7.718. Turning to the USDOC's Anti-Dumping Manual and the US court rulings that Korea refers to, we do not consider that the excerpts from these documents that Korea relies upon demonstrate the precise content of the alleged unwritten measure. For example, the USDOC's Anti-Dumping Manual is cast in permissive language and the excerpt from the US court rulings cited by Korea suggests that the USDOC is required to select "reasonably accurate" replacements for the missing information. As to Korea's reliance upon the USDOC's alleged "practice", we find that the database of 319 determinations provided by Korea is insufficient to establish the existence of the unwritten measure with the precise content alleged by it and note that Korea does not discuss or place on the record the full text of the 319 determinations. Given the "as such" nature of Korea's challenge and the general and prospective nature of the alleged unwritten norm, and in light of the limitations in Korea's discussion of the 319 determinations that it identifies, we also remain cautious in relying upon Korea's analysis of a limited subset of these cases. Even if we were to agree with Korea and find that the few cases that it discusses in greater detail reflect the precise content of the alleged unwritten measure that is identified by Korea, it remains unclear as to how this conclusion in respect of a limited number of determinations can be used to arrive at a similar finding for the many other determinations wherein the USDOC used "adverse facts available", but for which Korea provides very limited information.

7.719. In any event, we do not consider that the USDOC's conduct in the few cases that Korea discusses in greater detail always reflects the precise content of the alleged unwritten measure. Contrary to Korea's position, in many of the determinations placed on the record by the parties, the USDOC does, in fact, engage in some analysis and reasoning for purposes of selecting the replacement facts and, therefore, the link between a finding of non-cooperation and the adoption of adverse inferences and the selection of "adverse facts available" is not as "automatic" as Korea suggests. Insofar as Korea argues that the USDOC's analysis in these determinations is nonetheless WTO-inconsistent, given our interpretation of Article 6.8 and Annex II of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement, we consider that such a conclusion cannot be arrived at without a case-by-case assessment of each instance of the USDOC's use of "adverse facts available", thereby questioning the utility of Korea's "as such" challenge and the existence of a "rule or a norm" of general and prospective application.

7.720. For these reasons, we find that Korea has failed to establish the existence of the alleged unwritten measure with the precise content identified by it. In these circumstances, it is not necessary for us to examine whether the alleged unwritten measure is inconsistent with the United States' obligations under Article 6.8 and Annex II of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement.

8 CONCLUSIONS AND RECOMMENDATION

8.1. On Korea's claims concerning the USDOC's CORE AD investigation, for the reasons contained in this Report, the Panel concludes as follows:

a. the United States acted inconsistently with paragraph 1 of Annex II to the Anti-Dumping Agreement because the USDOC did not "specify in detail" the information requested and "the manner in which that information should be structured" with respect to Hyundai Steel's reporting of information concerning further manufactured sales. Given that paragraph 1 of Annex II serves as a precondition for an investigating authority's proper resort to facts available under Article 6.8 of the Anti-Dumping Agreement, we find that the United States also acted inconsistently with that provision;

b. in light of our findings of WTO-inconsistency, we do not consider it necessary to rule upon Korea's claims under paragraphs 3, 5, and 6 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us;

c. having found that the USDOC erred in resorting to facts available with respect to Hyundai Steel's reporting of information concerning further manufactured sales, we do not consider that making further findings on Korea's claims concerning the USDOC's selection of the replacement facts on the basis of the record used for the USDOC's WTO-inconsistent findings would assist in providing a positive solution to the dispute before us; and
d. having found that the United States acted inconsistently with Article 6.8 and paragraph 1 of Annex II, we do not consider it necessary to rule upon Korea's claims under Articles 1, 9.3, and 18.1 of the Anti-Dumping Agreement in order to resolve the dispute before us.

8.2. On Korea's claims concerning the USDOC's CRS AD investigation, for the reasons contained in this Report, the Panel concludes as follows:

a. in respect of the affiliated party transactions issue:

i. the United States acted inconsistently with the first sentence of paragraph 3 of Annex II to the Anti-Dumping Agreement because the USDOC did not "take[] into account" the information concerning affiliated party transactions that was submitted by Hyundai Steel in accordance with that provision. Given that paragraph 3 of Annex II serves as a precondition for an investigating authority's proper resort to facts available under Article 6.8 of the Anti-Dumping Agreement, we find that the United States also acted inconsistently with that provision;

ii. in light of our findings of WTO-inconsistency, we do not consider it necessary to rule upon Korea's claims under paragraphs 1, 5, and 6 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us; and

iii. having found that the USDOC erred in resorting to facts available with respect to information concerning affiliated party transactions that was submitted by Hyundai Steel, we do not consider that making further findings on Korea's claims concerning the USDOC's selection of the replacement facts on the basis of the record used for the USDOC's WTO-inconsistent findings would assist in providing a positive solution to the dispute before us.

b. in respect of the CONNUMs issue:

i. the United States acted inconsistently with Article 6.8 of the Anti-Dumping Agreement because the USDOC resorted to facts available in respect of the cost of manufacturing for all the affected CONNUMs for Specs D, E, and H home market sales;

ii. in light of our findings of WTO-inconsistency with respect to Specs D, E, and H home market sales, we do not consider it necessary to rule upon Korea's claims under paragraphs 3, 5, and 6 of Annex II to the Anti-Dumping Agreement concerning these sales in order to provide a positive solution to the dispute before us;

iii. having found that the USDOC erred in resorting to facts available with respect to Specs D, E, and H home market sales, we do not consider that making further findings on Korea's claims concerning the USDOC's selection of the replacement facts for these sales on the basis of the record used for the USDOC's WTO-inconsistent findings would assist in providing a positive solution to the dispute before us;

iv. with respect of the USDOC's resort to facts available for Spec C sales, Korea has not established that the United States acted inconsistently with Article 6.8 and paragraphs 3, 5, and 6 of Annex II of the Anti-Dumping Agreement; and

v. the United States acted inconsistently with Article 6.8 of the Anti-Dumping Agreement because, in selecting the replacement facts for the Spec C sales at issue, the USDOC failed to take into account all the information that was properly before it. In light of our finding of WTO-inconsistency, we do not consider it necessary to rule upon Korea's claim under paragraph 7 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us.

c. having found that the United States acted inconsistently with Article 6.8 and paragraph 3 of Annex II, we do not consider it necessary to rule upon Korea's claims under Articles 1, 9.3, and 18.1 of the Anti-Dumping Agreement in order to resolve the dispute before us.
8.3. On Korea's claims concerning the USDOC's HRS AD investigation, for the reasons contained in this Report, the Panel concludes as follows:

a. the United States acted inconsistently with paragraph 1 of Annex II to the Anti-Dumping Agreement because the USDOC did not "specify in detail" the information concerning the affiliates' contracts with unaffiliated customers "[a]s soon as possible after the initiation". Given that paragraph 1 of Annex II serves as a precondition for an investigating authority's proper resort to facts available under Article 6.8 of the Anti-Dumping Agreement, we find that the United States also acted inconsistently with that provision;

b. in light of our findings of WTO-inconsistency, we do not consider it necessary to rule upon Korea's claims under paragraphs 3, 5, and 6 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us;

c. having found that the USDOC erred in resorting to facts available, we do not consider that making further findings on Korea's claims concerning the USDOC's selection of the replacement facts on the basis of the record used for the USDOC's WTO-inconsistent findings would assist in providing a positive solution to the dispute before us; and

d. having found that the United States acted inconsistently with Article 6.8 and paragraph 1 of Annex II, we do not consider it necessary to rule upon Korea's claims under Articles 1, 9.3, and 18.1 of the Anti-Dumping Agreement in order to resolve the dispute before us.

8.4. On Korea's claims concerning the USDOC's CRS CVD investigation, for the reasons set forth in this Report, the Panel concludes as follows:

a. in respect of the issue of cross-owned affiliate input suppliers:

i. Korea has not established that the United States acted inconsistently with Article 12.7 of the SCM Agreement with respect to the USDOC's resort to facts available; and

ii. the United States acted inconsistently with Article 12.7 of the SCM Agreement because the USDOC, in selecting the replacement facts, did not take into account all the information that was properly before it and made an assumption unsupported by positive evidence that the inputs supplied by the cross-owned affiliates discovered at verification were "primarily dedicated" to the production of the downstream product, thereby also erring in finding that the relevant subsidies received by these affiliates were countervailable and attributable to POSCO.

b. in respect of the issue of a POSCO facility in an FEZ:

i. the United States acted inconsistently with Article 12.7 of the SCM Agreement because the USDOC, in resorting to facts available, erroneously disregarded the GOK's response; and

ii. having found that the USDOC erred in resorting to facts available, we do not consider that making further findings on Korea's claims concerning the USDOC's selection of the replacement facts on the basis of the record used for the USDOC's WTO-inconsistent findings would assist in providing a positive solution to the dispute before us.

c. in respect of the issue of the DWI loan data:

i. the United States acted inconsistently with Article 12.7 of the SCM Agreement because the USDOC, in resorting to facts available, did not take into account information that was submitted as part of POSCO's and DWI's direct responses before concluding that DWI had failed to provide "necessary" information; and

ii. having found that the USDOC erred in resorting to facts available, we do not consider that making further findings on Korea's claims concerning the USDOC's selection of
the replacement facts on the basis of the record used for the USDOC's WTO-inconsistent findings would assist in providing a positive solution to the dispute before us.

d. having found that the United States acted inconsistently with Article 12.7 of the SCM Agreement, we do not consider it necessary to rule upon Korea's claims under Articles 10, 19.4, and 32.1 of the SCM Agreement in order to resolve the dispute before us.

8.5. On Korea's claims concerning the USDOC's HRS CVD investigation, for the reasons contained in this Report, the Panel concludes as follows:

a. in respect of the issue of cross-owned affiliate input suppliers, the United States acted inconsistently with Article 12.7 of the SCM Agreement because the USDOC rejected the information concerning the cross-owned affiliate input suppliers solely on the basis that it was provided after the time-limit imposed by the USDOC, without considering whether, in light of the specific facts and circumstances, the information submitted by POSCO was nonetheless submitted within a "reasonable period";

b. in respect of the issue of a POSCO facility in an FEZ, the United States acted inconsistently with Article 12.7 of the SCM Agreement because the USDOC rejected the information concerning POSCO's facility in an FEZ solely on the basis that it was provided after the time-limit imposed by the USDOC, without considering whether, in light of the specific facts and circumstances, the information submitted by POSCO was nonetheless submitted within a "reasonable period";

c. in respect of the issue of the DWI loan data, the United States acted inconsistently with Article 12.7 of the SCM Agreement because the USDOC rejected the information concerning DWI loan data solely on the basis that it was provided after the time-limit imposed by the USDOC, without considering whether, in light of the specific facts and circumstances, the information submitted by POSCO was nonetheless submitted within a "reasonable period";

d. having found that the USDOC erred in resorting to facts available for each of the three issues set out above, we do not consider that making further findings concerning the USDOC's selection of the replacement facts on the basis of the record used for the USDOC's WTO-inconsistent findings would assist in providing a positive solution the dispute before us; and

e. having found that the United States acted inconsistently with Article 12.7 of the SCM Agreement, we do not consider it necessary to rule upon Korea's claims under Articles 10, 19.4, and 32.1 of the SCM Agreement in order to resolve the dispute before us.

8.6. On Korea's claims concerning the USDOC's LPT POR2 proceedings, for the reasons contained in this Report, the Panel concludes as follows:

a. the United States acted inconsistently with paragraph 6 of Annex II to the Anti-Dumping Agreement because – having "not accepted" the information provided by HHI – the USDOC failed to inform HHI "forthwith" of the reasons for its non-acceptance and failed to provide an opportunity to HHI for furnishing "further explanations within a reasonable period, due account being taken of the time limits of the investigation". Given that paragraph 6 of Annex II serves as a precondition for an investigating authority's proper resort to facts available under Article 6.8 of the Anti-Dumping Agreement, we find that the United States also acted inconsistently with that provision;

b. in light of our findings of WTO-inconsistency, we do not consider it necessary to rule upon Korea's claims under paragraphs 3 and 5 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us; and
c. having found that the USDOC erred in resorting to facts available with respect to HHI's reporting of information concerning service-related revenues, we do not consider that making further findings on Korea's claims concerning the USDOC's selection of the replacement facts on the basis of the record used for the USDOC's WTO-inconsistent findings would assist in providing a positive solution to the dispute before us.

8.7. On Korea's claims concerning the USDOC's LPT POR3 proceedings, for the reasons contained in this Report, the Panel concludes as follows:

a. in respect of the issue of service-related revenues, the United States acted inconsistently with the first sentence of paragraph 3 of Annex II to the Anti-Dumping Agreement because the USDOC, in resorting to facts available, did not "take[] into account" the information concerning service-related revenues that was submitted by HHI in accordance with that provision. Given that paragraph 3 of Annex II serves as a precondition for an investigating authority's proper resort to facts available under Article 6.8 of the Anti-Dumping Agreement, we find that the United States also acted inconsistently with that provision. In light of our findings of WTO-inconsistency, we do not consider it necessary to rule upon Korea's claims under paragraph 5 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us;

b. in respect of the issue of understatement of home-market prices, the United States acted inconsistently with Article 6.8 of the Anti-Dumping Agreement because the USDOC resorted to facts available for HHI's reporting of an LPT part as non-subject merchandise. In light of our finding of WTO-inconsistency, we do not consider it necessary to address Korea's claims under paragraphs 3 and 5 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us;

c. in respect of the issue of accessories, the United States acted inconsistently with paragraph 1 of Annex II to the Anti-Dumping Agreement because the USDOC, by not providing further guidance as to the meaning of the term "accessories", failed to "specify in detail" the information required before resorting to facts available. Given that paragraph 1 of Annex II serves as a precondition for an investigating authority's proper resort to facts available under Article 6.8 of the Anti-Dumping Agreement, we find that the United States also acted inconsistently with that provision. In light of our findings of WTO-inconsistency, we do not consider it necessary to rule upon Korea's claims under paragraphs 3 and 5 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us;

d. in respect of the issue of certain sales documentation, the United States acted inconsistently with paragraph 6 of Annex II because the USDOC - having "not accepted" the information provided by HHI - subsequently failed to give an opportunity to HHI to "provide further explanations within a reasonable period". Given that paragraph 6 of Annex II serves as a precondition for an investigating authority's proper resort to facts available under Article 6.8 of the Anti-Dumping Agreement, we find that the United States also acted inconsistently with that provision. In light of our findings of WTO-inconsistency, we do not consider it necessary to rule upon Korea's claims under paragraphs 3 and 5 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us; and

e. having found that the USDOC erred in resorting to facts available for each of the four issues identified above, we do not consider that making further findings on Korea's claims concerning the USDOC's selection of the replacement facts on the basis of the record used for the USDOC's WTO-inconsistent findings would assist in providing a positive solution to the dispute before us.

8.8. On Korea's claims concerning the USDOC's LPT POR4 proceeding, for the reasons contained in this Report, the Panel concludes as follows:

a. in respect of the issue of accessories for HHI, the United States acted inconsistently with paragraph 1 of Annex II to the Anti-Dumping Agreement because the USDOC, by not providing further guidance as to the meaning of the term "accessories", failed to "specify
in detail" the information required before resorting to facts available. Given that paragraph 1 of Annex II serves as a precondition for an investigating authority's proper resort to facts available under Article 6.8 of the Anti-Dumping Agreement, we find that the United States also acted inconsistently with that provision. In light of our findings of WTO-inconsistency, we do not consider it necessary to rule upon Korea's claims under paragraphs 3 and 5 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us;

b. in respect of the issue of home market gross-unit prices for HHI, the United States acted inconsistently with paragraph 6 of Annex II to the Anti-Dumping Agreement because the USDOC – having "not accepted" the information provided by HHI as it was "unclear" – did not subsequently give an opportunity to HHI to provide "further explanations within a reasonable period". Given that paragraph 6 of Annex II serves as a precondition for an investigating authority's proper resort to facts available under Article 6.8 of the Anti-Dumping Agreement, we find that the United States also acted inconsistently with that provision. In light of our findings of WTO-inconsistency, we do not consider it necessary to rule upon Korea's claims under paragraphs 3 and 5 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us;

c. in respect of the issue of the US sales agent for HHI, the United States acted inconsistently with paragraph 6 of Annex II to the Anti-Dumping Agreement because the USDOC – having not accepted HHI's submission that it was not affiliated with any of its sales agents – did not subsequently give an opportunity to HHI to provide "further explanations within a reasonable period". Given that paragraph 6 of Annex II serves as a precondition for an investigating authority's proper resort to facts available under Article 6.8 of the Anti-Dumping Agreement, we find that the United States also acted inconsistently with that provision. In light of our findings of WTO-inconsistency, we do not consider it necessary to address Korea's claims under paragraphs 3 and 5 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us;

d. in respect of the issue of service-related revenues for Hyosung, the United States acted inconsistently with paragraph 6 of Annex II to the Anti-Dumping Agreement because the USDOC did not inform Hyosung "forthwith" of the reasons for not accepting the information that had been submitted and did not give Hyosung an opportunity to provide "further explanations within a reasonable period". Given that paragraph 6 of Annex II serves as a precondition for an investigating authority's proper resort to facts available under Article 6.8 of the Anti-Dumping Agreement, we find that the United States also acted inconsistently with that provision. In light of our findings of WTO-inconsistency, we do not consider it necessary to address Korea's claims under paragraphs 3 and 5 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us;

e. in respect of the issue of the invoice covering multiple US sales for Hyosung, the United States acted inconsistently with paragraph 6 of Annex II to the Anti-Dumping Agreement because the USDOC did not inform Hyosung "forthwith" about the alleged deficiency in the invoice at issue that was "not accepted" and because it did not give Hyosung an opportunity to provide "further explanations within a reasonable period". Given that paragraph 6 of Annex II serves as a precondition for an investigating authority's proper resort to facts available under Article 6.8 of the Anti-Dumping Agreement, we find that the United States also acted inconsistently with that provision. In light of our findings of WTO-inconsistency, we do not consider it necessary to address Korea's claims under paragraphs 3 and 5 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us;

f. in respect of the issue of discounts and price adjustments for Hyosung, the United States acted inconsistently with paragraph 6 of Annex II to the Anti-Dumping Agreement because the USDOC did not inform Hyosung of any alleged deficiencies in the explanations that were provided in Hyosung's case brief and because it did not give Hyosung an opportunity to provide "further explanations within a reasonable period". Given that paragraph 6 of Annex II serves as a precondition for an investigating authority's proper resort to facts available under Article 6.8 of the Anti-Dumping Agreement, we find that the United States
also acted inconsistently with that provision. In light of our findings of WTO-inconsistency, we do not consider it necessary to address Korea's claims under paragraphs 3 and 5 of Annex II to the Anti-Dumping Agreement in order to provide a positive solution to the dispute before us;

g. having found that the USDOC erred in resorting to facts available with respect to both HHI and Hyosung for all of the issues set out above, we do not consider that making further findings on Korea's claims concerning the USDOC's selection of the replacement facts on the basis of the record used for the USDOC's WTO-inconsistent findings would assist in providing a positive solution to the dispute before us; and

h. in respect of the USDOC's selection of an "all others" rate, the United States acted inconsistently with Article 9.4 of the Anti-Dumping Agreement because the USDOC determined the ceiling for the "all others" rate in respect of Iljin, Iljin Electric, and LSIS based on "margins established under the circumstances referred to in paragraph 8 of Article 6" of the Anti-Dumping Agreement.

8.9. On the claims under Articles 1, 9.3, and 18.1 of the Anti-Dumping Agreement concerning the USDOC's LPT POR2, POR3, and POR4 proceedings, for the reasons contained in this Report, having already found that the United States acted inconsistently with Article 6.8 and certain provisions of Annex II, we do not consider it necessary to rule upon Korea's claims under Articles 1, 9.3, and 18.1 in order to resolve the dispute before us.

8.10. On Korea's "as such" claim against the alleged unwritten measure, for the reasons contained in this Report, the Panel concludes as follows:

a. Having considered the United States' request for a preliminary ruling regarding the Panel's terms of reference and the responses thereto, for purposes of Article 6.2 of the DSU, the alleged unwritten measure that is the object of Korea's "as such" challenge is properly identified in Section I.C of its panel request; and

b. Korea has failed to establish the existence of the alleged unwritten measure with the precise content identified by it.

8.11. Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment of benefits under that Agreement. Accordingly, to the extent the United States has acted inconsistently with certain provisions of the SCM and Anti-Dumping Agreements, we conclude that it has nullified or impaired benefits accruing to Korea under those Agreements.

8.12. Pursuant to Article 19.1 of the DSU, having found that the United States has acted inconsistently with the Anti-Dumping and the SCM Agreements, we recommend that the United States bring the measures at issue into conformity with these Agreements.