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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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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

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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

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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

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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

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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

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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.

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[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.

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[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.

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[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.