vigilance would be needed. Adequate time was not available to make the necessary logistical arrangements for cutting the video feed in real time, or arranging for video-recording and review by the parties, to ensure that no information was wrongly disclosed.

3.4. Moreover, we are concerned in principle with the prospect of public observation of the statements and responses of the United States and certain third parties to Panel questions in a case where the statements and responses of Korea and other third parties are not made in public. In our view, such partially public proceedings affect the ability of the viewing public to understand the substance being discussed by the Panel, parties and third parties, given that some statements, as well as some questions and answers, would not be public, while others would. In addition, the very fact that some statements and responses were not made in public might raise unwarranted implications as to reasons why some parties or third parties did not make statements or responses in public, as well as regarding the merits of their positions.[2] We recall that no third party to this dispute expressly supported the United States' position that the substantive meetings may be partially opened to public observation when one party objects to it. Further, as Korea and some third parties observed, Article 18.2 of the DSU provides that nothing in that agreement precludes a party to a dispute from disclosing statements of its own positions to the public. Thus, the United States, and any third party who so wishes, may disclose their oral statements and responses to Panel questions to the public should they choose to do so. Indeed, we understand that is routinely done by the United States.

[1] WTO panels, with one exception at the time of our decision, had conducted open hearings only with the consent of all the parties. The exception is the simultaneous compliance panels in DS381 – *US – Tuna II (Mexico) (Article 21.5 – Mexico II)* and *US – Tuna II (Mexico) (Article 21.5 – US),* which decided to partially open their substantive meetings to the public. As we understand it, the procedures adopted allowed the United States and third parties who chose to make their statements in public to do so by video-recording their statements and screening the recording at a later date, after ensuring that the statements did not disclose the statements of Mexico and third parties, who chose not to make their statements in public. We understand that an outside contractor was used for the recording. As the proceedings in this dispute are still on-going, the reasons for the panels' decision in this regard are not available to us.

[2] One panelist does not share the views expressed in the first two sentences of this paragraph. However, he considers that the Panel's conclusion is fully supported and adequately explained by the views set forth in paragraphs 3.2 and 3.3, and therefore joins in that conclusion.

3.5. Based on the foregoing, we denied the United States' request to allow the United States, and the third parties who choose to make their statements in public, to do so at the substantive meetings in this dispute.

ANNEX F

INTERIM REVIEW

ANNEX F-1

INTERIM REVIEW

1 INTRODUCTION

1.1. In accordance with Article 15.3 of the DSU, this Annex sets out the Panel's discussion of the arguments made at the interim review stage. We have revised certain aspects of the Report in light of the parties' comments, where we found it appropriate. We have also made a number of changes of an editorial nature to improve the clarity and accuracy of this Report, or to correct typographical and non-substantive errors, including those suggested by the parties. Due to changes made in the Report, the numbering of footnotes in the Final Report has changed from the Interim Report. References to footnotes pertain to that in the Final Report.

2 SPECIFIC REQUESTS FOR REVIEW SUBMITTED BY THE PARTIES

2.1 Paragraph 1.8

2.1. Korea requests the Panel to make certain modifications to reflect the summary of events leading to the adoption of the timetable, as well as the parties' correspondence on this matter.[1] Opposing this request, the United States submits that the modifications proposed are not an accurate reflection of the events, and other panel reports it is aware of do not provide such a summary.[2]

2.2. Korea presents no reasons in support of its request to modify this descriptive section of the Report, and we find no rationale for making them. Therefore, we deny Korea's request. We also observe that this descriptive section was issued to the parties prior to the issuance of the Interim Report, and Korea did not provide these comments at that stage.

2.2 Paragraph 7.8

2.3. Korea asks the Panel to revise this paragraph to more closely reflect its arguments.[3] The United States does not comment on Korea's request.

2.4. We consider that the language used in this paragraph represents Korea's position accurately. We therefore decline Korea's request.

2.3 Paragraph 7.11

2.5. Korea makes two requests in regard to this paragraph. First, Korea asks the Panel to revise this paragraph to more fully reflect its arguments. Second, Korea asks the Panel to include certain additional arguments it has made.[4] The United States objects to Korea's request, noting the Panel's express focus on the "main" arguments of the parties and suggesting that to the extent these ancillary arguments are not pertinent to the Panel's analysis, they are better made in the sections of the Report summarizing Korea's arguments. The United States also maintains that the final sentence of Korea's proposed addition to paragraph 7.11 is already summarized in the first sentence of that paragraph.[5]

2.6. As regards Korea's first request, we consider that this paragraph already references the arguments that Korea asks us to include.[6] We therefore decline Korea's request. We also decline Korea's second request, because the additional arguments that Korea asks us to include are not integral to our evaluation and findings.

[1] Korea's request for interim review, para. 3.
[2] United States' comments on Korea's request for interim review, para. 4.
[3] Korea's request for interim review, para. 4.
[4] Korea's request for interim review, para. 5.
[5] United States' comments on Korea's request for interim review, para. 6.
[6] See para. 7.11 and fn 35.

2.4 Paragraph 7.14

2.7. Korea asks the Panel to add certain language to this paragraph to improve clarity.[7] The United States objects to Korea's request arguing that the additional language proposed by Korea would inappropriately insert an interpretive argument made by Korea into the paragraph.[8]

2.8. Korea's request is, in our view, unwarranted, as the change it asks us to make to this paragraph is itself contested in this dispute. We therefore decline Korea's request.

2.5 Paragraph 7.17

2.9. Korea asks the Panel to revise this paragraph to more accurately reflect its arguments.[9] The United States objects to Korea's request, arguing that Korea's proposed modification does not accurately reflect the interpretive arguments made by Korea in these proceedings. Further the United States contends that the argument that Korea asks the Panel to add to this paragraph is unrelated to the issues of treaty interpretation that are relevant to the Panel's discussion in this section.[10]

2.10. We consider that Korea's arguments have been accurately reflected in this paragraph.[11] We therefore, decline Korea's request.

2.11. Korea also asks the Panel to delete certain language from a footnote to this paragraph, contending that it did make the arguments which the footnote states it did not.[12] The United States opposes Korea's request arguing that Korea's request has no basis as it does not offer any citations to such arguments.[13]

2.12. We have decided to accommodate Korea's request.

2.6 Paragraph 7.27

2.13. Korea requests the Panel to make certain additions and revisions to more accurately describe the USDOC's remand determination.[14] The United States agrees to Korea's request to specify the date on which this determination was affirmed by the USCIT, but suggests editing the language proposed by Korea.[15] The United States opposes other additions and revisions requested by Korea.[16]

2.14. We have clarified that the remand determination was affirmed in August 2016, albeit not in the language proposed by Korea. We reject Korea's request that we not use the term "methodology" for the reasons set out in paragraph 2.40 below. We also reject Korea's request to add a description of how the USDOC calculated CV profit in the remand determination because it is already reflected in other parts of the Report.

2.7 Paragraph 7.32

2.15. The United States requests the Panel to replace "surrogate company" in the second sentence of paragraph 7.32 with "an OCTG producer" as "surrogate company" could be confused with the term "surrogate values".[17] Korea objects to the United States' request, contending that there is no basis to believe that the Panel's use of the term "surrogate company"

[7] Korea's request for interim review, para. 6.
[8] United States' comments on Korea's request for interim review, para. 7.
[9] Korea's request for interim review, para. 7.
[10] United States' comments on Korea's request for interim review, paras. 8-10.
[11] Para. 7.17 and fn 43.
[12] Korea's request for interim review, para. 8.
[13] United States' comments on Korea's request for interim review, para. 11.
[14] Korea's request for interim review, para. 9.
[15] United States' comments on Korea's request for interim review, para. 9.
[16] United States' comments on Korea's request for interim review, para. 9.
[17] United States' request for interim review, para. 4.

could be confused with the term "surrogate values" and the United States provides no reasons why such confusion should arise.[18]

2.16. We agree with Korea, and therefore decline the United States' request.

2.8 Paragraph 7.34

2.17. Korea asks the Panel to revise this paragraph to more fully reflect its arguments, and to add a footnote to this paragraph referencing certain exhibits.[19] The United States does not comment on Korea's request.

2.18. We have decided to accommodate Korea's request. However, the exhibits that Korea asks us to reference are already cited in the footnote to this paragraph. We therefore decline this aspect of Korea's request.

2.9 Paragraph 7.55

2.19. Korea asks the Panel to add a footnote to this paragraph, setting out certain additional arguments it had made.[20] The United States does not comment on Korea's request.

2.20. We consider that the arguments that Korea asks us to include are not relevant to our evaluation and findings and therefore, decline Korea's request.

2.10 Paragraph 7.65

2.21. Korea asks the Panel to revise this paragraph to more accurately reflect its arguments.[21] The United States does not comment on Korea's request.

2.22. We have decided to accommodate Korea's request.

2.11 Paragraphs 7.69, 7.72, 7.74, 7.75

2.23. The United States submits that the Panel's statement in paragraph 7.72 that "*pipe products* not used for down hole application … fell within the definition of the like product" incorrectly includes non-OCTG pipe products within the definition of the like product.[22] Korea does not comment on this aspect of the United States' request.

2.24. While we disagree with the United States' reading of the last sentence of paragraph 7.72, we have modified that sentence to more clearly express our conclusion.

2.25. The United States further requests that the Panel make two changes to paragraph 7.69. First, it requests that the Panel replace "pipe products" with "OCTG" in the second sentence of paragraph 7.69. Second, it requests that instead of concluding that the same general category of products was subject to the limitation that such products be used for down hole applications, the Panel change its conclusion to state that the same general category of products, as defined by the USDOC, was expanded to incorporate only drill pipe and those non-scope OCTG pipe products that exhibit such a limitation.[23] Korea objects to the United States' request, contending that paragraph 7.69 accurately describes the USDOC's definition of the like product.[24]

2.26. We decline the United States' request to replace "pipe products" with "OCTG" because we consider that it follows from the use of the term "pipe products in question" in paragraph 7.69 that the reference to pipe products in that paragraph does not include all pipe products but only the pipe products covered under the product scope of the underlying investigation. We also decline the

[18] Korea's comments on the United States' request for interim review, para. 2.
[19] Korea's request for interim review, para. 10.
[20] Korea's request for interim review, para. 11.
[21] Korea's request for interim review, para. 12.
[22] United States' request for interim review, para. 6. (emphasis original)
[23] United States' request for interim review, paras. 5-8.
[24] Korea's comments on the United States' request for interim review, paras. 4-10.

United States' second request because it is not consistent with arguments that the United States has made in these proceedings.[25]

2.27. The United States requests that the Panel reconsider the conclusions reached in paragraphs 7.72, 7.74, and 7.75 that the same general category of products identified by the USDOC was narrower than the like product. It requests that, based on this reconsideration, the Panel find that Korea has failed to demonstrate that the USDOC's definition of the "general category of products" in the underlying investigation was inconsistent with Articles 2.2.2(i) and 2.2.2(iii) of the Anti-Dumping Agreement.[26] Korea agrees with the Panel's conclusions and therefore objects to the United States' request.[27]

2.28. We decline the United States' request because the reasons the United States presents for this request are not consistent with its arguments in these proceedings.[28] We have, however, added a citation to paragraph 7.69 to further clarify the basis for the Panel's conclusions.

2.12 Paragraph 7.76

2.29. Korea makes two requests in regard to this paragraph. First, Korea asks the Panel to revise paragraph 7.76(d) to more fully reflect its arguments. Second, it asks the Panel to add a sub-paragraph "e" to this paragraph to reflect certain additional arguments.[29] The United States considers that Korea has a basis for its request to add a new sub-paragraph 'e' but not for its request to modify paragraph 7.76(d).[30]

2.30. We consider that paragraph 7.76(d) and its footnote already cites the arguments that Korea asks us to include. We also note that paragraph 7.76(a) already reflects the argument that Korea asks us to include in a new sub-paragraph "e". We therefore decline both requests.

2.13 Paragraphs 7.101, 7.102, and 7.108(a)

2.31. The United States requests the Panel to revise the first sentence of paragraph 7.101 of the Report to state that the text of Article 2.2.2(iii) makes it clear that the determination of the profit cap is mandatory when data pertaining to sales of products of the same general category in the domestic market exist in the record of the proceeding. The United States further requests that paragraphs 7.102 and 7.108(a) be deleted in their entirety.[31] Korea objects to the United States' requests, contending that the Panel's reasoning does not provide any basis to conclude that the mandatory requirement to calculate a profit cap would be removed if data is lacking.[32]

2.32. We agree with Korea and decline the United States' requests.

2.14 Paragraphs 7.104, 7.107, 7.108(b), and 7.109

2.33. The United States makes two requests: First, the Panel should reconsider its findings in paragraphs 7.104, 7.107, and 7.108(b) regarding the USDOC's ability to calculate a profit cap to the extent they rely on the Panel's conclusions with respect to the same general category of products. Second, the Panel should reconsider its finding under paragraph 7.109 regarding whether the USDOC's inability to calculate a profit cap was inconsistent with its obligations under Article 2.2 of the Anti-Dumping Agreement.[33] Korea opposes the United States' first request, contending that it is premised on the erroneous view that the Panel incorrectly found that the USDOC's definition of the "same general category of products" is improper.[34] Korea also objects to the United States' second request, arguing that the USDOC had before it ample information with

[25] United States' response to Panel question No. 49, para. 22.
[26] United States' request for interim review, para. 9.
[27] Korea's comments on the United States' request for interim review, para. 11.
[28] United States' response to Panel question No. 49, para. 22.
[29] Korea's request for interim review, para. 13.
[30] United States' comments on Korea's request for interim review, para. 15.
[31] United States' request for interim review, para. 10.
[32] Korea's comments on the United States' request for interim review, paras. 13 and 14.
[33] United States' request for interim review, para. 11.
[34] Korea's comments on the United States' request for interim review, para. 17.

which it could have calculated a profit cap as required under Article 2.2.2(iii) and that, in any case, the Panel recognized the mandatory nature of the obligation to calculate a profit cap under that provision.[35]

2.34. As we have decided to decline the United States' request to reconsider our conclusions with respect to the same general category of products, we have no reason to reconsider our findings in paragraphs 7.104, 7.107, and 7.108(b), which are premised on those conclusions. We therefore decline the United States' first request. Given that we have decided not to modify our conclusions with respect to the USDOC's failure to calculate and apply a profit cap, we have no reason to reconsider our finding in paragraph 7.109. We therefore reject the United States' second request.

2.15 Paragraph 7.121

2.35. Korea requests certain revisions as well as additions to more accurately and fully reflect its arguments with respect to the USDOC's remand determination.[36] The United States opposes this request.[37]

2.36. We have made the revisions requested by Korea to more accurately reflect its arguments, and made changes in paragraph 7.133 to ensure consistency with this paragraph. We decline to make the additions proposed by Korea, because they affect the clarity of the Report. The parties are free to reflect their arguments in their executive summaries, annexed to the Final Report, as they deem fit. We see no need to specify these particular arguments in the Report itself.

2.16 Paragraph 7.122

2.37. The United States requests certain revisions to more accurately characterize the US proceedings at issue.[38] Korea does not oppose this request.[39] We have made the revisions requested by the United States but for consistency purposes, replaced the reference to "underlying" investigation with "final determination".

2.17 Footnote 161 to paragraph 7.125

2.38. Korea requests the Panel to add certain references to its submissions.[40] The United States opposes this request.[41] In the sentence referred to by Korea, we were setting out the issues that we considered in our analysis, and not reflecting the parties' arguments. The additions requested may create confusion between our understanding of the issues and the parties' arguments, and we decline to make them.

2.18 Paragraph 7.130(a)

2.39. Noting the panel's comment that the USDOC used a different "methodology" to determine the CV profit in the remand determination, Korea states that neither the remand determination, nor the United States, uses the term "methodology" and argues that the USDOC did not, in fact, use a different methodology in this determination.[42] Thus, Korea opposes the use of this term, and asks the Panel to revise this paragraph. The United States opposes this request, commenting that the USDOC did use a different method to determine CV profit in the remand determination.[43]

2.40. The Report makes it clear that we used the term "methodology" here to describe the manner in which the USDOC determined the CV profit in the final determination, and in the remand determination. Thus, we reject Korea's request, and do not revise this paragraph.

[35] Korea's comments on the United States' request for interim review, para. 18.
[36] Korea's request for interim review, para. 14.
[37] United States' comments on Korea's request for interim review, para. 16.
[38] United States' request for interim review, para. 12.
[39] Korea's comments on the United States' request for interim review, para. 19.
[40] Korea's request for interim review, para. 16
[41] United States' comments on Korea's request for interim review, para. 17.
[42] Korea's request for interim review, paras. 17 and 17(a).
[43] United States' comments on Korea's request for interim review, para. 18.

2.19 Paragraph 7.130(b)

2.41. Korea asks the Panel to provide additional explanation on the USDOC's alleged application of a profit cap.[44] The United States opposes this request.[45]

2.42. We reject Korea's request, as we consider the requested additions affect the clarity of the Report, and are unnecessary.

2.20 Paragraph 7.130(c)

2.43. Korea asks the Panel to make certain changes to precisely reflect what was done by the USDOC in the remand determination.[46] The United States does not comment on this request. We have made the changes requested by Korea.

2.21 Paragraphs 7.131(b) and (c)

2.44. Korea asks the Panel to make certain revisions in this paragraph consistent with the changes it proposes in paragraphs 7.130(b) and (c).[47] The United States takes no position on Korea's request.[48]

2.45. We have modified paragraph 7.131(c) to reflect the changes made in paragraph 7.130(c). Since we rejected Korea's request with respect to paragraph 7.130(b), we do not make changes in paragraph 7.131(b).

2.22 Footnote 178 to paragraph 7.134

2.46. Korea requests several revisions and additions in this footnote, which the United States opposes.[49]

2.47. Korea asks the Panel to specify the claims that it presented in its second written submission. Considering that these are already set out in paragraph 7.119, we decline Korea's request. Korea also asks us to modify this footnote to state that the opening statement at the second substantive meeting was the "first opportunity" Korea had to make specific claims challenging the remand determination, as this determination was affirmed by the USCIT in August 2016. Korea raised some of these specific claims in its second written submission that was filed before Korea made its opening statement. We do not understand how this opening statement could be considered the "first opportunity" to present these claims when Korea did avail itself of an opportunity to make such claims prior to this statement. Hence, we deny Korea's request. Korea asks us to delete certain observations. Considering this request is based on Korea's view, with which we disagree, that the opening statement was the first opportunity to present specific claims, we reject this request.

2.23 Paragraph 7.136

2.48. Korea disagrees that it accepted that through its conclusion of affiliation under US law, the USDOC in effect found "association" within the meaning of Article 2.3 of the Anti-Dumping Agreement.[50] Rather, it agreed that the USDOC "sought to find" association on this basis. The United States does not comment on Korea's statement. We have modified this paragraph to more accurately reflect Korea's position.

[44] Korea's request for interim review, paras. 17 and 17(b).
[45] United States' comments on Korea's request for interim review, para. 19.
[46] Korea's request for interim review, paras. 17 and 17(c).
[47] Korea's request for interim review, para. 18.
[48] United States' comments on Korea's request for interim review, para. 21.
[49] Korea's request for interim review, para. 19; and United States' comments on Korea's request for interim review, para. 22.
[50] Korea's request for interim review, para. 20.

2.24 Paragraph 7.137

2.49. Korea requests several revisions in this paragraph to more accurately reflect its arguments under Article 2.3 of the Anti-Dumping Agreement.[51] The United States does not comment on this request.

2.50. In our view, this paragraph accurately and adequately reflects Korea's arguments in these proceedings. However, we have added an additional citation to this paragraph.

2.25 Paragraph 7.150

2.51. Korea asks the Panel to add a citation to a sentence setting out our understanding of "association", based on the dictionary definitions.[52] The United States does not comment on this request. Considering that the sentence at issue sets out our own understanding, we do not add a citation in this regard.

2.26 Paragraph 7.158

2.52. The United States requests certain modifications to avoid conveying the impression that the Panel reviewed the USDOC's actions under US law, rather than under the Anti-Dumping Agreement, including replacing the reference to "decisions of" the USDOC, with "factual determinations made by" the USDOC.[53] Korea opposes the use of the word "factual" here to modify "determinations", but does not object to other aspects of the United States' request.[54] Considering the United States has not explained why the use of the word "factual" is necessary in this context, while accommodating other aspects of its request in order to clarify that the Panel did not review the USDOC's actions under US law, we have not added the word "factual".

2.27 Footnote 219 to paragraph 7.159

2.53. Korea asks the Panel to make certain additions to more accurately reflect its arguments.[55] The United States does not comment on this request. The additions requested by Korea are already reflected in paragraph 7.157. Hence, we deny its request.

2.28 Paragraph 7.165

2.54. Korea states that the Panel mischaracterizes its argument that evidence of marketing and technology collaboration between NEXTEEL and POSCO had little probative value considering POSCO engaged in the same types of activities with hundreds of companies, by stating that Korea essentially argues that evidence of such types of collaboration would have probative value only if they were exclusive between NEXTEEL and POSCO.[56] Korea asks the Panel to make changes to correctly reflect its argument. The United States does not comment on this request.

2.55. We note that contrary to its comment here, Korea did repeatedly emphasize the lack of an exclusive relationship between NEXTEEL and POSCO.[57] Therefore, we disagree that we mischaracterized its arguments in this regard. In any case, the first sentence of this paragraph reflects the Panel's understanding of Korea's argument, and we do not consider any revisions to be necessary in this regard.

2.29 Paragraph 7.175

2.56. Noting the Panel's statement that "the USDOC's conclusions of affiliation based on control under US law were supported by evidence", the United States asks us to modify this statement so

[51] Korea's request for interim review, para. 21.
[52] Korea's request for interim review, para. 22.
[53] United States' request for interim review, para. 13.
[54] Korea's comments on the United States' request for interim review, para. 20.
[55] Korea's request for interim review, para. 23.
[56] Korea's request for interim review, para. 24.
[57] Korea's first written submission, para. 180; response to Panel question No. 64, para. 71.

as to not convey the impression that the Panel was making substantive findings under US law.[58] Korea opposes this request.[59]

2.57. The Interim Report, including paragraphs 7.158 and 7.159, makes it clear that the Panel was reviewing the USDOC's overall conclusion regarding affiliation under Article 2.3 of the Anti-Dumping Agreement, and not US law. Nonetheless, to avoid confusion, we have decided to accommodate the United States' request.

2.30 Footnote 244 to paragraph 7.179

2.58. Korea requests the Panel to make certain revisions to more accurately reflect Korea's arguments under Article 2.3 of the Anti-Dumping Agreement.[60] The United States does not comment on this request. We have made the revisions requested by Korea.

2.31 Paragraph 7.191

2.59. Korea requests certain modifications to better reflect Korea's arguments under Article 2.2.1.1 of the Anti-Dumping Agreement.[61] The United States does not comment on this request. We have made the revisions requested by Korea, albeit not in the precise language suggested.

2.32 Paragraph 7.192

2.60. Korea requests certain modifications to better reflect Korea's arguments under Article 2.2.1.1 of the Anti-Dumping Agreement.[62] The United States does not comment on this request. We have made the modifications requested by Korea.

2.33 Paragraph 7.198

2.61. Korea requests the Panel to make certain additions to better reflect Korea's overall argumentation under Article 2.2.1.1 of the Anti-Dumping Agreement.[63] The United States opposes this request.[64]

2.62. The additions requested by Korea pertain to our analysis rather than the main arguments of the parties, and Korea does not explain how inclusion of this argument enhances the analysis. In our view, the additions requested would affect the clarity of the analysis presented in this paragraph, and hence, we deny Korea's request.

2.34 Paragraph 7.207

2.63. Korea asks the Panel to revise paragraph 7.207(a) to more fully reflect its arguments. The United States opposes this request, arguing that Korea fails to identify which of its written or oral submissions support its contention that the changes it requests reflect the arguments it made during this dispute. Korea also asks the Panel to delete Korea's argument in the last sentence of paragraph 7.207(c).[65] The United States does not comment on this request.

2.64. We have decided to accommodate Korea's request with regard to revising paragraph 7.207(a), albeit with certain modifications. As regards Korea's request to delete its argument in the last sentence of paragraph 7.207(c), considering that Korea made this argument in its first written submission, and that the Panel has addressed it in its evaluation, we decline this request.[66]

[58] United States' request for interim review, para. 14.
[59] Korea's comments on the United States' request for interim review, paras. 21-23.
[60] Korea's request for interim review, para. 24.
[61] Korea's request for interim review, para. 26.
[62] Korea's request for interim review, para. 27.
[63] Korea's request for interim review, para. 28.
[64] United States' comments on Korea's request for interim review, para. 23.
[65] Korea's request for interim review, para. 29.
[66] Korea's first written submission, para. 212.

2.35 Paragraph 7.213

2.65. Korea asks the Panel to revise this paragraph to more accurately reflect its arguments.[67] In particular, Korea asks us to replace the reference in this paragraph to the USDOC's failure to "notify its acceptance" of the Tenaris financial statements on the record with a reference to the USDOC's failure to "resolve the question of whether" the Tenaris financial statements "were properly" on the record. The United States opposes this request, arguing that Korea fails to identify which of its written or oral submissions support its contention that the changes it requests reflect the arguments it made during this dispute. The United States further contends that Korea's request misrepresents its arguments during these proceedings because it did make the arguments that it asks the Panel to modify.[68]

2.66. We note that Korea argues in these proceedings that the USDOC violated several requirements under the Anti-Dumping Agreement *by failing to resolve the question of whether* the Tenaris financial statements were properly on the record until its final determination.[69] Korea also argues that *by failing to render a decision* regarding the placement of the Tenaris financial statements on the record until its final determination, the USDOC denied the Korean respondents an opportunity to submit information rebutting the contents of the Tenaris financial statements.[70] However, Korea also argues that "without knowing that the USDOC had actually accepted the Tenaris financial statements, the respondents could not reasonably launch a full-scale argument against the use of Tenaris's financial statements, including the submission of rebuttal or clarification information against the information contained in the financial statements submitted by the petitioner".[71] We therefore understand Korea to argue that the Korean respondents were prevented from making rebuttal submissions because *they did not know*, until the final determination, that the USDOC had actually accepted those statements on the record. Considering that the Korean respondents could not formally know about the USDOC's decision to accept the Tenaris financial statements on the record unless the USDOC notified them of it, we understand Korea to effectively argue that it was the USDOC's failure to notify them of its acceptance of the Tenaris financial statements on the record that prevented them from making rebuttal submissions. This understanding is in keeping with the formulation of Korea's claim in its panel request which, in relevant part, states that the USDOC acted inconsistently with Articles 6.2, 6.4, and 6.9 because *it did not inform* interested parties of its decision to accept the petitioners' submission of the Tenaris financial statements on the record. This understanding is also consistent with Korea's argument that "without any guidance from the USDOC, the Korean respondents were unable to protect their interests as there was no reason to believe that information submitted by petitioners two months past the statutory deadline was properly on the record".[72] We therefore consider that paragraph 7.213 accurately reflects Korea's arguments and decline Korea's request to modify this paragraph. We have, however, included additional references in this paragraph to more fully reflect Korea's arguments.

2.36 Paragraph 7.221

2.67. Korea asks the Panel to revise this paragraph to more fully reflect its arguments.[73] The United States does not comment on Korea's request.

2.68. We have decided to accommodate Korea's request.

2.37 Paragraph 7.222

2.69. Korea asks the Panel to revise this paragraph to more closely reflect its arguments.[74] The United States opposes this request, arguing that Korea fails to identify which of its written or oral submissions support its contention that the changes it requests reflect the arguments it made

[67] Korea's request for interim review, para. 30.
[68] United States' comments on Korea's request for interim review, para. 24.
[69] Korea's opening statement at the first meeting of the Panel, para. 115.
[70] Korea's second written submission, para. 293.
[71] Korea's second written submission, para. 285; opening statement at the first meeting of the Panel, para. 115.
[72] Korea's first written submission, para. 204.
[73] Korea's request for interim review, para. 31.
[74] Korea's request for interim review, para. 32.

during this dispute. The United States further notes that Korea's request misrepresents its arguments during these proceedings.[75]

2.70. We decline Korea's request to modify this paragraph for the same reason that we rejected its request to amend paragraph 7.213.

2.38 Paragraph 7.227

2.71. Korea asks the Panel to revise this paragraph to more closely reflect its arguments.[76] The United States opposes this request, arguing that Korea fails to identify which of its written or oral submissions support its contention that the changes it requests reflect the arguments it made during this dispute. The United States further notes that Korea's request misrepresents its arguments during these proceedings.[77]

2.72. We decline Korea's request to modify this paragraph for the same reason that we rejected its request to amend paragraph 7.213.

2.39 Paragraph 7.236

2.73. Korea asks the Panel to revise this paragraph to more closely reflect its arguments.[78] The United States opposes this request, arguing that Korea fails to identify which of its written or oral submissions support its contention that the changes it requests reflect the arguments it made during this dispute.[79]

2.74. We have decided to accommodate Korea's request, albeit with certain modifications.

2.40 Paragraph 7.253

2.75. Korea asks the Panel to revise this paragraph to more closely reflect its arguments.[80] The United States opposes this request, arguing that Korea fails to identify which of its written or oral submissions support its contention that the changes it requests reflect the arguments it made during these proceedings.[81]

2.76. We have decided to accommodate Korea's request.

2.41 Paragraph 7.259

2.77. Korea requests certain revisions to provide a more comprehensive summary of the relevant facts at issue under Article 6.10.2 of the Anti-Dumping Agreement.[82] The United States does not comment on this request.

2.78. The factual background section of the Interim Report presents the necessary facts, and the additions proposed by Korea are more detailed than is necessary in this regard. Hence, we reject Korea's request.

2.42 Paragraph 7.268

2.79. Korea requests certain revisions to more accurately reflect its arguments.[83] The United States opposes Korea's request.[84] The revisions requested pertain to the section containing the Panel's analysis rather than the parties' arguments, would affect the clarity of our analysis, and delete some of our conclusions. Hence, we deny Korea's request.

[75] United States' comments on Korea's request for interim review, para. 24.
[76] Korea's request for interim review, para. 33.
[77] United States' comments on Korea's request for interim review, para. 24.
[78] Korea's request for interim review, para. 34.
[79] United States' comments on Korea's request for interim review, para. 24.
[80] Korea's request for interim review, para. 35.
[81] United States' comments on Korea's request for interim review, para. 24.
[82] Korea's request for interim review, para. 36.
[83] Korea's request for interim review, para. 37.
[84] United States' comments on Korea's request for interim review, para. 25.

2.43 Paragraph 7.283

2.80. Korea requests that the Panel reflect two of its arguments in this paragraph.[85] The United States does not comment on this request.

2.81. We have modified this paragraph to reflect the first argument made by Korea, albeit in different language from that proposed by Korea. We have also made certain changes in paragraph 7.284. The second argument is already reflected in paragraph 7.284 of our Report, and thus we do not find it necessary to reflect it in this paragraph as well.

2.44 Paragraph 7.293(b)

2.82. Korea requests the Panel to make a revision to more accurately reflect the facts of the underlying investigation.[86] The United States does not comment on Korea's request. We have made the revision requested by Korea.

2.45 Paragraph 7.313(a)

2.83. Korea requests the Panel to make certain additions to more accurately reflect Korea's arguments under Article X:3(a) of the GATT 1994.[87] The United States opposes this request.[88] The additions requested by Korea are set out in paragraph 260 of its first written submission, and do add clarity on Korea's position on this issue. Hence, we have made the additions requested by Korea, citing this paragraph of its first written submission.

2.46 Paragraph 7.326

2.84. Korea requests certain additions in the first sentence of this paragraph to more accurately reflect Korea's arguments under Article X:3(a) of the GATT 1994.[89] The United States opposes this request.[90]

2.85. The first sentence accurately reflects Korea's view that since Tenaris's financial statements were not on the record of the underlying investigation, the Korean respondents could not avail themselves of the opportunity to submit rebuttal facts.[91] The second and third sentences of this paragraph already reflect the additions requested by Korea where we note its view that the Korean respondents were prohibited from submitting rebuttal facts until the USDOC "conveyed a formal decision" placing the Tenaris's financial statement on the record of the underlying investigation, and that the USDOC denied these respondents an opportunity to submit such facts. The additions requested would be repetitive, and hence, we reject Korea's request.

2.47 Paragraph 7.330

2.86. Korea requests the Panel to add a summary of Korea's argument under Article X:3(a) of the GATT 1994 in a footnote to paragraph 7.330.[92] The United States opposes this request.[93] We have added a sentence in paragraph 7.331 to reflect Korea's submission in this regard, along with our views regarding this submission.

2.48 USDOC's remand determination

2.87. Korea requests the Panel to reconsider its conclusion that the USDOC's remand determination is outside the terms of reference. In support of its view, Korea presents new evidence (Exhibits KOR-98 and KOR-99), relating to the first administrative review initiated by the USDOC on imports of OCTG from Korea, which allegedly shows the high degree of political

[85] Korea's request for interim review, para. 38.
[86] Korea's request for interim review, para. 39.
[87] Korea's request for interim review, para. 40.
[88] United States' comments on Korea's request for interim review, para. 26.
[89] Korea's request for interim review, para. 41.
[90] United States' comments on Korea's request for interim review, para. 26.
[91] Korea's comments on United States' response to Panel question No. 70(a), para. 102.
[92] Korea's request for interim review, para. 31.
[93] United States' comments on Korea's request for interim review, para. 27.

intervention in this domestic proceeding.[94] These allegedly show how the USDOC can circumvent its implementation obligations in the future.[95] The United States opposes Korea's request, noting in particular that Korea's submission of new evidence is untimely and must be rejected.[96]

2.88. Article 15.2 of the DSU permits parties to submit a written request for the panel to review "precise aspects of the interim report" before issuance of the Final Report. The Appellate Body and past panels have held that Article 15.2 does not permit parties to introduce new evidence during this review process.[97] Consistent with these findings, we decline to accept the new evidence filed by Korea, and do not consider it in our interim review. Insofar as Korea raises due process concerns regarding our conclusion on our terms of reference, the Report already addresses those concerns. Thus, we have not changed our conclusion that the USDOC's remand determination falls outside our terms of reference.

[94] Korea's request for interim review, para. 43.
[95] Korea's request for interim review, para. 45.
[96] United States' comments on Korea's request for interim review, para. 28.
[97] Appellate Body Reports, *EC – Sardines*, para. 301; and *EC – Selected Customs Matters*, para. 259; and Panel Report, *EC – IT Products*, para. 6.48.