WORLD TRADE ORGANIZATION

WT/DS504/AB/R

10 September 2019

(19-5758)

KOREA – ANTI-DUMPING DUTIES ON PNEUMATIC VALVES FROM JAPAN

AB-2018-3

Report of the Appellate Body

Table of Contents

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
BCI	business confidential information
CKD	CKD Corporation
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
Japan's panel request	Request for the Establishment of a Panel by Japan, WT/DS504/2
Korean investigating authorities	Korea Trade Commission and Office of Trade Investigation
KCC	KCC Co., Ltd.
KTC	Korea Trade Commission
KTC's Final Resolution	KTC, Resolution of Final Determination on Dumping and Injury to Domestic Industry of Valves for Pneumatic Transmissions from Japan, 20 January 2015 (Panel Exhibits JPN-4b (public version) and KOR-1b (BCI))
KTC's Preliminary Resolution	KTC, Resolution of Preliminary Determination on Dumping and Injury to the Domestic Industry of Valves for Pneumatic Transmissions from Japan, 26 June 2014 (Panel Exhibit JPN-1b)
MOSF	Minister/Ministry of Strategy and Finance
MOSF's Decree No. 498	MOSF, Decree No. 498, Regulation Concerning the Imposition of Anti-Dumping Duties on Valves for Pneumatic Transmissions originating from Japan, 19 August 2015 (Panel Exhibit JPN-6b)
MOSF's Public Announcement	MOSF, Public Announcement No. 2015-156, Decision to Apply Anti-Dumping Duties on the Pneumatic Transmissions Valves from Japan, 19 August 2015 (Panel Exhibit KOR-3b (BCI))
OTI	Office of Trade Investigation
OTI's Final Report	OTI, Final Report on Dumping and Injury to Domestic Industry of Valves for Pneumatic Transmissions Imported from Japan, 20 January 2015 (Panel Exhibits JPN-5b (public version) and KOR-2b (BCI))
OTI's Interim Report	OTI, Interim Investigation Report on Dumping and Injury to Domestic Industry of Valves for Pneumatic Transmissions from Japan, 23 October 2014 (Panel Exhibit JPN-3b)
OTI's Preliminary Report	OTI, Preliminary Report on Dumping and Injury to Domestic Industry of Valves for Pneumatic Transmissions imported from Japan, 26 June 2014 (Panel Exhibit JPN-2b)
Panel Report	*Korea – Anti-Dumping Duties on Pneumatic Valves from Japan* (WT/DS504/R)
pneumatic valves	valves for pneumatic transmissions
POI	period of investigation
SG&A	selling, general, and administrative (costs)
Shin Yeong	Shin Yeong Mechatronics
SMC	SMC Corporation

Abbreviation	Description
TPC	TPC Mechatronics Corporation
Working Procedures	Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010
WTO	World Trade Organization
Yonwoo	Yonwoo Pneumatic

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Argentina – Footwear (EC)	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, p. 515
Argentina – Import Measures	Appellate Body Reports, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015, DSR 2015:II, p. 579
Argentina – Poultry Anti-Dumping Duties	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003, DSR 2003:V, p. 1727
Australia – Apples	Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/AB/R, adopted 17 December 2010, DSR 2010:V, p. 2175
Australia – Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, p. 3327
Brazil – Desiccated Coconut	Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, p. 167
Brazil – Retreaded Tyres	Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, p. 1527
Canada – Periodicals	Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, p. 449
Canada – Renewable Energy / Canada – Feed-in Tariff Program	Appellate Body Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013, DSR 2013:I, p. 7
Chile – Price Band System	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3045 (Corr.1, DSR 2006:XII, p. 5473)
Chile – Price Band System (Article 21.5 – Argentina)	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS207/AB/RW, adopted 22 May 2007, DSR 2007:II, p. 513
China – Autos (US)	Panel Report, *China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States*, WT/DS440/R and Add.1, adopted 18 June 2014, DSR 2014:VII, p. 2655
China – Cellulose Pulp	Panel Report, *China – Anti-Dumping Measures on Imports of Cellulose Pulp from Canada*, WT/DS483/R and Add.1, adopted 22 May 2017, DSR 2017:IV, p. 1961
China – GOES	Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012, DSR 2012:XII, p. 6251

Short Title	Full Case Title and Citation
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China – HP-SSST (Japan) / China – HP-SSST (EU)	Appellate Body Reports, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*, WT/DS454/AB/R and Add.1 / WT/DS460/AB/R and Add.1, adopted 28 October 2015, DSR 2015:IX, p. 4573
China – HP-SSST (Japan) / China – HP-SSST (EU)	Panel Reports, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*, WT/DS454/R and Add.1 / WT/DS460/R, Add.1 and Corr.1, adopted 28 October 2015, as modified by Appellate Body Reports WT/DS454/AB/R / WT/DS460/AB/R, DSR 2015:IX, p. 4789
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EC – Asbestos	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 3243
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, p. 591
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EC – Hormones	Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
EC – Poultry	Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, p. 2031
EC – Sardines	Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3359
EC – Seal Products	Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014, DSR 2014:I, p. 7
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EC and certain member States – Large Civil Aircraft (Article 21.5 – US)	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft – Recourse to Article 21.5 of the DSU by the United States*, WT/DS316/AB/RW and Add.1, adopted 28 May 2018
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India – Patents (US)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, p. 9
Japan – Apples	Appellate Body Report, *Japan – Measures Affecting the Importation of Apples*, WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, p. 4391
Korea – Alcoholic Beverages	Appellate Body Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I, p. 3
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, p. 3
Korea – Pneumatic Valves (Japan)	Panel Report, *Korea – Anti-Dumping Duties on Pneumatic Valves from Japan*, WT/DS504/R and Add.1, circulated to WTO Members 12 April 2018
Mexico – Corn Syrup (Article 21.5 – US)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, p. 6675
Peru – Agricultural Products	Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/AB/R and Add.1, adopted 31 July 2015, DSR 2015:VI, p. 3403
Russia – Commercial Vehicles	Appellate Body Report, *Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy*, WT/DS479/AB/R and Add.1, adopted 9 April 2018

Short Title	Full Case Title and Citation
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Russia – Pigs (EU)	Appellate Body Report, *Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union*, WT/DS475/AB/R and Add.1, adopted 21 March 2017, DSR 2017:I, p. 207
Thailand – H-Beams	Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 2701
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US – 1916 Act	Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, p. 4793
US – Anti-Dumping and Countervailing Duties (China)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011, DSR 2011:V, p. 2869
US – Anti-Dumping Methodologies (China)	Appellate Body Report, *United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China*, WT/DS471/AB/R and Add.1, adopted 22 May 2017, DSR 2017:III, p. 1423
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
US – Carbon Steel (India)	Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 19 December 2014, DSR 2014:V, p. 1727
US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
US – COOL	Appellate Body Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012, DSR 2012:V, p. 2449
US – Countervailing and Anti-Dumping Measures (China)	Appellate Body Report, *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/AB/R and Corr.1, adopted 22 July 2014, DSR 2014:VIII, p. 3027
US – Countervailing Measures (China)	Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/R, adopted 16 January 2015, DSR 2015:I, p. 7
US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475)
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697

Short Title	Full Case Title and Citation
US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, p. 4051
US – Large Civil Aircraft (2nd complaint)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012, DSR 2012:I, p. 7
US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, p. 3257
US – Section 211 Appropriations Act	Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted 1 February 2002, DSR 2002:II, p. 589
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755
US – Softwood Lumber VI (Article 21.5 – Canada)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865
US – Steel Safeguards	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, p. 3117
US – Tax Incentives	Appellate Body Report, *United States – Conditional Tax Incentives for Large Civil Aircraft*, WT/DS487/AB/R and Add.1, adopted 22 September 2017, DSR 2017:V, p. 2199
US – Tyres (China)	Appellate Body Report, *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/AB/R, adopted 5 October 2011, DSR 2011:IX, p. 4811
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US – Washing Machines	Appellate Body Report, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/AB/R and Add.1, adopted 26 September 2016, DSR 2016:V, p. 2275
US – Wheat Gluten	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, p. 717
US – Zeroing (EC) (Article 21.5 – EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/AB/RW and Corr.1, adopted 11 June 2009, DSR 2009:VII, p. 2911
US – Zeroing (Japan) (Article 21.5 – Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/AB/RW, adopted 31 August 2009, DSR 2009:VIII, p. 3441

WORLD TRADE ORGANIZATION
APPELLATE BODY

Korea – Anti-Dumping Duties on Pneumatic Valves from Japan	AB-2018-3
Japan, *Appellant/Appellee* Republic of Korea, *Other Appellant/Appellee*	Appellate Body Division:
Brazil, *Third Participant* Canada, *Third Participant* China, *Third Participant* Ecuador, *Third Participant* European Union, *Third Participant* Norway, *Third Participant* Singapore, *Third Participant* Turkey, *Third Participant* United States, *Third Participant* Viet Nam, *Third Participant*	Bhatia, Presiding Member Graham, Member Servansing, Member

1 INTRODUCTION

1.1. Japan and the Republic of Korea (Korea) each appeal certain issues of law and legal interpretations developed in the Panel Report, *Korea – Anti-Dumping Duties on Pneumatic Valves from Japan*[1] (Panel Report).

1.2. This dispute concerns the definitive anti-dumping duties imposed by Korea on imports of valves for pneumatic transmissions (pneumatic valves) originating from Japan, following the investigation conducted by the Korea Trade Commission (KTC) and the KTC's Office of Trade Investigation (OTI).[2] The KTC initiated the investigation and published the notice of initiation on 21 February 2014 based on an application filed by two producers of pneumatic valves in Korea.[3] On 19 August 2015, on the basis of the KTC's Final Resolution[4], the Minister of Strategy and Finance (MOSF) imposed anti-dumping duties on the imports of pneumatic valves from Japan through Decree No. 498 for five years at the following rates: 11.66% for SMC Corporation (SMC) and exporters of its products, and 22.77% for CKD Corporation (CKD), Toyooki Kogyo Co., Ltd., and exporters of their products, as well as other suppliers from Japan.[5]

1.3. The Panel was established on 4 July 2016 to consider the complaint by Japan with respect to the consistency of the anti-dumping measures imposing the above duties (the measure at issue) with the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) and the General Agreement on Tariffs and Trade 1994 (GATT 1994).[6] After consultation with the parties, on 15 November 2016, the Panel adopted its

[1] WT/DS504/R, 12 April 2018.
[2] Panel Report, paras. 2.1-2.5.
[3] Panel Report, para. 2.2. The applicants were TPC Mechatronics Corporation (TPC) and KCC Co., Ltd. (KCC). (Ibid.)
[4] KTC, Resolution of Final Determination on Dumping and Injury to Domestic Industry of Valves for Pneumatic Transmissions from Japan, 20 January 2015 (KTC's Final Resolution) (Panel Exhibits JPN-4b (public version) and KOR-1b (BCI)). In this Report, Panel exhibit numbers that are followed by the letter "b" refer to the English version of the relevant document. The KTC issued its Final Resolution on the basis of OTI, Final Report on Dumping and Injury to Domestic Industry of Valves for Pneumatic Transmissions Imported from Japan, 20 January 2015 (OTI's Final Report) (Panel Exhibits JPN-5b (public version) and KOR-2b (BCI)).
[5] Panel Report, para. 2.5 (referring to MOSF, Decree No. 498, Regulation Concerning the Imposition of Anti-Dumping Duties on Valves for Pneumatic Transmissions originating from Japan, 19 August 2015 (MOSF's Decree No. 498) (Panel Exhibit JPN-6b); MOSF, Public Announcement No. 2015-156, Decision to Apply Anti-Dumping Duties on the Pneumatic Transmissions Valves from Japan, 19 August 2015 (MOSF's Public Announcement) (Panel Exhibit KOR-3b (BCI))).
[6] Panel Report, paras. 1.3-1.4; Request for the Establishment of a Panel by Japan, WT/DS504/2 (Japan's panel request).

working procedures, additional working procedures concerning business confidential information (BCI), and timetable.[7]

1.4. In the Request for the Establishment of a Panel by Japan (Japan's panel request), Japan requested the Panel to find that the measure at issue is inconsistent with Korea's obligations under Articles 3.1 and 3.2, Articles 3.1 and 3.4, Articles 3.1 and 3.5, Articles 3.1 and 4.1, Article 6.5, Article 6.5.1, Article 6.9, Article 12.2, and Article 12.2.2 of the Anti-Dumping Agreement.[8] As a consequence of these inconsistencies, Japan also claimed that Korea acted inconsistently with Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994.[9]

1.5. On 24 November 2016, Korea filed a request for the Panel to issue a preliminary ruling that Japan's claims under Articles 3.1, 3.2, 3.4, 3.5, and 4.1 of the Anti-Dumping Agreement were outside the Panel's terms of reference because Japan's panel request failed to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly", as required by Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).[10] At the invitation of the Panel, Japan submitted a written response to Korea's request on 16 December 2016. Korea responded to Japan's views in its first written submission. The European Union and the United States also provided their views on Korea's request in their respective third party submissions.[11] On 7 July 2017, the Panel informed the parties that, in view of the circumstances of the case and the extraordinary scope of Korea's request, which involved seven of the 13 claims raised by Japan in this dispute, the Panel had decided not to issue a separate ruling on the matter of the sufficiency of Japan's panel request under Article 6.2 of the DSU, indicating that it would instead address the matter in the Panel Report.[12]

1.6. In the Panel Report, circulated to Members of the World Trade Organization (WTO) on 12 April 2018, the Panel found that:

a. the following claims in Japan's panel request failed to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly as required under Article 6.2 of the DSU and are therefore *not* within the Panel's terms of reference:[13]

   i. Japan's claim under Articles 3.1 and 4.1 of the Anti-Dumping Agreement concerning the definition of the domestic industry[14];

   ii. Japan's claim under Articles 3.1 and 3.2 of the Anti-Dumping Agreement concerning Korea's analysis of an increase in the volume of the dumped imports[15];

   iii. Japan's claim under Articles 3.1 and 3.2 of the Anti-Dumping Agreement concerning the consideration of the effect of the dumped imports on prices[16];

   iv. Japan's claim under Articles 3.1 and 3.4 of the Anti-Dumping Agreement concerning the impact of the dumped imports on the state of the domestic industry, with the exception of the allegations that the KTC and the OTI (Korean investigating authorities) failed to evaluate two of the specific factors listed in Article 3.4, namely the ability to raise capital or investments, and the magnitude of the margin of dumping[17];

   v. Japan's claim under Articles 3.1 and 3.5 of the Anti-Dumping Agreement concerning the alleged failure by the Korean investigating authorities to consider adequately all known factors other than the dumped imports that were injuring the domestic industry

[7] Panel Report, para. 1.7. The Panel revised its timetable, after consulting the parties, on 21 June and 20 July 2017. (Ibid.)
[8] Panel Report, para. 3.1. See also Japan's panel request.
[9] Panel Report, para. 3.1.
[10] Panel Report, para. 1.12.
[11] Panel Report, para. 1.13.
[12] Panel Report, para. 1.14.
[13] Panel Report, para. 8.1.
[14] Panel Report, paras. 7.67 and 8.1.a.
[15] Panel Report, paras. 7.94 and 8.1.b.
[16] Panel Report, paras. 7.131 and 8.1.c.
[17] Panel Report, paras. 7.175 and 8.1.d.

at the same time, with the exception of the allegations concerning whether the Korean investigating authorities considered certain known factors in isolation and dismissed them without an adequate examination[18];

vi. Japan's claim under Article 6.9 of the Anti-Dumping Agreement concerning the alleged failure by the Korean investigating authorities to inform interested parties of essential facts that formed the basis for the decision to impose definitive anti-dumping measures[19];

vii. Japan's claims under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement concerning the alleged failure by the Korean investigating authorities to give proper public notice of their final determination[20]; and

viii. Japan's consequential claim under Article VI of the GATT 1994[21]; and

b. the following claims in Japan's panel request provided a brief summary of the legal basis of the complaint sufficient to present the problem clearly pursuant to Article 6.2 of the DSU and are therefore properly *within* the Panel's terms of reference:[22]

i. Japan's claim under Articles 3.1 and 3.4 of the Anti-Dumping Agreement concerning the alleged failure of the Korean investigating authorities to evaluate the ability to raise capital or investments, and the magnitude of the margin of dumping under Article 3.4[23];

ii. Japan's claim under Articles 3.1 and 3.5 of the Anti-Dumping Agreement that the Korean investigating authorities' demonstration of causation lacks a foundation in its analyses of volume of dumped imports, effects of imports on prices, and the impact of those imports on the domestic industry, irrespectively and independently of whether the Korean investigating authorities' analyses are found to be inconsistent with Articles 3.1, 3.2, and 3.4 of the Anti-Dumping Agreement[24];

iii. Japan's claim under Articles 3.1 and 3.5 of the Anti-Dumping Agreement concerning the alleged failure by the Korean investigating authorities to demonstrate any causal relationship between the dumped imports and the injury to the domestic industry[25];

iv. Japan's claim under Articles 3.1 and 3.5 of the Anti-Dumping Agreement concerning the alleged failure of the Korean investigating authorities to examine certain known factors adequately and their examination of those factors in isolation[26];

v. Japan's claims under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement concerning the treatment of confidential information and the provision of non-confidential summaries of information for which confidential treatment was sought by the applicants[27]; and

vi. Japan's consequential claim under Article 1 of the Anti-Dumping Agreement.[28]

[18] Panel Report, paras. 7.243 and 8.1.e.
[19] Panel Report, paras. 7.517 and 8.1.f.
[20] Panel Report, paras. 7.540 and 8.1.g.
[21] Panel Report, paras. 7.549 and 8.1.h.
[22] Panel Report, para. 8.2.
[23] Panel Report, paras. 7.175 and 8.2.a.
[24] Panel Report, paras. 7.226 and 8.2.b.
[25] Panel Report, paras. 7.235 and 8.2.c.
[26] Panel Report, paras. 7.243 and 8.2.d.
[27] Panel Report, paras. 7.418 and 8.2.e.
[28] Panel Report, paras. 7.549 and 8.2.f.

1.7. For the claims that the Panel found to be within its terms of reference, the Panel found that:

a. with respect to Japan's claim under Articles 3.1 and 3.4 of the Anti-Dumping Agreement:

i. Japan did *not* establish that the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.4 in their consideration of the two factors listed in Article 3.4., namely the ability to raise capital or investments and the magnitude of the margin of dumping[29];

b. with respect to Japan's claims under Articles 3.1 and 3.5 of the Anti-Dumping Agreement:

i. Japan did *not* establish that the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.5 with respect to their conclusion that the dumped imports, through the effects of dumping, were causing injury to the domestic industry[30];

ii. Japan did *not* establish that the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.5 with respect to their examination of known factors other than the dumped imports that were injuring the domestic industry at the same time[31]; and

iii. Japan *demonstrated* that the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.5 in their causation analysis as a result of flaws in their analysis of the effect of the dumped imports on prices in the domestic market[32];

c. with respect to Japan's claim under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement:

i. Japan *demonstrated* that the Korean investigating authorities acted inconsistently with Article 6.5 with respect to their treatment of information provided by the applicants as confidential without requiring that good cause be shown[33]; and

ii. Japan *demonstrated* that the Korean investigating authorities acted inconsistently with Article 6.5.1 with respect to their failure to require that the submitting parties provide a sufficient non-confidential summary of the information for which confidential treatment was sought[34]; and

d. with respect to Japan's claim under Article 1 of the Anti-Dumping Agreement:

i. Japan *demonstrated* that the Korean investigating authorities acted inconsistently with Article 1 as a consequence of and to the extent that they acted inconsistently with Articles 3.1 and 3.5, and Articles 6.5 and 6.5.1, of the Anti-Dumping Agreement.[35]

1.8. In accordance with Article 19.1 of the DSU, and having found that Korea acted inconsistently with certain provisions of the Anti-Dumping Agreement, the Panel recommended that Korea bring its measure into conformity with its obligations under that Agreement.[36]

1.9. On 28 May 2018, Japan notified the Dispute Settlement Body (DSB), pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, and filed a Notice of Appeal and an appellant's submission[37] pursuant to Rule 20 and Rule 21, respectively, of the Working Procedures for Appellate Review[38] (Working Procedures). On 4 June 2018, Korea notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and

[29] Panel Report, paras. 7.192 and 8.3.a.
[30] Panel Report, paras. 7.361 and 8.3.b.
[31] Panel Report, paras. 7.389 and 8.3.c.
[32] Panel Report, paras. 7.349 and 8.4.a.
[33] Panel Report, paras. 7.441, 7.451, and 8.4.b.
[34] Panel Report, paras. 7.450-7.451 and 8.4.c.
[35] Panel Report, paras. 7.552-7.553 and 8.4.d.
[36] Panel Report, para. 8.6.
[37] WT/DS504/5.
[38] WT/AB/WP/6, 16 August 2010.

certain legal interpretations developed by the Panel, and filed a Notice of Other Appeal[39] and an other appellant's submission, pursuant to Rule 23 of the Working Procedures.

1.10. On 30 May 2018, the Chair of the Appellate Body received a communication from the European Union requesting the Division hearing this appeal to extend the deadline for the filing of third participants' submissions to allow for sufficient time for third participants to consider and react to the appellees' submissions. On 31 May 2018, on behalf of the Division hearing this appeal, the Chair of the Appellate Body invited Korea, Japan, and other third participants in this dispute to comment in writing on the communication from the European Union.[40] On 6 June 2018, the Chair, on behalf of the Division hearing the appeal, issued a Procedural Ruling extending the deadline for filing third participants' submissions and notifications under Rule 24(1) and (2) of the Working Procedures to 22 June 2018.[41]

1.11. On 15 June 2018, Japan and Korea each filed an appellee's submission.[42] On 22 June 2018, the European Union and the United States each filed a third participant's submission.[43] On the same day, Canada and Singapore each notified its intention to appear at the oral hearing as a third participant.[44] On the same day, Norway, Turkey, and Viet Nam each notified its intention to reserve its right to attend the oral hearing, while Brazil, China, and Ecuador each notified the same on 25 June 2018.[45]

1.12. By letter dated 27 July 2018, the Chair of the Appellate Body notified the Chair of the DSB that the Appellate Body would not be able to circulate its Report within the 60-day period pursuant to Article 17.5 of the DSU, or within the 90-day period pursuant to the same provision, for the reasons mentioned therein.[46] For the reasons explained in the letter, work on this appeal could gather pace only in January 2019. On 9 July 2019, the Chair of the Appellate Body notified the Chair of the DSB that the Appellate Body Report in these proceedings would be circulated to WTO Members no later than 10 September 2019.[47]

1.13. By letter dated 28 September 2018, the participants and third participants were informed that the Chair of the Appellate Body had notified the Chair of the DSB that Mr Shree Baboo Chekitan Servansing had been authorized by the Appellate Body, pursuant to Rule 15 of the Working Procedures, to complete the disposition of this appeal, although his term of office would expire before the completion of these appellate proceedings.

1.14. On 4 March 2019, the Presiding Member of the Division hearing this appeal received a joint communication from Japan and Korea requesting the Division to adopt additional working procedures for the protection of BCI, pursuant to Article 16(1) of the Working Procedures. On 5 March 2019, the Presiding Member of the Division invited the third participants to provide comments on the joint communication by the participants. No responses were received from the third participants. On 26 March 2019, the Division issued a Procedural Ruling on the protection of the information marked by the participants as BCI in their submissions to the Appellate Body and the information designated by the Panel as BCI in its Report and on the Panel record.[48]

1.15. The hearing in this appeal was held on 3-4 April 2019. The participants and two of the third participants (the European Union and Norway) made oral statements. During the hearing, the

[39] WT/DS504/6.
[40] The Chair received a letter from each participant indicating that they did not have specific comments on this matter.
[41] Contained in Annex D of the Addendum to this Report (WT/DS504/AB/R/Add.1).
[42] Pursuant to Rules 22 and 23(4) of the Working Procedures.
[43] Pursuant to Rule 24(1) of the Working Procedures.
[44] Pursuant to Rule 24(2) of the Working Procedures.
[45] Pursuant to Rule 24(4) of the Working Procedures.
[46] WT/DS504/7. The Chair of the Appellate Body explained that, in view of the backlog of appeals pending, and the overlap in the composition of all divisions resulting in part from the reduced number of Appellate Body Members, it would not be possible for the Division to focus on the consideration of this appeal for some time, that is, schedule internal meetings, fully staff it, and schedule the hearing. (Ibid.)
[47] WT/DS504/8.
[48] Contained in Annex D of the Addendum to this Report (WT/DS504/AB/R/Add.1).

participants and the third participants also responded to questions posed by the Members of the Division hearing this appeal.

2 ARGUMENTS OF THE PARTICIPANTS

2.1. The claims and arguments of the participants are reflected in the executive summaries of their written submissions provided to the Appellate Body.[49] The Notice of Appeal and the executive summaries of the participants' claims and arguments are contained in Annexes A and B of the Addendum to this Report, WT/DS504/AB/R/Add.1.

3 ARGUMENTS OF THE THIRD PARTICIPANTS

3.1. The arguments of the third participants that filed a written submission (the European Union and the United States) are reflected in the executive summaries of their written submissions provided to the Appellate Body[50] and are contained in Annex C of the Addendum to this Report, WT/DS504/AB/R/Add.1.

4 ISSUES RAISED

4.1. The following issues are raised in this appeal:

a. with respect to Japan's claim under Articles 3.1 and 4.1 of the Anti-Dumping Agreement (raised by Japan):

   i. whether the Panel erred in finding that Japan's panel request, as it relates to the claim under Articles 3.1 and 4.1 of the Anti-Dumping Agreement concerning the Korean investigating authorities' definition of the domestic industry (claim 7), failed to comply with the requirements of Article 6.2 of the DSU and, consequently, in finding that this claim was outside the Panel's terms of reference; and

   ii. if the Appellate Body were to find that the Panel erred in finding that Japan's claim 7 was outside its terms of reference, whether the Appellate Body can complete the legal analysis and find that the Korean investigating authorities' definition of the domestic industry was inconsistent with Articles 3.1 and 4.1 of the Anti-Dumping Agreement;

b. with respect to Japan's claims under Article 3 of the Anti-Dumping Agreement:

   i. whether the Panel erred in finding that Japan's panel request, as it relates to the following claims, failed to comply with the requirements of Article 6.2 of the DSU and, consequently, in finding that these claims were outside the Panel's terms of reference (raised by Japan):

      - the claim under Articles 3.1 and 3.2 of the Anti-Dumping Agreement concerning the Korean investigating authorities' consideration of the volume of the dumped imports (claim 1);

      - the claim under Articles 3.1 and 3.2 of the Anti-Dumping Agreement concerning the Korean investigating authorities' consideration of the effects of the dumped imports on price (claim 2); and

      - the claim under Articles 3.1 and 3.4 of the Anti-Dumping Agreement concerning the Korean investigating authorities' examination of the impact of the dumped imports on the domestic industry (part of claim 3);

[49] Pursuant to the Appellate Body's communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings" (WT/AB/23, 11 March 2015).

[50] Pursuant to the Appellate Body's communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings" (WT/AB/23, 11 March 2015).

ii. whether the Panel erred in finding that Japan's panel request, as it relates to the following claims, complied with the requirements of Article 6.2 of the DSU and, consequently, in finding that these claims were within its terms of reference (raised by Korea):

- the claim under Articles 3.1 and 3.5 of the Anti-Dumping Agreement that the Korean investigating authorities failed to properly establish a causal link between the dumped imports and the alleged injury (claim 4);
- the claim under Articles 3.1 and 3.5 of the Anti-Dumping Agreement concerning the Korean investigating authorities' non-attribution analysis (part of claim 5); and
- the claim under Articles 3.1 and 3.5 of the Anti-Dumping Agreement that the Korean investigating authorities' causation determination was undermined by its flawed price effects and volume analyses under Article 3.2, and by its flawed impact analysis under Article 3.4, "irrespective and independent" of whether these analyses were found to be inconsistent with Articles 3.2 and 3.4 (claim 6);

iii. whether the Panel erred in finding that Japan failed to establish that the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement in their evaluation of the magnitude of the margin of dumping for purposes of examining the impact of the dumped imports on the domestic industry (raised by Japan);

iv. whether the Panel erred in its interpretation or application of Articles 3.1 and 3.5 of the Anti-Dumping Agreement in resolving Japan's claim 6 (raised by the participants);

v. whether the Panel erred in its interpretation or application of Articles 3.1 and 3.5 of the Anti-Dumping Agreement in resolving Japan's claim 4 (raised by Japan);

vi. if the Appellate Body were to find that the Panel erred in finding that Japan's claim 1 was outside its terms of reference, whether the Appellate Body can complete the legal analysis and find that the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement in their consideration of the volume of the dumped imports in the anti-dumping investigation at issue (raised by Japan);

vii. if the Appellate Body were to find that the Panel erred in finding that Japan's claim 2 was outside its terms of reference, whether the Appellate Body can complete the legal analysis and find that the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement in their consideration of the effects of the dumped imports on prices in the anti-dumping investigation at issue (raised by Japan); and

viii. if the Appellate Body were to find that the Panel erred in finding that part of Japan's claim 3 was outside its terms of reference, whether the Appellate Body can complete the legal analysis and find that the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement in their determination of the impact of the dumped imports on the domestic industry in the anti-dumping investigation at issue (raised by Japan);

c. with respect to Japan's claims under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement (raised by Korea):

i. whether the Panel erred in finding that Japan's panel request, as it relates to the claims under, respectively, Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement concerning the confidential treatment of information (claims 8 and 9), complied with the requirements of Article 6.2 of the DSU and, consequently, were within its terms of reference;

ii. whether the Panel erred in its interpretation or application of Article 6.5 of the Anti-Dumping Agreement in finding that the Korean investigating authorities acted inconsistently with this provision by treating certain information as confidential without "good cause" having been shown; and

iii. whether the Panel erred in its application of Article 6.5.1 of the Anti-Dumping Agreement in finding that the Korean investigating authorities acted inconsistently with this provision by failing to require that the submitting parties provide a sufficient non-confidential summary of the information for which confidential treatment was sought; and

d. with respect to Japan's claim under Article 6.9 of the Anti-Dumping Agreement (raised by Japan):

i. whether the Panel erred in finding that Japan's panel request, as it relates to the claim under Article 6.9 of the Anti-Dumping Agreement concerning the disclosure of essential facts (claim 10), failed to comply with the requirements of Article 6.2 of the DSU and, consequently, in finding that this claim was outside the Panel's terms of reference; and

ii. if the Appellate Body were to find that the Panel erred in finding that Japan's claim 10 was outside its terms of reference, whether the Appellate Body can complete the legal analysis and find that Korea acted inconsistently with Article 6.9 of the Anti-Dumping Agreement because the Korean investigating authorities failed to disclose the "essential facts" under consideration before the final determination was made.

5 ANALYSIS OF THE APPELLATE BODY

5.1. As noted in paragraph 1.5 above, the Panel did not issue a separate ruling on Korea's challenge of the sufficiency of Japan's panel request with respect to all of the claims contained therein[51], but instead addressed the issues regarding the sufficiency of Japan's panel request in its final Report.

5.2. In its final Report, the Panel began by articulating its overarching understanding of the relevant legal standard under Article 6.2 of the DSU.[52] The Panel then addressed each of the claims raised in Japan's panel request, starting with Japan's claim regarding the Korean investigating authorities' definition of the domestic industry, followed by, *inter alia*, the claims concerning the Korean investigating authorities' injury determination, treatment of confidential information, and disclosure of essential facts.[53] For each claim, the Panel began by determining whether it fell within its terms of reference in light of the legal standard under Article 6.2 of the DSU. For those claims found to be within its terms of reference, the Panel proceeded to examine the merits of each of them pursuant to the relevant provisions of the Anti-Dumping Agreement. In our analysis below, we largely follow the same order, beginning with a review of the legal standard under Article 6.2 and our understanding of the Panel's articulation of this standard. We then turn to the appeal of the Panel's findings on Japan's claim regarding the Korean investigating authorities' definition of the domestic industry, followed by the appeals of the Panel's findings on Japan's claims regarding the Korean investigating authorities' determination of injury, treatment of confidential information, and disclosure of essential facts.

5.1 Overall considerations regarding the legal standard under Article 6.2 of the DSU

5.1.1 The legal standard under Article 6.2 of the DSU

5.3. Article 6.2 of the DSU provides, in relevant part:

[51] See also Panel Report, para. 7.16.
[52] Panel Report, paras. 7.18-7.27.
[53] The Panel's findings on Japan's remaining claims, brought under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement, are not subject to appeal.

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

5.4. The requirements under Article 6.2 of the DSU are "central to the establishment of the jurisdiction of a panel".[54] A panel request governs a panel's terms of reference and delimits the scope of the panel's jurisdiction.[55] In addition, by establishing and defining the jurisdiction of the panel, "the panel request also fulfils a due process objective" by providing the respondent and third parties with notice regarding the nature of the complainant's case and enabling them to respond accordingly.[56]

5.5. In assessing whether a panel request is sufficiently precise to meet the requirements of Article 6.2 of the DSU, panels must "scrutinize carefully the panel request, read as a whole, and on the basis of the language used".[57] Whether a panel request complies with the requirements of Article 6.2 of the DSU must therefore be determined on the face of the panel request[58], on a case-by-case basis.[59] Defects in the request for the establishment of a panel cannot be cured in the subsequent submissions of the parties during the panel proceedings. However, "in considering the sufficiency of a panel request, submissions and statements made during the course of the panel proceedings, in particular the first written submission of the complaining party, may be consulted in order to confirm the meaning of the words used in the panel request."[60]

5.6. The present dispute concerns whether Japan's panel request has identified the legal basis of the complaint with sufficient clarity, and does not pertain to the identification of "the specific measures at issue". At the centre of the dispute is the question whether Japan's panel request "provide[d] a brief summary of the legal basis of the complaint sufficient to present the problem clearly" within the meaning of the latter part of the second sentence of Article 6.2 of the DSU. Pursuant to this requirement, while the summary of the legal basis may be "brief", the degree of brevity that is permissible under Article 6.2 is a function of its clarity in presenting the problem. The Appellate Body has found that, to meet this requirement, a panel request must "plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed".[61] The identification of the treaty provision claimed to have been violated is "always necessary" and a "minimum prerequisite".[62] At the same time, depending on the particular circumstances of a case, the identification of the treaty provision alleged to have been breached may not alone be sufficient to comply with the requirements of Article 6.2. For example, "to the extent that a provision contains not one single, distinct obligation, but rather multiple obligations, a panel request might need to specify which of the obligations contained in the provision is being

[54] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.6.

[55] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.12. See also Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, para. 640; *US – Countervailing Measures (China)*, para. 4.6; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.6.

[56] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.7 (referring to Appellate Body Reports, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, p. 186; *Chile – Price Band System*, para. 164; *Thailand – H-Beams*, para. 88; *US – Continued Zeroing*, para. 161).

[57] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU*), para. 5.13 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 562 (fn omitted)).

[58] Appellate Body Reports, *US – Carbon Steel*, para. 127; *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.13.

[59] Appellate Body Reports, *Korea – Dairy*, para. 127; *China – Raw Materials*, para. 220; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.17.

[60] Appellate Body Report, *US – Carbon Steel*, para. 127 (referring to Appellate Body Report, *Thailand – H-Beams*, para. 95). See also Appellate Body Reports, *China – Raw Materials*, para. 220; *China – HP-SSST (Japan) / China – HP-SSST (EU*), para. 5.13.

[61] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU*), para. 5.15 (quoting Appellate Body Reports, *China – Raw Materials*, para. 220; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.8, in turn quoting Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162). See also Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.9.

[62] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU*), para. 5.14 (quoting Appellate Body Report, *Korea – Dairy*, para. 124, in turn referring to Appellate Body Reports, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, p. 186; *EC – Bananas III*, paras. 145 and 147; *India – Patents (US)*, paras. 89 and 92-93).

challenged."[63] Thus, in light of the requirement to consider the sufficiency of a panel request on its face and on a case-by-case basis, what is sufficient to "plainly connect" the measure with the provision of the covered agreements claimed to have been infringed will also depend on the circumstances of each case. Such circumstances may include the nature of the measure at issue and the manner in which it is described in the panel request, as well as the nature of the provision of the covered agreements alleged to have been breached.[64] In addition, a panel request need only provide the "legal basis of the complaint", that is, the *claims* underlying this complaint and not the *arguments* in support thereof.[65]

5.7. The Appellate Body has also on three occasions indicated that a brief summary of the legal basis of the complaint required by Article 6.2 of the DSU "aims to explain succinctly *how* or *why* the measure at issue is considered by the complaining Member to be violating the WTO obligation in question".[66] For example, in *EC − Selected Customs Matters*, the Appellate Body used the phrase "how or why" in connection with the requirement that the summary of the legal basis "be sufficient to present the problem clearly".[67] Subsequently, in *China − Raw Materials*, the Appellate Body considered that the panel request in that dispute failed to explain succinctly how or why the measure at issue is inconsistent with the WTO obligation in question because the panel request failed to connect the different measures with the various obligations listed therein.[68] Thus, the use of the phrase "how or why" in these cases does not imply a new and different legal standard for complying with the requirements of Article 6.2 of the DSU. As described above, the applicable legal standard, which requires a "brief summary of the legal basis … sufficient to present the problem clearly", entails the consideration of whether the panel request plainly connects the measure with the provision of the covered agreements claimed to have been infringed. The sufficiency of a panel request under this standard is to be assessed on a case-by-case basis.

5.8. In sum, the requirements under Article 6.2 of the DSU are central to the proper establishment of the jurisdiction of a panel. A panel request governs a panel's terms of reference and delimits the scope of the panel's jurisdiction. In addition, by establishing and defining the jurisdiction of the panel, the panel request also fulfils a due process objective by providing the respondent and third parties with notice regarding the nature of the complainant's case and by enabling them to respond accordingly. Whether a panel request complies with the requirements of Article 6.2 of the DSU must be determined on the face of the panel request, on a case-by-case basis. Defects in the request for the establishment of a panel cannot be cured in the subsequent submissions of the parties during the panel proceedings. However, in considering the sufficiency of a panel request, submissions and statements made during the course of the panel proceedings, in particular the first written submission of the complaining party, may be consulted in order to confirm the meaning of the words used in the panel request.

5.9. In order to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly" pursuant to Article 6.2 of the DSU, a panel request must plainly connect the measure(s) with the provision(s) of the covered agreements claimed to have been infringed. The identification of the treaty provision claimed to have been violated by the respondent is "always necessary" and a "minimum prerequisite"[69], but may not be sufficient to meet the above requirement of Article 6.2 depending on the particular circumstances of a case. Such circumstances include the

[63] Appellate Body Report, *US − Countervailing Measures (China)*, para. 4.9 (quoting Appellate Body Reports, *China − Raw Materials*, para. 220, in turn referring to Appellate Body Reports, *Korea − Dairy*, para. 124; *EC − Fasteners (China)*, para. 598; *US − Countervailing and Anti-Dumping Measures (China)*, para. 4.8).

[64] See Appellate Body Report, *US − Countervailing Measures (China)*, para. 4.9.

[65] See para. 5.31 below. See also Appellate Body Reports, *China − HP-SSST (Japan) / China − HP-SSST (EU)*, para. 5.14; *Korea − Dairy*, para. 139; *US − Countervailing Measures (China)*, para. 4.9.

[66] Appellate Body Report, *EC − Selected Customs Matters*, para. 130. (emphasis original) See also Appellate Body Reports, *China − Raw Materials*, para. 226; *US − Countervailing Measures (China)*, para. 4.9.

[67] Appellate Body Report, *EC − Selected Customs Matters*, para. 130.

[68] Appellate Body Reports, *China − Raw Materials*, para. 266. In that dispute, the panel request listed 37 legal instruments as the measures at issue and alleged them to be inconsistent with 13 provisions of the covered agreements. The Appellate Body noted that it was "not clear which allegations of error pertain to which particular measure or set of measures identified in the panel requests". (Ibid., paras. 226 and 229)

[69] Appellate Body Reports, *China − HP-SSST (Japan) / China − HP-SSST (EU)*, para. 5.14 (quoting Appellate Body Report, *Korea − Dairy*, para. 124, in turn referring to Appellate Body Reports, *Brazil − Desiccated Coconut*, fn 21 at p. 22, DSR 1997:I, p. 186; *EC − Bananas III*, paras. 145 and 147; *India − Patents (US)*, paras. 89 and 92-93).

nature of the measure at issue and the manner in which it is described in the panel request, as well as the nature of the provision of the covered agreements alleged to have been breached.

5.1.2 Whether the Panel erred in its articulation of the applicable legal standard under Article 6.2 of the DSU

5.10. The Panel recalled that a panel request serves a dual function, because it: (i) "forms the basis for a panel's terms of reference under Article 7.1 of the DSU"; and (ii) "informs other WTO Members of the nature of the dispute, which in turn allows the respondent to prepare its defence and allows other Members to assess whether they have an interest in the matter, for example, to decide whether to participate as third parties".[70] The Panel noted that compliance with the requirements under Article 6.2 must be demonstrated on the face of the panel request[71], and that later submissions and statements by the parties may only be considered to confirm the meaning of the words used in the panel request and to assess whether the ability of the respondent to defend itself was prejudiced.[72] With respect to the requirement in Article 6.2 to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly, the Panel said that the "legal basis of the complaint" refers to the "claims" made by the complaining party.[73] For this purpose, the Panel distinguished between "claims" and "arguments" by noting that a panel request must identify the claims put forward by the complainant but need not identify the complainant's arguments.[74]

5.11. Furthermore, the Panel indicated that "a panel request must plainly connect the challenged measures with the provisions of the covered agreements claimed to have been infringed, so that the responding party is aware of the basis for the alleged nullification or impairment of the complaining party's benefits."[75] The Panel noted that the narrative of a panel request "functions to explain succinctly *how* or *why* the measure at issue is considered by the complaining Member to be violating the WTO obligations in question".[76] To the Panel, as a minimum requirement, a complainant must list in the panel request the provisions of the covered agreements claimed to have been violated. The Panel noted, however, that there are situations in which a "mere listing" of treaty provisions does not satisfy the standards of clarity in the statement of the legal basis of the complaint required by Article 6.2.[77] The Panel further stated that whether the listing of a treaty provision allegedly violated is sufficient to constitute a "brief summary of the legal basis of the complaint sufficient to present the problem clearly" depends on the circumstances of each case, and in particular the extent to which a mere reference to a treaty provision sheds light on the nature of the obligation at issue.[78]

5.12. In its articulation of the relevant legal standard under Article 6.2 of the DSU, the Panel rightly noted the dual function of the panel request in establishing the terms of reference and fulfilling a due process objective by providing notice to other Members of the nature of the dispute. The Panel also rightly indicated that the consistency of the panel request is to be established on a case-by-case basis, and that the panel request must connect the challenged measure with the provision of the covered agreement claimed to have been infringed such that it provides a brief summary of the legal basis of the complaint sufficient to present the problem clearly by, at a minimum, identifying the provision in question. With regard to the Panel's reference to the function of the panel request to

[70] Panel Report, para. 7.19 (referring to Appellate Body Reports, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, p. 186; *EC – Bananas III*, para. 142; *US – Carbon Steel*, para. 126; *US – Continued Zeroing*, para. 161; *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 108).

[71] Panel Report, para. 7.20.

[72] Panel Report, para. 7.20 (referring to Appellate Body Reports, *US – Carbon Steel*, para. 127; *Australia – Apples*, para. 418).

[73] Panel Report, para. 7.21 (referring to Appellate Body Report, *Guatemala – Cement I*, para. 72).

[74] Panel Report, para. 7.22 (referring to Appellate Body Reports, *Korea – Dairy*, para. 139; *EC – Bananas III*, para. 141).

[75] Panel Report, para. 7.24 (referring to Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162).

[76] Panel Report, para. 7.24 (referring to Appellate Body Reports, *EC – Selected Customs Matters*, para. 130; *China – Raw Materials*, para. 226; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.26). (emphasis original)

[77] Panel Report, para. 7.26 (referring to Appellate Body Report, *Korea – Dairy*, para. 124). By way of example, the Panel noted that this would be the case where the provisions listed in the panel request establish not one single, distinct obligation, but rather multiple obligations. (Ibid.)

[78] Panel Report, para. 7.27 (referring to Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.47; Preliminary Ruling by the Panel on the Consistency of the Complaining Parties' Panel Requests with Article 6.2 of the DSU, para. 79).

"explain succinctly *how* or *why* the measure at issue is considered … to be violating the WTO obligations in question"[79], we reiterate our understanding set out in paragraph 5.7 above. Specifically, the reference to the phrase "how or why" in certain past disputes does not indicate a standard different from the requirement that a panel request include a "brief summary of the legal basis … sufficient to present the problem clearly" within the meaning of Article 6.2 of the DSU.

5.13. The Panel went on to make certain observations regarding the relevance of the obligation under Article 3.1 of the Anti-Dumping Agreement for purposes of assessing the sufficiency of the panel request in this dispute. The Panel noted that, of the 13 claims set out in Japan's panel request, 7 relate to Korea's injury determination, each of which invokes Article 3.1 of the Anti-Dumping Agreement together with another subparagraph of Article 3 or, in 1 claim, Article 4.1 of the Anti-Dumping Agreement.[80] For purposes of its findings under Article 6.2 of the DSU, the Panel considered it useful to explain its understanding of the legal framework for injury determinations so as to "provide the context for [its] consideration of whether the claims raised by Japan are properly before the Panel".[81] The Panel noted that the provisions of Article 3 of the Anti-Dumping Agreement are interrelated in the sense that the required elements under Article 3 all contribute to the explanation of the ultimate determination of whether dumped imports are causing injury to the domestic industry of the importing Member.[82] In this regard, the Panel indicated that Article 3.1 functions as a *chapeau* and informs the rest of Article 3, such that it is an "overarching provision" that sets forth a Member's fundamental obligation with respect to the determination of injury, and "informs the more detailed obligations in succeeding paragraphs".[83] However, the Panel indicated that the principles set out in Article 3.1 "do not … establish independent obligations which can be judged in the abstract, or in isolation and separately from the substantive requirements set out in the remainder of Article 3".[84]

5.14. Noting that the requisite degree of specificity and clarity in a panel request must be examined on a case-by-case basis[85], the Panel indicated at the same time that, "merely to mention the first part of Article 3.1, or use the language of that provision … in a panel request will not in itself normally suffice to present a problem clearly with respect to an allegation of violation of the Anti-Dumping Agreement."[86] To the Panel, that would not, by itself, "explain *how* or *why* a complainant considers the measure at issue to be inconsistent with a specific obligation under the Anti-Dumping Agreement", or "be precise enough to serve the dual function of a panel request" to define the basis for the Panel's terms of reference and to inform other WTO Members of the status of the dispute.[87] Subsequently, in applying Article 6.2 of the DSU, the Panel relied, *inter alia*, on this reasoning in determining that certain of Japan's claims were not within its terms of reference.[88]

5.15. However, we observe that, in the panel request, none of Japan's claims is limited to paraphrasing the language of Article 3.1 of the Anti-Dumping Agreement alone. Rather, Japan also identifies, at a minimum, another paragraph of Article 3 or Article 4 alleged to have been breached. Therefore, whether Japan's paraphrasing of Article 3.1, together with the remainder of the narrative

[79] Panel Report, para. 7.24 (referring to Appellate Body Reports, *EC − Selected Customs Matters*, para. 130; *China − Raw Materials*, para. 226; *US − Countervailing and Anti-Dumping Measures (China)*, para. 4.26). (emphasis original)

[80] Panel Report, para. 7.28

[81] Panel Report, para. 7.29.

[82] Panel Report, para. 7.30 (referring to Panel Report, *China − Cellulose Pulp*, para. 7.10). The Panel indicated that the reference to "positive evidence" in Article 3.1 refers to "the facts underpinning and justifying the injury determination" and to "the quality of the evidence that an investigating authority may rely upon in making a determination", and that the term "positive" suggests that the evidence should be "affirmative, objective, verifiable, and credible". (Ibid., para. 7.32 (quoting Appellate Body Reports, *US − Hot-Rolled Steel*, para. 193; *China − GOES*, para. 126; referring to Appellate Body Report, *US − Hot-Rolled Steel*, para. 192; Panel Report, *China − Cellulose Pulp*, para. 7.12)) Further, the Panel found that the reference to an "objective examination" in Article 3.1 relates to the investigative process itself, and requires that the process "conform to the dictates of the basic principles of good faith and fundamental fairness" and be conducted "in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation". (Ibid., para. 7.32 (quoting Appellate Body Report, *China − GOES*, para. 126; referring to Appellate Body Report, *US − Hot-Rolled Steel*, para. 193; Panel Report, *China − Cellulose Pulp*, para. 7.12))

[83] Panel Report, para. 7.33 (quoting Appellate Body Report, *Thailand − H-Beams*, para. 106).

[84] Panel Report, para. 7.33 (quoting Panel Report, *China − Cellulose Pulp*, para. 7.13).

[85] Panel Report, para. 7.34.

[86] Panel Report, para. 7.35.

[87] Panel Report, para. 7.35. (emphasis original)

[88] See Panel Report, paras. 7.64, 7.91, 7.129, and 7.173.

contained in the panel request, including Japan's reference to the other provision(s) concerned, complies with the requirements of Article 6.2 should be assessed on a case-by-case basis, depending on the relevant circumstances of each claim. Thus, the fact that the narrative of Japan's claims, as set out in its panel request, paraphrases the language of Article 3.1, in and of itself, is not dispositive of whether the panel request complies with Article 6.2 of the DSU.

5.16. We will proceed to determine whether the Panel erred in its application of the legal standard under Article 6.2 for each of the claims under appeal in the respective sections below.

5.2 Domestic industry

5.17. The Panel found that Japan's claim 7, as listed in its panel request, which concerns the Korean investigating authorities' definition of the domestic industry, did not meet the requirements of Article 6.2 of the DSU and, consequently, was not within its terms of reference. Japan appeals this finding and requests the Appellate Body to find that this claim is within the Panel's terms of reference. In addition, Japan requests the Appellate Body to complete the legal analysis and find that the Korean investigating authorities acted inconsistently with Articles 3.1 and 4.1 of the Anti-Dumping Agreement in defining the domestic industry in the anti-dumping investigation at issue. Korea, for its part, requests the Appellate Body to uphold the Panel's finding under Article 6.2 of the DSU. Should the Appellate Body reverse the Panel's finding, Korea argues that the Appellate Body cannot complete the legal analysis.

5.18. We will first assess whether the Panel erred in finding that Japan's claim concerning the definition of the domestic industry did not comport with the requirements of Article 6.2 of the DSU. If we reverse the Panel's findings under Article 6.2, and find that Japan's claim concerning the definition of the domestic industry is within the Panel's terms of reference, we will proceed to examine whether we can complete the legal analysis with respect to Japan's claim that the Korean investigating authorities acted inconsistently with Articles 3.1 and 4.1 of the Anti-Dumping Agreement.

5.2.1 Whether the Panel erred in finding that Japan's claim 7 concerning the definition of the domestic industry was not within its terms of reference

5.19. Claim 7 in Japan's panel request states that Korea's measures imposing anti-dumping duties on pneumatic valves from Japan are inconsistent with Korea's obligations under:

> Articles 3.1 and 4.1 of the [Anti-Dumping] Agreement because Korea failed to make an objective examination based on positive evidence in defining the domestic industry producing the like product and consequently in making a determination of injury[.]

5.20. The Panel found that this claim consisted of a general reference to the language in Article 3.1 of the Anti-Dumping Agreement, which was not sufficient to present the problem clearly. According to the Panel, merely paraphrasing the language in the first part of Article 3.1 does not explain how or why Japan considers the measures at issue to be inconsistent with the specific obligations in Articles 3.1 and 4.1 of the Anti-Dumping Agreement with respect to the definition of the domestic industry.[89] The Panel thus considered that the panel request was not precise enough to serve the dual function of defining the basis for the Panel's terms of reference under Article 7.1 of the DSU, and informing other WTO Members, including the respondent, of the nature of the dispute.[90] Rather, the Panel considered that Japan's claim was "essentially generic", since "nothing in the panel request link[ed] the claim to the particular circumstances of the investigation at issue."[91] The Panel then found that its conclusion was confirmed when taking into account the "broad and diverse scope of the allegations concerning the alleged inconsistency in the definition of the domestic industry" advanced in Japan's later submissions.[92]

5.21. On appeal, the participants raise a number of arguments regarding the Panel's articulation and application of the legal standard under Article 6.2 of the DSU, generally, as well as certain

[89] Panel Report, para. 7.64.
[90] Panel Report, para. 7.65.
[91] Panel Report, para. 7.64.
[92] Panel Report, para. 7.66.

specific arguments for each of the individual claims concerning the Panel's application of Article 6.2. In this regard, Japan alleges several errors in the Panel's application of Article 6.2 to all of the claims it found to be outside its terms of reference.[93] First, Japan argues that the Panel failed to consider the nature of the obligation at issue in each case, and that, for claims involving Article 3.1 of the Anti-Dumping Agreement, the Panel focused inordinately on that part of Japan's panel request related to this provision.[94] Regarding claim 7, in particular, Japan argues that the Panel never discussed the narrow and specific obligation under Article 4.1 of the Anti-Dumping Agreement to define the domestic industry properly, and instead focused on Article 3.1 as a general obligation.[95]

5.22. Second, Japan argues that the Panel failed to consider the nature of the measure, despite the fact that four of the claims expressly correspond to specific sections of the measure at issue.[96] In particular, Japan argues that, because claim 7 referred specifically to "defining the domestic industry"[97], and the corresponding part of the measure at issue also references Article 4.1, Korea should have been able to fully understand this claim.[98] Third, Japan argues that the Panel improperly relied on the phrase "how or why" used by the Appellate Body in certain disputes to create "its own arbitrary standard"[99] requiring a complainant "to show not only a 'claim', but also the 'argument' in support of that claim".[100] Finally, Japan argues that the Panel improperly relied on later arguments, contrary to the Appellate Body's findings that, "[c]ompliance with the requirement of Article 6.2 must be determined on the face of the panel request, and a panel request should be evaluated based on what existed at that time."[101]

5.23. As a preliminary matter, Korea submits that Japan's claims are essentially concerned with the Panel's alleged lack of reasoned and adequate explanation, its alleged failure to consider certain facts, and the allegedly "unfair" nature of the Panel's approach, which Japan should have brought under Article 11 of the DSU.[102] Turning to the specific errors alleged by Japan, Korea begins by noting that, given the multifaceted nature of the obligations referenced in Japan's claims, the Panel did not err in considering that Japan's panel request failed to summarize the "how or why" of the violation.[103] Korea adds that the Panel did not ignore the fact that Japan's claim 7 was made pursuant to Articles 3.1 and 4.1 in combination, but found that the "generic" reference to Articles 3.1 and 4.1 was insufficient to present the problem clearly.[104]

5.24. Furthermore, Korea argues that the Panel did not fail to consider the nature of the measure.[105] According to Korea, the frequent references in the investigating authorities' determinations to the relevant legal obligations under the Anti-Dumping Agreement "[are] not a factor for determining the sufficiency of the claims made in a request for the establishment of a panel".[106] Korea also argues that, contrary to Japan's argument, the Panel indicated that a complainant is not required to present a summary of the arguments in the panel request. Korea asserts, however, that Japan cannot meet the requirements of Article 6.2 of the DSU "by simply indicating the legal basis of the claim and paraphrasing the obligation".[107] Korea further contends that, from a due process perspective, Japan's claim 7 concerning the definition of the domestic industry did not allow Korea to defend itself, especially in the context of a dispute involving a complex anti-dumping measure.[108] Finally, Korea

[93] Japan's appellant's submission, para. 27.
[94] Japan's appellant's submission, paras. 28-29. See also ibid., paras. 30-37.
[95] Japan's appellant's submission, para. 79.
[96] Japan's appellant's submission, para. 40. See also ibid., paras. 38-39 and 82.
[97] Japan's appellant's submission, para. 82.
[98] Japan's appellant's submission, paras. 83-84.
[99] Japan's appellant's submission, para. 42.
[100] Japan's appellant's submission, para. 43. See also ibid., paras. 44-46 and 90.
[101] Japan's appellant's submission, para. 47 (referring to Panel Report, para. 7.20; Appellate Body Reports, *US − Carbon Steel*, para. 127; *Australia − Apples*, para. 418; *US − Countervailing Measures (China)*, para. 4.7; *EC and certain member States − Large Civil Aircraft*, para. 642; *US − Gambling*, para. 269). See also ibid., paras. 48-50 and 91-92.
[102] Korea's appellee's submission, para. 6. See also ibid., paras. 67, 167, 229, 244, and 477.
[103] Korea's appellee's submission, para. 9.
[104] Korea's appellee's submission, para. 85.
[105] Korea's appellee's submission, para. 88.
[106] Korea's appellee's submission, para. 89 (referring to Appellate Body Report, *Thailand − H-Beams*, paras. 94-95).
[107] Korea's appellee's submission, para. 10.
[108] Korea's appellee's submission, paras. 75-76.

indicates that the Panel properly examined subsequent submissions to confirm its assessment of Japan's panel request.[109]

5.25. As we see it, the fact that part of Japan's claim may consist of paraphrasing the language of Article 3.1 of the Anti-Dumping Agreement is not, in and of itself, sufficient to establish that it does not comply with the requirements of Article 6.2 of the DSU. While we note the brevity of Japan's claim as listed in its panel request, we also observe that, beyond paraphrasing Article 3.1 of the Anti-Dumping Agreement, Japan also refers to Article 4.1 of the Anti-Dumping Agreement, such that it identifies both Articles 3.1 and 4.1 as the provisions of the covered agreements alleged to have been breached by Korea. As such, therefore, Japan's panel request fulfils the minimum requirement identified above, which is to identify the provisions of the covered agreements alleged to have been breached. The Panel's task should thus have consisted in determining whether, in these circumstances, the panel request presents the problem clearly by plainly connecting the measure with these provisions, taking into consideration, *inter alia*, the nature of the Korean measure, and the nature of the provisions concerned.

5.26. Furthermore, Japan's claim under Articles 3.1 and 4.1 highlights that Japan is concerned with the manner in which the Korean investigating authorities "*defin*[*ed*] *the domestic industry producing the like product*".[110] Thus, the panel request, on its face, makes clear that Japan's claim relates specifically to the portion of the measure at issue that concerns the definition of the domestic industry and its alleged inconsistency with Korea's obligation under Articles 3.1 and 4.1, and not the anti-dumping measure "as a whole".[111]

5.27. Regarding the nature of the provisions concerned, we recall that Article 4.1 of the Anti-Dumping Agreement defines the term "domestic industry" as either "the domestic producers as a whole of the like products" or "those [of them] whose collective output of the products constitutes a major proportion of the total domestic production of those products".[112] In addition, in light of the requirement in Article 3.1 of the Anti-Dumping Agreement that the determination of injury "be based on positive evidence and involve an objective examination", "an investigating authority must not act so as to give rise to a material risk of distortion in defining the domestic industry", in order "to ensure the accuracy of an injury determination".[113] Thus, insofar as it relates to the definition of the domestic industry in general, the obligation established by Articles 3.1 and 4.1 is well delineated. Together, Articles 3.1 and 4.1 establish a distinct obligation, such that Japan's identification of these provisions in the narrative of the panel request would seem to plainly connect the measure at issue with the provisions of the covered agreement alleged to have been breached, as required by Article 6.2 of the DSU.

5.28. Korea argues that Japan's claim "simply paraphrased the very general and essentially generic obligation under Article 3.1", and did not provide any narrative as to whether its claim related to specific aspects of Article 4.1, such as the selection of producers, the level of production represented by these producers or these producers not being qualitatively representative of domestic production, or a combination thereof.[114] As a result, Korea maintains that it was not possible to know what claim it had to answer.[115]

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[109] Korea's appellee's submission, paras. 11 and 97-102.

[110] Emphasis added.

[111] See Korea's appellee's submission, para. 88.

[112] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.298 (referring to Appellate Body Report, *EC – Fasteners (China)*, para. 411). We also recall that, by using the term "a major proportion", the second method "focuses on the question of *how much* production must be represented by those producers making up the domestic industry when the domestic industry is defined as less than the domestic producers as a whole". (Ibid. (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 411) (emphasis original)) The Appellate Body has read the "major proportion" requirement as having both quantitative and qualitative aspects. (Ibid., para. 5.302) Article 4.1 also prescribes two specific ways for defining the domestic industry in the particular situations in which: (i) producers are related to exporters or importers or are themselves importers; or (ii) the territory of a Member is divided into two or more competitive markets in exceptional circumstances. (See Article 4.1(i) and (ii) of the Anti-Dumping Agreement)

[113] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.300 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 414).

[114] Korea's appellee's submission, para. 86.

[115] Korea's appellee's submission, para. 86.

5.29. As we understand it, Korea's argument stands for the proposition that there are several ways in which an investigating authority can breach the obligation established by Articles 3.1 and 4.1, and that Japan's panel request does not specify in which of these ways the Korean investigating authorities allegedly breached the obligation in question. However, the fact that "an investigating authority can act inconsistently with [a provision] in different ways, does not … mean that [it] therefore contains multiple, distinct obligations".[116] In our view, the different ways highlighted by Korea in which the obligation can be breached do not establish many different obligations, but are rather different alternatives by which the Korean investigating authorities might have failed to ensure that the domestic industry was defined consistently with Articles 3.1 and 4.1, in a manner that ensures that the accuracy of an injury determination is not undermined by introducing a material risk of distortion in this definition.

5.30. As noted above, the Panel relied on Japan's later submissions in order to confirm its finding that Japan's claim concerning the definition of the domestic industry was not within its terms of reference. The Panel found the "allegations" under Articles 3.1 and 4.1 in these submissions to be "broad and diverse" in comparison with the narrative of the panel request.[117] In our view, however, similar to the different "aspects" of the obligation under Article 4.1 that Korea refers to, these "allegations" referenced by the Panel are also different ways in which the Korean investigating authorities may have breached the obligation under Articles 3.1 and 4.1. As we see it, these allegations relate to the manner in which the Korean investigating authorities allegedly failed to define the domestic industry properly, namely, by including only two domestic producers representing slightly more than half of the total domestic production and consisting of the applicants only[118], by failing to make efforts to collect information from other domestic producers or other sources and to ensure that the domestic industry was representative of the total domestic production[119], and by failing to consider evidence objectively and adequately reason the decision to exclude certain producers from the definition.[120] In our view, in making these allegations, Japan elaborated on why it considered that the Korean investigating authorities failed to define the domestic industry consistently with the requirements under Articles 3.1 and 4.1, that is, to define the domestic industry either as all of the domestic producers of the like product, or "a major proportion" thereof, and to avoid introducing a material risk of distortion to such definition.

5.31. Furthermore, the Appellate Body has said that the term "legal basis of the complaint" in Article 6.2 of the DSU refers to the *claims* pertaining to a specific provision of a covered agreement, that is, an allegation that "the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement."[121] As such, *claims* are to be distinguished from *arguments*, which are statements put forth by a complaining party "to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision", and do not need to be included in the panel request.[122] This is because Article 6.2 requires only "a *brief* summary of the legal basis of the complaint".[123]

5.32. In our view the elements that, in Korea's view, Japan should have developed in its panel request, as well as Japan's later submissions on which the Panel relied to confirm its finding, are arguments rather than claims, particularly because they do not relate to different obligations, but rather serve to explain the manner in which the Korean investigating authorities allegedly breached the obligation contained in Articles 3.1 and 4.1 of the Anti-Dumping Agreement. Japan was not required to include in its panel request the level of detail asserted by Korea in order to provide a "brief summary of the legal basis of the complaint sufficient to present the problem clearly".

5.33. According to the Panel, the fact that Japan did not provide more detail in its panel request meant that its claim was "essentially generic" and "[did] not explain *how* or *why* Japan considers

[116] Appellate Body Report, *US − Countervailing Measures (China)*, para. 4.24.
[117] Panel Report, para. 7.66.
[118] See Panel Report, para. 7.66.a-b.
[119] See Panel Report, para. 7.66.c-d.
[120] See Panel Report, para. 7.66.e-f.
[121] Appellate Body Reports, *China − HP-SSST (Japan) / China − HP-SSST (EU)*, para. 5.14 (quoting Appellate Body Report, *Korea − Dairy*, para. 139).
[122] Appellate Body Reports, *China − HP-SSST (Japan) / China − HP-SSST (EU)*, para. 5.14 (quoting Appellate Body Report, *Korea − Dairy*, para. 139). See also Appellate Body Report, *US − Countervailing Measures (China)*, para. 4.9.
[123] Emphasis added.

that the Korean Investigating Authorities' definition of the domestic industry did not involve an objective examination or was not based on positive evidence".[124] We consider that the Panel's reasoning was based on a misunderstanding of the significance of the term "how or why" that the Appellate Body has used at times.[125] The Panel appears to have considered this term to entail that a complainant would be required to include in the narrative of its panel request a level of detail going beyond setting out the claim underlying the complaint. However, as stated above, by using the term "how or why" in certain cases, the Appellate Body did not introduce a legal standard different from the one outlined in paragraphs 5.3 to 5.9 above.

5.34. In sum, Japan's panel request refers to both Articles 3.1 and 4.1 of the Anti-Dumping Agreement and thus identifies the provisions of the covered agreements alleged to have been breached. Japan's claim also makes clear that it relates specifically to the portion of the measure at issue concerning the definition of the domestic industry and its alleged inconsistency with Korea's obligation under Articles 3.1 and 4.1. In turn, Articles 3.1 and 4.1 together establish a distinct, well-delineated obligation regarding the definition of the domestic industry. Thus, Japan's claim 7 "provide[s] a brief summary of the legal basis of the complaint sufficient to present the problem clearly" within the meaning of Article 6.2 of the DSU.

5.35. For the foregoing reasons, we find that the Panel erred in finding that claim 7 in Japan's panel request was not within its terms of reference. Consequently, we reverse the Panel's finding, in paragraphs 7.67 and 8.1.a of the Panel Report, and find that Japan's claim 7 is within the Panel's terms of reference.

5.2.2 Whether the Appellate Body can complete the legal analysis

5.2.2.1 Introduction

5.36. Japan submits that, if the Appellate Body reverses the Panel's finding that Japan's claim under Articles 3.1 and 4.1 of the Anti-Dumping Agreement was not within its terms of reference, the Appellate Body should complete the legal analysis and find that the Korean investigating authorities' definition of the domestic industry was inconsistent with these provisions. In Japan's view, "this claim rests on undisputed facts"[126], in that the section entitled "Relevant facts" in the Panel Report sets forth all the key facts needed to resolve this claim.[127] On the basis of the facts set out in this section, Japan claims that the KTC acted inconsistently with Articles 3.1 and 4.1 by defining the domestic industry as consisting of the two applicants, whose production the KTC found to constitute a major proportion of the total domestic production of the like products. Japan contends that the domestic industry as defined by the KTC failed to meet the qualitative and quantitative elements of the "major proportion" requirement pursuant to Articles 3.1 and 4.1.[128]

5.37. Korea submits that the Panel did not explore the substantive issues and did not make any factual findings with respect to Japan's claim under Articles 3.1 and 4.1.[129] According to Korea, the "Relevant facts" section of the Panel Report "describes some of the issues that were discussed in the course of the proceedings", but it contains neither factual findings by the Panel nor an overview of the undisputed facts on the record.[130] Korea further contends that the Panel's summary of relevant facts is incomplete and, as such, does not provide a sufficient basis for the Appellate Body to

[124] Panel Report, para. 7.64. (emphasis original)
[125] See para. 5.7 above.
[126] Japan's appellant's submission, para. 93. Japan also argues that this claim is "closely related to the Article 3 claims [that] the Panel did address", i.e. claims under Articles 3.1, 3.4, and 3.5 of the Anti-Dumping Agreement. (Ibid.) However, Japan does not explain how the claim under Articles 3.1 and 4.1 is "closely related" to its claims under Article 3 of the Anti-Dumping Agreement. Japan also does not identify facts or findings pertaining to "the Article 3 claims that the Panel did address" in support of its Articles 3.1 and 4.1 arguments, other than those contained in the "Relevant facts" section of the Panel Report for the Articles 3.1 and 4.1 claim.
[127] Japan's appellant's submission, para. 94 (referring to Panel Report, paras. 7.46-7.55).
[128] Japan's appellant's submission, paras. 101-107.
[129] Korea's appellee's submission, paras. 19 and 106-107.
[130] Korea's appellee's submission, para. 108.

complete the legal analysis.[131] In any event, Korea submits that the Korean investigating authorities defined the domestic industry consistently with Articles 3.1 and 4.1.[132]

5.38. The Appellate Body has completed the legal analysis with a view to facilitating the prompt settlement and effective resolution of the dispute *only* when the factual findings by the panel and/or undisputed facts on the panel record provide a sufficient factual basis for doing so.[133] In this regard, the Appellate Body has found that the plain text of an investigating authority's determinations in a trade remedy investigation could be relied on in completing the legal analysis.[134] Moreover, the Appellate Body has declined to complete the legal analysis in view of due process considerations[135], for example, where the panel had not examined a claim at all[136], or where there had not been a full exploration of the issues[137] or scrutiny of the relevant evidence by the panel.[138] With these considerations in mind, we turn to recall briefly the relevant legal standard under Articles 3.1 and 4.1 of the Anti-Dumping Agreement and the relevant facts, before reviewing whether we could complete the legal analysis as requested by Japan.

5.2.2.2 Relevant legal standards

5.39. The first sentence of Article 4.1 of the Anti-Dumping Agreement provides for two methods of defining the domestic industry. It states:

> Article 4
>
> Definition of Domestic Industry
>
> 4.1 For the purposes of this Agreement, the term "domestic industry" shall be interpreted as referring to *the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion* of the total domestic production of those products[.][139]

5.40. Under the second method of defining the domestic industry, the "major proportion of the total domestic production" is determined by comparing the collective output of producers considered for inclusion with the production as a whole.[140] The Appellate Body has read the "major proportion"

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[131] Korea's appellee's submission, para. 109.

[132] Korea's appellee's submission, paras. 120 and 149.

[133] See e.g. Appellate Body Reports, *Australia − Salmon*, paras. 117-119; *US − Large Civil Aircraft (2nd complaint)*, para. 1250; *US − Lamb*, para. 150; *US − Shrimp*, para. 124; *US − Section 211 Appropriations Act*, para. 343; *EC and certain member States − Large Civil Aircraft*, para. 1178; *Colombia − Textiles*, para. 5.30; *US − Anti-Dumping Methodologies (China)*, para. 5.146; *Russia − Pigs (EU)*, para. 5.141; *EC and certain member States − Large Civil Aircraft (Article 21.5 − US)*, para. 5.745; *US − Continued Zeroing*, para. 195.

[134] See e.g. Appellate Body Report, *US − Countervailing Measures (China)*, para. 4.83.

[135] See e.g. Appellate Body Reports, *Russia − Commercial Vehicles*, para. 5.141 (referring to Appellate Body Reports, *Canada − Renewable Energy / Canada − Feed-in Tariff Program*, para. 5.224; *EC − Seal Products*, paras. 5.63 and 5.69; *US − Anti-Dumping Methodologies (China)*, para. 5.146); *EC − Export Subsidies on Sugar*, para. 339; *Peru − Agricultural Products*, para. 5.157; *Colombia − Textiles*, para. 5.30; *US − Countervailing Measures (China)*, para. 4.82.

[136] See e.g. Appellate Body Report, *Russia − Pigs (EU)*, para. 5.141 (referring to Appellate Body Reports, *EC − Poultry*, para. 107; *EC − Asbestos*, paras. 79 and 82; *US − Section 211 Appropriations Act*, para. 343; *EC − Export Subsidies on Sugar*, para. 337).

[137] See e.g. Appellate Body Reports, *EC − Asbestos*, paras. 81-82; *EC − Seal Products*, para. 5.69; *Russia − Commercial Vehicles*, para. 5.141; *EC and certain member States − Large Civil Aircraft (Article 21.5 − US)*, para. 5.721.

[138] See e.g. Appellate Body Report, *US − Countervailing Measures (China)*, para. 4.157.

[139] Emphasis added. Article 4.1 goes on to provide for two situations where producers of the like product may be excluded from the definition of the domestic industry, namely: (i) where producers are "related" to exporters or importers or are themselves importers of the allegedly dumped product; and (ii) where the territory of a Member is divided into two or more competitive markets and the producers within each market are regarded as a separate industry under specified conditions.

[140] Appellate Body Report, *EC − Fasteners (China)*, para. 412. As indicated by the Appellate Body, "the collective output of 'those' producers must be determined in relation to the production of the domestic producers as a whole." (Ibid.)

requirement in Article 4.1 as having both quantitative and qualitative aspects.[141] With regard to the *quantitative* consideration, "a major proportion" should be properly understood as a relatively high proportion of the total domestic production, and will standardly serve as a substantial reflection of the total domestic production.[142] The *qualitative* consideration, in turn, is concerned with whether the domestic producers of the like product that are included in the definition of the domestic industry are representative of the total domestic production.[143] The quantitative and qualitative aspects of the definition of the domestic industry are closely connected in that "[t]he lower the proportion, the more sensitive an investigating authority will have to be to ensure that the proportion used sufficiently represents" the total domestic production.[144]

5.41. Furthermore, in light of Article 3.1, an investigating authority must not act so as to give rise to a material risk of distortion when defining the domestic industry as a "major proportion" of the total domestic production pursuant to Article 4.1.[145] Such a risk would arise, for example, where the investigating authorities define the domestic industry "on the basis of willingness to be included in the [injury] sample", thereby imposing a "self-selection process among the domestic producers".[146] A material risk of distortion could also arise if an investigating authority were permitted to leave out from the definition of the domestic industry domestic producers of the like product that had provided data and sought to cooperate in the investigation on the basis of alleged deficiencies in the information provided without seeking to obtain additional information.[147] The Appellate Body has stated that "there is an inverse relationship between, on the one hand, the proportion of total production included in the domestic industry and, on the other hand, the existence of a material risk of distortion in the definition of domestic industry and in the assessment of injury."[148] This comports with the notion that the term "major proportion" has "both quantitative and qualitative connotations"[149], and that the process by which an investigating authority defines the domestic industry, including the degree of efforts made by the investigating authority in obtaining information, is also relevant in assessing the qualitative aspect of the requirement.

5.42. Finally, in view of "[t]he practical constraint on an authority's ability to obtain information", especially in special market situations such as a fragmented industry, "what constitutes 'a major proportion of the total domestic production' may be lower than what is ordinarily permissible."[150] In such cases, however, "the investigating authority bears the same obligation to ensure that the process of defining the domestic industry does not give rise to a material risk of distortion" and

[141] Appellate Body Reports, *EC − Fasteners (China) (Article 21.5 − China)*, para. 5.302; *Russia − Commercial Vehicles*, para. 5.12.

[142] Appellate Body Report, *EC − Fasteners (China)*, para. 412.

[143] Appellate Body Report, *Russia − Commercial Vehicles*, para. 5.13.

[144] Appellate Body Report, *Russia − Commercial Vehicles*, para. 5.13. See also Appellate Body Report, *EC − Fasteners (China)*, para. 412.

[145] Appellate Body Report, *EC − Fasteners (China)*, para. 414. See also Appellate Body Report, *EC − Fasteners (China) (Article 21.5 − China)*, para. 5.300.

[146] Appellate Body Report, *EC − Fasteners (China)*, para. 427. In the subsequent compliance dispute pursuant to Article 21.5 of the DSU, the Appellate Body found that the investigating authority relied on the same Notice of Initiation that conditioned the producers' eligibility to be included in the domestic industry on their willingness to be included in the injury sample. The Appellate Body found that the investigating authority failed to eliminate the material distortive effects on the composition of the group of domestic producers that had come forward. (Appellate Body Report, *EC − Fasteners (China) (Article 21.5 − China)*, para. 5.314)

[147] Appellate Body Report, *Russia − Commercial Vehicles*, paras. 5.21-5.22. In that dispute, the investigating authority defined the domestic industry as a single producer accounting for 87.9% of the total domestic production of the like product. (Ibid., para. 5.6) While there were two producers that cooperated with the investigation and provided data, the investigating authority decided not to include one of the two producers in the definition of the domestic industry after having reviewed that producer's data due to certain deficiencies in the data. (Ibid., para. 5.4) The Appellate Body found that the investigating authority acted inconsistently with Articles 3.1 and 4.1 of the Anti-Dumping Agreement, stating that the investigating authority "should seek to obtain additional information" from the domestic producer that provided allegedly deficient information, and that several provisions of the Anti-Dumping Agreement provide "tools … to address the inaccuracy and incompleteness of information". (Ibid., para. 5.22)

[148] Appellate Body Report, *Russia − Commercial Vehicles*, para. 5.13. See also Appellate Body Report, *EC − Fasteners (China) (Article 21.5 − China)*, para. 5.302.

[149] Appellate Body Report, *EC − Fasteners (China) (Article 21.5 − China)*, para. 5.302.

[150] Appellate Body Report, *EC − Fasteners (China)*, para. 415.

"would need to make a greater effort to ensure that the selected domestic producers are representative of the total domestic production".[151]

5.2.2.3 Overview of relevant facts relating to the definition of the domestic industry

5.43. As a result of its finding that Japan's claim under Articles 3.1 and 4.1 was not within the Panel's terms of reference, the Panel did not examine the merits of the claim.[152] Nonetheless, the Panel Report contains a section entitled "Relevant facts", which describes the relevant aspects of the underlying anti-dumping investigation at issue relating to Japan's claim under Articles 3.1 and 4.1. In this section, the Panel quoted or summarized the relevant content of the documents on the Panel record.[153] Neither participant disputes the accuracy of the Panel's summary contained in this section.

5.44. According to the "Relevant facts" section and the evidence on the Panel record referenced therein, the OTI sent the questionnaires to all nine known producers of the like product, but only the two applicants, namely TPC Mechatronics Corporation (TPC) and KCC Co., Ltd. (KCC), submitted responses and reported their production volumes.[154] Two of the remaining seven producers, Yonwoo Pneumatic (Yonwoo) and Shin Yeong Mechatronics (Shin Yeong), did not respond to the questionnaire, referring to the lack of resources.[155] Subsequently, i.e. after the public hearing with interested parties, these two producers submitted limited data, including their 2013 production volumes.[156] As for the other five domestic producers, the Panel Report indicates that, because the OTI "did not have any reliable source from which it could obtain accurate production data of domestic producers of the pneumatic valves", it calculated the production volume based on the data provided by the applicants.[157] Based on these data, the OTI found that the production volume of the two applicants constituted 55.4% of the total domestic production of the like product.[158] The OTI considered that the two applicants' combined production volume accounted for "a considerable portion of the total domestic production" and that, "[f]or the purpose of the investigation into the injury to the domestic industry[,] … the 'domestic industry' is defined as the 'total of TPC's and KCC's businesses producing a like product'."[159]

5.45. The OTI noted the Japanese respondents' argument that it should take into account all identified domestic producers of the like product for the purpose of the injury determination.[160] The OTI considered that, "if it is impossible to obtain [relevant] data on the entire domestic industry *despite the relevant efforts of the investigation authorities*, and if the companies whose data are available account for a majority proportion of the domestic industry, it is appropriate and reasonable

[151] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.303. See also Appellate Body Report, *EC – Fasteners (China)*, para. 416.

[152] Panel Report, para. 7.67. The Panel stated that it "will neither consider [Japan's claim under Articles 3.1 and 4.1] further nor resolve it". (Ibid.)

[153] Panel Report, paras. 7.46-7.55 and fns 82-109 thereto. These documents include: (i) the investigation application; (ii) OTI, Preliminary Report on Dumping and Injury to Domestic Industry of Valves for Pneumatic Transmissions imported from Japan, 26 June 2014 (OTI's Preliminary Report) (Panel Exhibit JPN-2b); OTI, Interim Investigation Report on Dumping and Injury to Domestic Industry of Valves for Pneumatic Transmissions from Japan, 23 October 2014 (OTI's Interim Report) (Panel Exhibit JPN-3b); and OTI's Final Report (Panel Exhibit KOR-2b (BCI)); (iii) KTC, Resolution of Preliminary Determination on Dumping and Injury to the Domestic Industry of Valves for Pneumatic Transmissions from Japan, 26 June 2014 (KTC's Preliminary Resolution) (Panel Exhibit JPN-1b) and KTC's Final Resolution (Panel Exhibit KOR-1b (BCI)); and (iv) Korea's responses to the Panel's questions. Most of the facts in the "Relevant facts" section correspond to the content of these underlying documents on the Panel record.

[154] Panel Report, para. 7.49.

[155] Korea's first written submission to the Panel, para. 315. See also Panel Report, para. 7.49 (referring to OTI's Final Report (Panel Exhibit KOR-2b (BCI)), p. 22 and fn 32 thereto); Korea's appellee's submission, para. 115. We note that the names of Yonwoo and Shin Yeong were redacted in the underlying documents (e.g. KTC's Final Resolution (Panel Exhibit KOR-1b (BCI)) and OTI's Final Report (Panel Exhibit KOR-2b (BCI))). However, Korea unredacted the names of these companies in its submissions. (See Korea's first written submission to the Panel, para. 315) During the oral hearing, Korea confirmed that the names of Yonwoo and Shin Yeong are not to be treated as BCI.

[156] Korea's appellee's submission, paras. 118 and 139-140; response to Panel question No. 102, paras. 83 and 85. See also Panel Report, para. 7.49; OTI's Final Report (Panel Exhibit KOR-2b (BCI)), pp. 19, 71, and 112.

[157] Panel Report, para. 7.49 (quoting Korea's response to Panel question No. 102, paras. 78 and 81).

[158] Panel Report, para. 7.49. See also OTI's Final Report (Panel Exhibit KOR-2b (BCI)), p. 19.

[159] Panel Report, para. 7.49 (quoting OTI's Final Report (Panel Exhibit KOR-2b (BCI)), pp. 22-23).

[160] Panel Report, para. 7.50.

to analyze the injury to the domestic industry only based on the data from such companies."[161] The OTI added that, due to the fact that most domestic producers were small and medium-sized companies and the lack of associations, groups, or research institutions in connection with the pneumatic valve industry, it would be "impossible to obtain reliable materials on the business conditions of the overall domestic industry".[162]

5.46. In addition, the OTI indicated that it conducted "an additional investigation" into the two domestic producers that submitted limited production and profitability data, Yonwoo and Shin Yeong, in light of the Japanese respondents' argument that these two producers were not suffering from injury.[163] The OTI found that both producers "showed changes in indicators similar to those of the applicants during the [period of investigation (POI)]".[164] The OTI further found that, although the operating profit ratio of these two companies "was relatively good compared to that of the applicants", this was due mainly to their smaller selling, general, and administrative (SG&A) expenses.[165]

5.47. On the basis of the OTI's findings, the KTC stated in its Final Resolution that the domestic industry was properly defined as the total of TPC and KCC's businesses producing the like product.[166] The KTC also noted that the OTI had "conducted an additional analysis by including some producers mentioned by the respondents among the domestic producers who did not participate in the investigation, to the extent that data related thereto were available".[167] The KTC concluded that the OTI's findings in this respect showed that the inclusion of these companies "would not significantly change the overall trends of the injury indicators of the domestic industry".[168]

5.2.2.4 Whether the Appellate Body can complete the legal analysis regarding Japan's claim that the Korean investigating authorities' definition of the domestic industry is inconsistent with Articles 3.1 and 4.1 of the Anti-Dumping Agreement

5.48. The domestic industry at issue was defined as those producers whose production accounted for a "major proportion" of the total domestic production under Article 4.1 of the Anti-Dumping Agreement. As noted above, the Appellate Body has read the "major proportion" requirement in Article 4.1 as having both quantitative and qualitative aspects, which are closely connected.

5.49. Regarding the quantitative aspect of the "major proportion" requirement, Japan alleges several defects in the KTC's calculation of the proportion of the total domestic output attributable to the domestic producers that were included in the definition of the domestic industry (i.e. TPC and KCC, who are also the two applicants of the anti-dumping investigation). Japan argues that "the KTC did not consider the available evidence objectively" by accepting the production volumes provided by the applicants for the five producers that did not provide any information.[169] Japan contends that "[t]he OTI did not even bother to confirm the accuracy of this basic number" or to "confirm, update, or verify … this information with subsequently submitted information for the two partially cooperative firms, Yonwoo and Shin Yeong".[170] Korea disputes this and contends that "the numbers originally provided by the applicants for Yonwoo and Shin Yeong were surprisingly similar to the actual production volumes submitted later by Yonwoo and Shin Yeong themselves."[171] Korea also contends that "[the] KTC confirmed with the applicants that they had estimated the production volumes of the other five domestic producers taking into account the total output of pneumatic valves in the

[161] Panel Report, para. 7.50 (quoting OTI's Final Report (Panel Exhibit KOR-2b (BCI)), p. 23). (emphasis added)
[162] Panel Report, para. 7.51 (quoting OTI's Final Report (Panel Exhibit KOR-2b (BCI)), p. 24).
[163] Korea's response to Panel question no. 64; Panel Report, para. 7.52 (quoting OTI's Final Report (Panel Exhibit KOR-2b (BCI)), p. 24; referring to OTI's Final Report (Panel Exhibit KOR-2b (BCI), pp. 70-71)). See also Korea's appellee's submission, para. 118.
[164] Panel Report, para. 7.52 (referring to OTI's Final Report (Panel Exhibit KOR-2b (BCI)), pp. 70-71).
[165] Panel Report, para. 7.52 (referring to OTI's Final Report (Panel Exhibit KOR-2b (BCI)), pp. 70-71).
[166] Panel Report, para. 7.54 (referring to KTC's Final Resolution (Panel Exhibit KOR-1b (BCI)), p. 13).
[167] Panel Report, para. 7.54 (quoting KTC's Final Resolution (Panel Exhibit KOR-1b (BCI)), p. 14; referring to KTC's Final Resolution (Panel Exhibit KOR-1b (BCI)), p. 24).
[168] Panel Report, para. 7.55 (quoting KTC's Final Resolution (Panel Exhibit KOR-1b (BCI)), p. 24).
[169] Japan's appellant's submission, para. 106.
[170] Japan's appellant's submission, para. 106. (fns omitted)
[171] Korea's appellee's submission, para. 140.

Korean market, the size of production capacity of these five producers, and the overall market shares of the five producers generally known to the players in the Korean market."[172]

5.50. Although Japan and Korea raised similar arguments before the Panel[173], the Panel did not explore these arguments, nor is there anything in the "Relevant facts" section that addresses these arguments. Moreover, neither Japan nor Korea directed us to findings in the Panel Report or undisputed facts on the Panel record that would allow us to assess the objectivity and sufficiency of the evidentiary basis of the Korean investigating authorities' examinations as to whether they "confirmed" the applicants' estimations.

5.51. In addition, we note Japan's argument that the calculation of the applicants' proportion of the total domestic output (i.e. 55.4%) was undermined by the inconsistencies between the production volumes submitted by Yonwoo and Shin Yeong before the investigation was initiated and their production volumes relied on by the OTI in its Final Report.[174] In response, Korea explains that the production volumes of Yonwoo and Shin Yeong relied on by the OTI in the Final Report were from 2013 and covered the "like products", whereas the production volumes provided by Yonwoo and Shin Yeong before the investigation was initiated were from 2012 and did not represent the "like products", because these data were provided before the scope of subject products was defined by the investigating authorities.[175] We note that Yonwoo and Shin Yeong's production data are directly relevant to determining the proportion of the total domestic production of pneumatic valves attributable to TPC and KCC (i.e. two applicants defined as the domestic industry in the investigation), as they are part of the total domestic output with which TPC and KCC's production was compared and the proportion of 55.4% was calculated. While the same arguments were presented by Japan and Korea before the Panel[176], the Panel did not explore the issue, including by, *inter alia*, scrutinizing and weighing the evidence before it.

5.52. Thus, in the absence of relevant factual findings, sufficient undisputed facts on the Panel record, and sufficient exploration of these issues by the Panel, we are unable to assess whether the KTC considered the available evidence objectively in calculating the proportion of the total domestic production attributable to the applicants.

5.53. With respect to the qualitative aspect of the "major proportion" requirement, Japan argues that "the KTC provided no explanation at all … to show whether and how the two [applicants] could be considered to represent the total domestic production as a whole."[177] As a result, Japan contends that there was a material risk of distortion in the KTC's definition of the domestic industry.[178] According to Japan, "the KTC should have included more domestic producers (regardless of whether they were willing to cooperate at that point of time) … so that the definition of the domestic industry would be sufficiently representative" or, if necessary, the KTC could have relied on "facts available" under Article 6.8 of the Anti-Dumping Agreement.[179] In response, Korea contends that there was "nothing in the process" leading up to the definition of the domestic industry at issue that "was skewed in favor of one of the parties or biased in any way".[180] Rather, all domestic producers were invited to participate and received questionnaires, but only the applicants returned responses.[181]

5.54. As indicated in the "Relevant facts" section of the Panel Report, although the Korean investigating authorities contacted all known domestic producers of the like product, only the applicants submitted responses to the questionnaires. In this regard, the situation in the present case differs from the previous disputes in which an investigating authority was found to have failed

[172] Korea's appellee's submission, para. 141.
[173] Korea's response to Panel question No. 102, paras. 80-81; Japan's comments on Korea's response to Panel question No. 102, paras. 76-78; second written submission to the Panel, para. 197.
[174] Japan's appellant's submission, para. 106 (referring to Japan's second written submission to the Panel, para. 198).
[175] Korea's appellee's submission, paras. 144-145 (referring to Korea's response to Panel question No. 102).
[176] See Japan's second written submission to the Panel, para. 198; Korea's response to Panel question No. 102, paras. 82-85.
[177] Japan's appellant's submission, para. 101.
[178] Japan's appellant's submission, paras. 102-103.
[179] Japan's appellant's submission, para. 103. (fn omitted)
[180] Korea's appellee's submission, para. 119. See also ibid., para. 133.
[181] Panel Report, para. 7.49; Korea's appellee's submission, para. 115.

to avoid a material risk of distortion in its definition of the domestic industry. As noted above, in those disputes, the investigating authorities either imposed a *self-selection process* whereby only those producers that chose to be included in the injury sample made up the domestic industry[182], or they excluded *a cooperating producer* from the definition of the domestic industry due to alleged deficiencies in the submitted data.[183]

5.55. In addition, we recall that what constitutes a "major proportion" may be lower in light of the practical constraints of obtaining information.[184] This is not to suggest, however, that difficulty in obtaining data is, by itself, sufficient to relieve the investigating authorities of their duty under Articles 3.1 and 4.1 of the Anti-Dumping Agreement. As noted above, investigating authorities have an obligation to ensure that the process of defining the domestic industry does not give rise to a material risk of distortion and to make a greater effort to ensure that the domestic producers included in the definition of the domestic industry are indeed *representative* of the total domestic production.[185] Thus, although only the applicants initially responded to the questionnaires, this in itself did not necessarily mean that the qualitative aspect of the definition of the domestic industry at issue comports with the requirements of Articles 3.1 and 4.1. Rather, completing the legal analysis on Japan's claim under Articles 3.1 and 4.1 would require an assessment of whether the producers included in the domestic industry as defined by the KTC were indeed representative, and whether the Korean investigating authorities acted in a manner that gave rise to a material risk of distortion.

5.56. In this regard, we note Korea's assertions that the two applicants represented a "relatively high production volume", the two applicants were "genuinely representative of the total domestic production" based on certain features of their operations, and "there was a low risk that they somehow would not sufficiently represent the domestic producers as a whole."[186] Korea made the same argument before the Panel[187], but the Panel did not explore this argument or include any statements in this regard in the "Relevant facts" section.[188] While there are facts on the Panel record that may potentially be relevant in addressing Korea's argument[189], in the absence of any exploration of the issue by the Panel, we consider that completing the legal analysis would raise due process concerns.

5.57. In addition, we recall that the process by which an investigating authority defines the domestic industry, including the degree of efforts made by the investigating authority, is relevant in assessing whether there was a material risk of distortion in defining the domestic industry.[190] In the present case, Japan and Korea dispute the characterization of the efforts made by the Korean investigating authorities. Specifically, Japan contends that the Korean investigating authorities were "passive" in gathering information for purposes of defining the domestic industry.[191] Korea contends that "it is highly disputed that the Korean investigating authorities were 'passive'."[192] The same arguments

[182] Appellate Body Report, *EC – Fasteners (China)*, para. 427.
[183] Appellate Body Report, *Russia – Commercial Vehicles*, paras. 5.21-5.22.
[184] Appellate Body Report, *EC – Fasteners (China)*, para. 415.
[185] Appellate Body Reports, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.303; *EC – Fasteners (China)*, para. 416.
[186] Korea's appellee's submission, para. 132. Specifically, Korea argues that "it is clear that the two Korean producers that formed the domestic industry produced a wide range of the pneumatic valve models included in the product definition; they sold valves both individually and as a part of the pneumatic system; they sold pneumatic valves for equipment in a diverse range of major industries, and they sold in the domestic Korean market through the main distributing channels." According to Korea, the two producers that formed the domestic industry were "thus genuinely representative of the total domestic production". (Ibid. (fn omitted))
[187] Korea's first written submission to the Panel, paras. 309-310.
[188] During the oral hearing, Japan acknowledged that Korea made the same argument before the Panel but that the Panel made no findings in the Panel Report.
[189] The OTI's Final Report describes various aspects of the two applicants' operations relied on by Korea, such as the number of models that the two applicants produce, their sales of pneumatic valves as part of the pneumatic system, their customer base, and their distribution channel. (OTI's Final Report (Panel Exhibit KOR-2b (BCI)), pp. 4, 9, 15, and 17)
[190] As discussed above in paragraph 5.41and footnote 147 thereto, the Appellate Body in *Russia – Commercial Vehicles* faulted the investigating authorities for excluding a cooperating domestic producer on the basis of alleged deficiencies in its questionnaire response without seeking additional information. (Appellate Body Report, *Russia – Commercial Vehicles*, para. 5.22).
[191] Japan's appellant's submission, para. 95.
[192] Korea's appellee's submission, para. 110.

were raised before the Panel[193], but the Panel did not explore them or include in the "Relevant facts" section any statement regarding whether the Korean investigating authorities were "passive". Moreover, neither Japan nor Korea directed us to findings in the Panel Report or undisputed facts on the Panel record that would allow us to complete the legal analysis on this issue.

5.58. Furthermore, Japan and Korea dispute the meaning and the relevance of the "additional analysis" conducted by the OTI for assessing whether the domestic industry defined as TPC and KCC is representative of the total domestic production. As noted above, following arguments by the Japanese respondents, the OTI examined the limited data provided by Yonwoo and Shin Yeong[194], and found that, while "[t]he operating profit ratio of these two companies was relatively good compared to that of the applicants", the changes in their indicators were "similar to those of the applicants during the POI".[195] According to Korea, this additional analysis supports its view that there was no material risk of distortion.[196] Japan, on the other hand, argues that the OTI's analysis was not adequately reasoned and failed to resolve the material risk of distortion.[197] Thus, Japan contends that the Korean investigating authorities "provided no explanation at all addressing the qualitative aspects to show whether and how the two petitioning firms could be considered to represent the total domestic production as a whole".[198]

5.59. Although the OTI's "additional analysis" is described in the "Relevant facts" section of the Panel Report, this section does not contain any evaluation by the Panel of such analysis in light of the arguments presented by Japan and Korea. In particular, Korea relies on the OTI's discussion of the similarity in the *pattern* of certain performance indicators between the two applicants, on the one hand, and Yonwoo and Shin Yeong, on the other hand.[199] Japan, in contrast, relies on the differences in the sales and profits between these two groups of companies in *absolute* terms.[200] These arguments were raised before the Panel[201], but the Panel did not assess the OTI's additional analysis in light of these arguments. Japan's arguments raise the question whether the data concerning performance indicators of domestic producers are relevant for assessing the qualitative aspect of the definition of the domestic industry under Articles 3.1 and 4.1. However, in the absence of the Panel's exploration of the OTI's additional analysis in light of the parties' arguments, we do not have a sufficient factual basis to complete the legal analysis to determine whether, and to what extent, Yonwoo and Shin Yeong's economic indicators were relevant in assessing the representativeness of the producers included in the definition of the domestic industry (i.e. TPC and KCC).

5.60. In sum, in defining the domestic industry as a "major proportion" of the total domestic production, an investigating authority is required to assess both quantitative and qualitative aspects[202], and ensure that it does not act in a manner that gives rise to a material risk of distortion.[203] As discussed above, we are unable to complete the legal analysis with regard to the above aspects of the "major proportion" requirement. First, in the absence of relevant factual findings by the Panel or undisputed facts on the Panel record, we are unable to assess whether the KTC considered the available evidence objectively in calculating the proportion of the total domestic production accounted for by the applicants. In addition, we do not have sufficient factual findings by the Panel or undisputed facts on the Panel record to assess whether the two applicants included in the definition of the domestic industry were sufficiently representative of the total domestic production, or whether the Korean investigating authorities' process of defining the domestic

[193] Korea's appellee's submission, para. 110 (referring to Korea's second written submission to the Panel, paras. 140-142).

[194] Korea's response to Panel question no. 64; Panel Report, para. 7.52 (referring to OTI's Final Report (Panel Exhibit KOR-2b (BCI)), pp. 24 and 70-71). See also Korea's appellee's submission, para. 118.

[195] Panel Report, para. 7.52.

[196] Korea's appellee's submission, para. 133; response to questioning at the oral hearing.

[197] Japan's appellant's submission, para. 102.

[198] Japan's appellant's submission, para. 101.

[199] Panel Report, para. 7.52; OTI's Final Report (Panel Exhibit KOR-2b (BCI)), p. 71; Korea's response to questioning at the oral hearing.

[200] Japan's first written submission to the Panel, para. 250; response to questioning at the oral hearing.

[201] Japan's first written submission to the Panel, paras. 249-252; Korea's comments on Japan's response to Panel question No. 111.

[202] Appellate Body Reports, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.302; *Russia – Commercial Vehicles*, para. 5.12.

[203] Appellate Body Reports, *EC – Fasteners (China)*, para. 414; *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.300; *Russia – Commercial Vehicles*, para. 5.14.

industry introduced a material risk of distortion. Consequently, we find ourselves unable to complete the legal analysis regarding Japan's claim that the Korean investigating authorities' definition of the domestic industry is inconsistent with Articles 3.1 and 4.1 of the Anti-Dumping Agreement.

5.3 Determination of injury

5.3.1 Introduction

5.61. Japan's panel request sets out six claims challenging the Korean investigating authorities' injury determination under the provisions of Article 3 of the Anti-Dumping Agreement. The Panel found that Japan's panel request, as it relates to several of these claims, failed to meet the requirements of Article 6.2 of the DSU to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". Consequently, the Panel found these claims to be outside its terms of reference. Specifically, the Panel found that Japan's claims 1[204] and 2[205], concerning the Korean investigating authorities' analysis of the volume of the dumped imports and price effects of such imports, were not within its terms of reference. The Panel found that Japan's claim 3, insofar as it relates to the Korean investigating authorities' examination of two of the specific economic factors listed in Article 3.4, was within the Panel's terms of reference, but that the remaining part of this claim was not.[206] Furthermore, the Panel found that Japan's claims 4[207] and 6[208], concerning the Korean investigating authorities' causation analysis, were within its terms of reference. Finally, the Panel found that Japan's claim 5 was within the Panel's terms of reference, insofar as it concerns the *adequacy* of the Korean investigating authorities' examination regarding certain known factors, other than the dumped imports, which caused injury to the domestic industry.[209]

5.62. Having reached the above findings under Article 6.2 of the DSU, the Panel examined the substance of Japan's claims that it found to be within its terms of reference, namely those under Articles 3.1, 3.4, and 3.5 of the Anti-Dumping Agreement. On the basis of its analysis, the Panel found that the Korean investigating authorities did not act inconsistently with Articles 3.1 and 3.4 with respect to their examination of the impact of dumped imports on the state of the domestic industry[210], but acted inconsistently with Articles 3.1 and 3.5 in certain aspects of their causation determination.[211]

5.63. Japan and Korea each appeal different aspects of the Panel's findings under Article 6.2 of the DSU and the Panel's substantive findings under the provisions of the Article 3 of the Anti-Dumping Agreement. In addition, Japan requests the Appellate Body to complete the legal analysis regarding the claims under Article 3 that the Panel excluded from its terms of reference, while Korea maintains that the Appellate Body cannot complete the legal analysis.

5.64. In light of the claims and arguments raised on appeal, we begin by examining whether the Panel erred in its findings pursuant to Article 6.2 of the DSU regarding Japan's various claims under Article 3 of the Anti-Dumping Agreement. We will then review the Panel's substantive findings under Article 3. Finally, if we reverse the Panel's findings under Article 6.2 of the DSU concerning Japan's claims 1, 2, and/or part of claim 3, and find that these claims were within the Panel's terms of reference, we will assess whether we can complete the legal analysis with respect to these claims.

[204] Panel Report, para. 7.94.
[205] Panel Report, para. 7.131.
[206] Panel Report, paras. 7.170 and 7.175.
[207] Panel Report, para. 7.235.
[208] Panel Report, para. 7.226.
[209] Panel Report, paras. 7.241 and 7.243. However, the Panel found that the allegation that the KTC failed to consider some known factors *at all* is not within its terms of reference. In the Panel's view, nothing in the panel request hints that the KTC omitted to consider any known factors causing injury. This finding is not subject to appeal. (Ibid., paras. 7.242-7.243)
[210] Panel Report, para. 7.192.
[211] Panel Report, paras. 7.272, 7.322-7.323, and 7.349.

5.3.2 Whether the Panel erred in its findings under Article 6.2 of the DSU

5.3.2.1 Whether the Panel erred in finding that Japan's claim 1 concerning the volume of the dumped imports was not within its terms of reference

5.65. Claim 1 in Japan's panel request states that Korea's measure imposing the anti-dumping duties on pneumatic valves from Japan (the measure at issue) is inconsistent with Korea's obligations under:

> Articles 3.1 and 3.2 of the [Anti-Dumping] Agreement because Korea's analysis of a significant increase of the imports under investigation did not involve an objective examination based on positive evidence[.]

5.66. The Panel considered that Japan's panel request failed to meet the requirements of Article 6.2 of the DSU because Japan's claim merely paraphrased the language in the first part of Article 3.1 of the Anti-Dumping Agreement without any additional narrative description of the problems that Japan considered to constitute the alleged inconsistency. To the Panel, therefore, this was insufficient to explain how or why Japan considered Articles 3.1 and 3.2 to be breached, or to mark out the parameters of the case of alleged inconsistency with Article 3.2 that Japan advanced in this dispute. The Panel thus found that Japan's claim was "essentially generic", since nothing in the panel request linked the claim to the particular circumstances of the investigation at issue.[212] The Panel then found that its conclusion was confirmed when taking into account the scope of the allegations concerning volume effects advanced in Japan's written submissions.[213]

5.67. On appeal, Japan argues that the Panel erred in finding that its claim under Articles 3.1 and 3.2 concerning the volume of dumped imports was not within its terms of reference.[214] Japan argues that its claim "expressly identifies Articles 3.1 and 3.2 as the specific provisions at issue for this claim"[215], but that the Panel "never discussed the narrow and specific obligation under Article 3.2 to analyse the significant increase of the imports, and instead focused on Article 3.1 as a general obligation".[216] Japan also indicates that, with regard to the nature of the measure, the claim "expressly refers to the Korean measures imposing anti-dumping duties on pneumatic valves from Japan, as set forth in the KTC's Final Resolution"[217], and that the Korean investigating authorities should have been able to fully understand that it concerned the analysis of the significant increase in the volume of imports.[218] In this regard, Japan indicates that the KTC's Final Resolution expressly cites Article 3.2 when discussing its obligation under the Anti-Dumping Agreement.[219] Japan also reiterates that the Panel improperly relied on the phrase "how or why"[220], and improperly relied on Japan's arguments in its written submissions.[221]

5.68. Korea contends that the Panel did not ignore the fact that Japan's claim was made pursuant to both Articles 3.1 and 3.2. Rather, the Panel correctly concluded that Japan's panel request only paraphrased the language of Article 3.1, and did not include any description of what it considered to be the problems with the Korean investigating authorities' consideration of the volume of dumped imports under Article 3.2.[222] Korea also argues that it is not the task of a panel to discuss the measures to discover references in the investigation record that could have hinted at the nature of the problem.[223] Korea further maintains that the Panel did not use the phrase "how or why" to supersede the Appellate Body's repeated affirmation that parties need not present the arguments in

[212] Panel Report, para. 7.91.
[213] Panel Report, para. 7.93.
[214] Japan's appellant's submission, para. 111.
[215] Japan's appellant's submission, para. 113.
[216] Japan's appellant's submission, para. 114. (fn omitted)
[217] Japan's appellant's submission, para. 118.
[218] Japan's appellant's submission, para. 119.
[219] Japan's appellant's submission, para. 119.
[220] Japan's appellant's submission, para. 124.
[221] Japan's appellant's submission, paras. 125-126.
[222] Korea's appellee's submission, para. 168.
[223] Korea's appellee's submission, para. 172.

support of their claim in their panel request, and did not improperly rely on Japan's arguments made in written submissions.[224]

5.69. As noted in section 5.1.2 above, before applying the legal standard under Article 6.2 of the DSU to Japan's panel request, the Panel set out its understanding of the legal framework for injury determination under Article 3 of the Anti-Dumping Agreement so as to provide the context for its examination under Article 6.2 of the DSU.[225] In so doing, the Panel indicated that merely mentioning the first part of Article 3.1, or using the language of that provision in a panel request, will not in itself normally suffice to present a problem clearly with respect to an allegation of violation of the Anti-Dumping Agreement.[226] Such understanding guided the Panel's subsequent application of the legal standard under Article 6.2 of the DSU to Japan's panel request, including claim 1 listed therein. As discussed in paragraph 5.15 above, the fact that the narrative of Japan's claims set out in its panel request paraphrases the language of Article 3.1, in and of itself, is not dispositive of whether the panel request complies with Article 6.2 of the DSU. In our view, the Panel focused too narrowly on the part of the narrative of Japan's claim paraphrasing the language of Article 3.1. In doing so, the Panel failed to assess whether the narrative, in its entirety and in light of the nature of the measure and the nature of the obligations established by Article 3.1 *and* Article 3.2 of the Anti-Dumping Agreement sufficed to meet the requirements of Article 6.2 of the DSU. Therefore, we consider that the Panel's overemphasis on the reference to Article 3.1 in Japan's panel request undermined its analysis under Article 6.2 of the DSU. In our view, whether Japan's paraphrasing of Article 3.1 of the Anti-Dumping Agreement, together with the remainder of the narrative contained in the panel request, complies with the requirements of Article 6.2 of the DSU should be assessed by taking into consideration the relevant circumstances of the claim.[227]

5.70. We note that, beyond paraphrasing Article 3.1, Japan's claim also includes a reference to Article 3.2 and indicates that it relates to "Korea's analysis of a significant increase of the imports". As such, Japan's panel request fulfils the minimum requirement we have identified above, which is to identify the provisions of the covered agreements alleged to have been breached. The Panel's task should thus have consisted in determining whether, in these circumstances, the panel request provides a summary of the legal basis sufficient to present the problem clearly, including by plainly connecting the measure at issue with these provisions, taking into consideration, for instance, the nature of the Korean measure and the nature of the provisions concerned.

5.71. With regard to the nature of the measure, claim 1 in Japan's panel request refers to "Korea's analysis of a significant increase of the imports under investigation". Japan's panel request thus makes it clear that this claim concerns the specific portion of the measure at issue relating to the Korean investigating authorities' consideration of the volume of the dumped imports and its alleged inconsistency with Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

5.72. With regard to the nature of the provisions at issue, we recall that Article 3 "contain[s] several paragraphs setting out an investigating authority's obligations with regard to various aspects of an injury determination in anti-dumping ... investigations".[228] Article 3.2 governs an investigating authority's consideration regarding the volume of dumped imports and the effect of such imports on domestic prices. By clarifying in the narrative of its claim that Japan's concerns are addressed at "Korea's analysis of a significant increase of the imports under investigation", Japan has thereby specified which of the elements of Article 3.2 it invokes under its claim, namely the consideration of volume, contained in the first sentence of Article 3.2.

5.73. The first sentence of Article 3.2 provides that, "[w]ith regard to the volume of the dumped imports, the investigating authorities *shall consider whether there has been a significant increase in dumped imports*, either in absolute terms or relative to production or consumption in the importing Member."[229] Furthermore, an investigating authority's consideration of the volume of dumped imports pursuant to Article 3.2 is also subject to the overarching principles, under Article 3.1, that it be based on positive evidence and involve an objective examination.[230] In our view, therefore, the

[224] Korea's appellee's submission, paras. 175-179.
[225] See para. 5.13 above.
[226] See para. 5.13 above. See also Panel Report, para. 7.35.
[227] See paras. 5.5-5.6 above.
[228] Appellate Body Report, *China − GOES*, para. 125.
[229] Emphasis added.
[230] Appellate Body Report, *China − GOES*, para. 130.

obligation established by Article 3.1 and the first sentence of Article 3.2 is distinct and well delineated, in that it requires investigating authorities to make an objective examination of whether there has been a significant increase in dumped imports on the basis of positive evidence. Thus, by referring to Articles 3.1 and 3.2 as the provisions of the covered agreement alleged to have been breached by Korea, and by indicating specifically which of the elements in Article 3.2 it concerns, namely the consideration of the volume of dumped imports, Japan's claim, while brief, plainly connects the challenged measure with the obligation in question.

5.74. Korea nonetheless argues that Japan's claim concerning the volume of the dumped imports should be found to be outside the Panel's terms of reference because, "[i]n addition to the indication of the legal basis of the complaint, there was no narrative sufficient to present the problem clearly."[231] As noted in section 5.1.1 above, however, in order to plainly connect the challenged measure with the obligation alleged to have been breached, a complainant is required to include in its panel request only the legal basis of the complaint, that is, its *claim*.[232] As indicated, the complainant is not required to include in the narrative of its claim details beyond the legal basis of the complaint, such as arguments in support of its claim. In addition, as we have indicated in section 5.2.1 above, the fact that an investigating authority can act inconsistently with a provision in different ways does not mean that the provision therefore contains multiple, distinct obligations.[233]

5.75. In this regard, the Panel indicated that the scope of the allegations advanced in Japan's submissions concerning the Korean investigating authorities' analysis of the volume of imports confirmed its conclusion that Japan's claim is not within its terms of reference. We recall that the Panel relied on the following allegations: (i) the KTC failed to find an increase in the volume of the dumped imports that was "significant"; (ii) the KTC improperly assumed a competitive relationship between domestic like products and dumped imports; (iii) the KTC improperly considered the effect of dumped imports that were still in inventory; and (iv) the KTC failed to consider that no domestic volume had been displaced by the dumped imports.[234]

5.76. We also recall that the obligation established by Article 3.1 and the first sentence of Article 3.2 of the Anti-Dumping Agreement is distinct and well delineated, in that it requires investigating authorities to make an objective examination of whether there has been a significant increase in dumped imports on the basis of positive evidence. As we see it, Japan's later allegations, on which the Panel relied, all relate to the different ways in which the Korean investigating authorities failed to conduct the required examination properly. Therefore, these allegations appear to us to be arguments setting out the reasons why Japan considers that Korea has breached the obligation established by Articles 3.1 and 3.2 concerning the volume of the dumped imports. Thus, by relying on these later allegations as a confirmation that Japan's claim was not sufficiently detailed to comport with the requirements of Article 6.2 of the DSU, the Panel appears to have erroneously considered that Japan should have included arguments in support of its claim in the panel request.

5.77. We also indicated in section 5.2.1 above that the Panel's similar findings in the context of Japan's claim relating to the definition of the domestic industry had apparently been informed by the Panel's misunderstanding of the significance of the term "how or why".[235] For the reasons outlined above, the Appellate Body's reference to the term "how or why" in certain disputes did not suggest a legal standard different from that under Article 6.2 of the DSU, and did not suggest that complainants are required to include more detail beyond the legal basis of their complaint in their panel requests.

5.78. In sum, Japan's claim 1 identifies both Articles 3.1 and 3.2 of the Anti-Dumping Agreement as the provisions alleged to have been breached and indicates that it relates to "Korea's analysis of a significant increase of the imports under investigation". This claim thus identifies the provisions of the covered agreements alleged to have been breached. It further makes it clear that it concerns the specific portion of the measure at issue relating to the Korean investigating authorities' consideration of the volume of the dumped imports and its alleged inconsistency with Articles 3.1

[231] Korea's appellee's submission, para. 170.
[232] See para. 5.31 above.
[233] See para. 5.29 above. See also Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.24.
[234] Panel Report, para. 7.93 (referring to Japan's first written submission to the Panel, paras. 117, 128, 132-136, and 139-141; second written submission to the Panel, paras. 98-117).
[235] See para. 5.33 above.

and 3.2 of the Anti-Dumping Agreement. With regard to volume, Article 3.1 and the first sentence of Article 3.2 together establish a distinct and well-delineated obligation that the investigating authorities make an objective examination of whether there has been a significant increase in dumped imports on the basis of positive evidence. Thus, Japan's claim 1 "provide[s] a brief summary of the legal basis of the complaint sufficient to present the problem clearly" within the meaning of Article 6.2 of the DSU.

5.79. For the foregoing reasons, we find that the Panel erred in finding that Japan's claim 1, concerning the volume of the dumped imports, was not within its terms of reference. Consequently, we reverse the Panel's finding, in paragraphs 7.94 and 8.1.b of the Panel Report, and find that Japan's claim 1 is within the Panel's terms of reference.

5.3.2.2 Whether the Panel erred in finding that Japan's claim 2 concerning the price effects of the dumped imports was not within its terms of reference

5.80. Claim 2 in Japan's panel request states that the measure at issue is inconsistent with Korea's obligations under:

> Articles 3.1 and 3.2 of the [Anti-Dumping] Agreement because Korea's analysis of the effect of the imports under investigation on prices in the domestic market for like products did not involve an objective examination based on positive evidence; and because Korea failed to properly consider whether the effect of the imports under investigation was to depress prices to a significant degree or prevent price increase, which otherwise would have occurred, to a significant degree[.]

5.81. The Panel considered that Japan's panel request concerning the Korean investigating authorities' price-effects analysis contains two elements, namely: (i) Korea's analysis of the effect of the imports under investigation on prices in the domestic market for like products did not involve an objective examination based on positive evidence; and (ii) Korea failed to *properly* consider whether the effect of the imports under investigation was to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree.[236]

5.82. With regard to the first element, the Panel indicated that the claim paraphrases the language in the first part of Article 3.1 of the Anti-Dumping Agreement and recalled its earlier view that "a general reference to the language in Article 3.1 in itself is not normally sufficient to present the problem clearly."[237] To the Panel, this formulation did not explain how or why Japan considers the measures at issue to be violating the specific WTO obligations in question, including that in Article 3.1.[238]

5.83. With regard to the second element, the Panel found that "the claim paraphrases the language of the second sentence of Article 3.2 [of the Anti-Dumping Agreement], with two notable differences."[239] First, Japan specifically referred to two of the three price effects mentioned in the second sentence of Article 3.2 (price suppression and price depression). Second, the use of the word "properly" indicated that Japan took issue with the manner in which the KTC considered price suppression and price depression, which would include the extent of the alleged price suppression and price depression.[240] However, the Panel found that Japan's panel request fell short of explaining "how or why" it considered the KTC's consideration of price suppression and price depression to be "improper" and consequently inconsistent with Articles 3.1 and 3.2.[241] This is because, to the Panel, the propriety of an investigating authority's consideration of complex economic issues is a broad concept, such that the true nature of the complaint cannot be presented clearly without some additional identification of the main elements of the alleged violation(s).[242]

[236] Panel Report, para. 7.124.
[237] Panel Report, para. 7.125. (fn omitted)
[238] Panel Report, para. 7.125.
[239] Panel Report, para. 7.126.
[240] Panel Report, para. 7.126.
[241] Panel Report, para. 7.126.
[242] Panel Report, para. 7.126.

5.84. On appeal, Japan argues that the Panel erred in finding that its claim under Articles 3.1 and 3.2 of the Anti-Dumping Agreement concerning the price effects of the dumped imports was not within its terms of reference.[243] Japan argues that its claim refers specifically to "Korea's failure 'to properly consider whether the effect … was to depress prices to a significant degree or prevent price increase … to a significant degree', and expressly identifie[s] Articles 3.2 and 3.1 as the provisions at issue."[244] However, according to Japan, the Panel failed to consider fully and carefully the "nature and scope" of this obligation, and failed to consider at all the claim in light of the nature of the specific measure being challenged.[245] Japan further indicates that its claim refers specifically to the analysis of the effect of the imports on prices, and that, in light of the nature of the measure at issue, the Korean investigating authorities should have been fully able to understand this claim.[246] Japan also reiterates that the Panel improperly relied on the phrase "how or why"[247], and improperly relied on Japan's arguments in its written submissions.[248]

5.85. Korea maintains that a general reference to the language in Article 3.1, coupled with a generic reference to Article 3.2, is insufficient to present the problem clearly and does not inform Korea about how and why the Korean investigating authorities' analysis in question was supposedly inconsistent with these provisions.[249] Korea indicates that Japan's claim paraphrases parts of Article 3.2, but does not state how or why the KTC's consideration was problematic in light of the different obligations in Article 3.2. Korea therefore argues that the Panel did not fail to consider the nature of the obligation, and did not ignore the fact that Japan's claim was made pursuant to both Articles 3.1 and 3.2.[250] With regard to the nature of the measure, Korea argues that Japan's panel request did not specifically provide a narrative that linked particular intermediate findings by the Korean investigating authorities to the legal provisions allegedly breached.[251] Furthermore, Korea indicates that the Panel did not improperly rely on the term "how or why", but was rather aware of the distinction between claims and arguments.[252] Finally, Korea submits that the Panel correctly took account of the scope of allegations as presented by Japan in its written submissions to confirm its determination that Japan's panel request failed to meet the requirements of Article 6.2 of the DSU.[253]

5.86. The Panel correctly noted that Japan's panel request identifies both Articles 3.1 and 3.2 of the Anti-Dumping Agreement as the provisions alleged to have been breached. The Panel then divided Japan's claim into two different "elements" in order to assess its consistency with Article 6.2 of the DSU, namely one regarding the obligation under Article 3.1 of the Anti-Dumping Agreement, and the other regarding the obligation under Article 3.2. In assessing the consistency of the claim under Article 6.2 of the DSU with respect to the first of these "elements", the Panel relied once again on its earlier finding that merely paraphrasing Article 3.1 of the Anti-Dumping Agreement will not normally suffice to present the problem clearly.[254] However, as indicated above[255], whether Japan's paraphrasing of Article 3.1, together with the remainder of the narrative in the panel request, complies with the requirements of Article 6.2 should be assessed on a case-by-case basis, taking into account the specific circumstances of each claim, including the nature of the measure and that of the obligation alleged to have been breached.

5.87. We note that, with regard to the nature of the measure, Japan's claim refers to "Korea's analysis of the effect of the imports under investigation on prices in the domestic market for like products" and "whether the effect of the imports under investigation was to depress prices to a significant degree or prevent price increase, which otherwise would have occurred, to a significant degree".[256] Japan's panel request thus clearly indicates that this claim concerns the specific portion of the measure at issue that relates to the Korean investigating authorities' consideration of the

[243] Japan's appellant's submission, para. 156.
[244] Japan's appellant's submission, para. 158.
[245] Japan's appellant's submission, para. 159.
[246] Japan's appellant's submission, paras. 162 and 164.
[247] Japan's appellant's submission, para. 168.
[248] Japan's appellant's submission, paras. 169-170.
[249] Korea's appellee's submission, para. 230.
[250] Korea's appellee's submission, paras. 231-232 and 237.
[251] Korea's appellee's submission, para. 242.
[252] Korea's appellee's submission, para. 246.
[253] Korea's appellee's submission, para. 251.
[254] See Panel Report, para. 7.125. See also paras. 5.13 and 5.20 above.
[255] See para. 5.15 above.
[256] Japan's panel request, claim 2.

price effects of the dumped imports, more precisely significant price suppression and price depression, and its alleged inconsistency with Articles 3.1 and 3.2.

5.88. With regard to the nature of the provisions at issue, the second sentence of Article 3.2 requires an authority to "consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree". Moreover, an investigating authority's consideration pursuant to Article 3.2 is also subject to the overarching principles, under Article 3.1, that it be based on positive evidence and involve an objective examination.[257]

5.89. Thus, similar to the obligation relating to the volume of dumped imports, the second sentence of Article 3.2, in conjunction with Article 3.1, sets out an obligation that is distinct and well defined, with, at its core, the requirement to consider, on the basis of an objective examination of positive evidence, whether the effect of the dumped imports on domestic prices consists of the economic phenomena contained therein. For the purpose of Japan's claim 2, such phenomena are significant price suppression and price depression. Therefore, by identifying the relevant portion of the measure concerned by this claim, listing Articles 3.1 and 3.2 of the Anti-Dumping Agreement as the provisions of the covered agreement alleged to have been breached by Korea, and indicating specifically which of the phenomena in Article 3.2 the claim concerns, Japan's claim, while brief, plainly connects the challenged measure with the obligation in question.

5.90. We note that the Panel considered certain aspects of the circumstances regarding claim 2 in its evaluation of the second "element" of Japan's claim. The Panel indicated that "[t]he propriety of an investigating authority's consideration of complex economic issues is a broad concept", and that "[t]he true nature of the complaint cannot be presented clearly without some additional identification of the main elements of the alleged violation(s)."[258] The Panel also downplayed the relevance of the distinction between claims and arguments, noting that "in cases alleging violations of provisions governing complex economic issues such as those in the Anti-Dumping Agreement, in which … the measures at issue rest on a series of intermediate considerations involving such issues, … the boundary between a claim and an argument may not be entirely clear."[259]

5.91. In our view, all the steps of an investigating authority's analysis under Article 3 of the Anti-Dumping Agreement, leading to its overall determination of injury, are likely to entail a certain degree of complex economic analysis. At the same time, we recall that Article 6.2 of the DSU requires only "a brief summary of the legal basis of the complaint sufficient to present the problem clearly". We do not share the view that, beyond such a brief summary, a panel request must also spell out precisely which elements of the investigating authority's price-effects analysis are concerned by a claim of inconsistency with Article 3.2. We indicated in section 5.3.2.1 above, concerning Japan's claim 1, that it was sufficient for Japan to have identified the Korean investigating authorities' determination with respect to the volume of dumped imports as the specific portion of the measure concerned for the measure at issue to be plainly connected to the obligations alleged to have been breached. In our view, the same considerations are valid for Japan's claim 2. By indicating that "Korea failed to properly consider whether the effect of the imports under investigation was to depress prices to a significant degree or prevent price increase, which otherwise would have occurred, to a significant degree", Japan has identified the Korean investigating authorities' consideration of significant price suppression and price depression as the specific portion of the measure concerned and has plainly connected it with Articles 3.1 and 3.2.

5.92. We recall that the Panel relied on the scope of Japan's allegations in its subsequent written submissions to confirm its finding that claim 2 in Japan's panel request is not sufficient to present the problem clearly, and therefore not within its terms of reference. However, we observe that these later allegations, on which the Panel relied, all relate to the different ways in which Japan considers that the obligation concerned might have been breached by Korea. More specifically, these allegations relate to the Korean investigating authorities failure to: (i) examine price comparability for purposes of examining the price effects[260]; (ii) consider the implications of the diverging price

[257] Appellate Body Report, *China − GOES*, para. 130.
[258] Panel Report, para. 7.126.
[259] Panel Report, para. 7.128.
[260] See Panel Report, para. 7.130.a.

trends of the dumped imports and domestic like products[261]; (iii) explain "the reasonable sales price" methodology used for assessing price suppression[262]; (iv) take into account certain facts and evidence including, in particular, the higher prices of the dumped imports[263]; (v) consider whether the price suppression and price depression were "significant"[264]; and (vi) conduct a counterfactual analysis of how the prices and volumes might have been different in the absence of dumping.[265]

5.93. Therefore, in our view, the different allegations relied on by the Panel elaborate on why Japan considers the Korean investigating authorities' price-effects analysis to be inconsistent with Articles 3.1 and 3.2 and, as such, are arguments in support of its claim under these provisions. As we indicated in section 5.1.1 above, the fact that an investigating authority can act inconsistently with a provision in different ways does not mean that it therefore contains multiple, distinct obligations, each of which must be specified in a panel request.[266] Indeed, in assessing Japan's claim 6 under Articles 3.1 and 3.5 of the Anti-Dumping Agreement, the Panel itself acknowledged that such allegations are "arguments [Japan] made in support of its claims under" Articles 3.1 and 3.2.[267] In our view, while the boundary between a claim and an argument need not be rigid[268], it does not follow that a complainant should, in a panel request, elaborate on the reasons for which it believes the respondent has breached a provision of the covered agreements beyond what is required to provide the legal basis of the complaint sufficient to present the problem clearly.[269] This is because Article 6.2 demands only "a *brief* summary" of the legal basis of the complaint and not the arguments in support of the complaint.[270]

5.94. In sum, Japan's claim 2 identifies both Articles 3.1 and 3.2 of the Anti-Dumping Agreement as the provisions alleged to have been breached. In addition, Japan's panel request indicates that this claim concerns the specific portion of the measure at issue that relates to the Korean investigating authorities' consideration of the price effects of the dumped imports, more precisely significant price suppression and price depression, and its alleged inconsistency with Articles 3.1 and 3.2. With regard to price effects, the second sentence of Article 3.2, in conjunction with Article 3.1, sets out an obligation that is distinct and well defined, with, at its core, the requirement to consider, on the basis of an objective examination of positive evidence, whether the effect of the dumped imports on domestic prices consists of the economic phenomena contained therein, including significant price suppression and price depression. Therefore, Japan's claim 2 "provide[s] a brief summary of the legal basis of the complaint sufficient to present the problem clearly" within the meaning of Article 6.2 of the DSU.

5.95. For the foregoing reasons, we find that the Panel erred in finding that Japan's claim 2, concerning the price effects of the dumped imports, is not within its terms of reference. Consequently, we reverse the Panel's finding, in paragraphs 7.131 and 8.1.c of the Panel Report, and find that Japan's claim 2 is within the Panel's terms of reference.

5.3.2.3 Whether the Panel erred in finding that part of Japan's claim 3 concerning the impact of the dumped imports on the domestic industry was not within its terms of reference

5.96. Claim 3 in Japan's panel request states that the measure at issue is inconsistent with Korea's obligations under:

> Articles 3.1 and 3.4 of the [Anti-Dumping] Agreement because Korea's analysis of the impact of the imports under investigation on the domestic industry at issue did not involve an objective examination based on positive evidence, including an evaluation of

[261] See Panel Report, para. 7.130.b.
[262] See Panel Report, para. 7.130.c.
[263] See Panel Report, para. 7.130.c and 7.130.d.
[264] See Panel Report, para. 7.130.d.ii.
[265] See Panel Report, para. 7.130.d.iii.
[266] See para. 5.29 above.
[267] Panel Report, para. 7.222. See also section 5.3.2.6 below.
[268] See Panel Report, para. 7.128.
[269] See para. 5.31 above.
[270] Emphasis added.

> all relevant economic factors and indices having a bearing on the state of the domestic industry at issue[.]

5.97. The Panel noted that the first part of the above claim paraphrases the first part of Article 3.1 of the Anti-Dumping Agreement.[271] Recalling that a general reference to the language in Article 3.1, in itself, is not normally sufficient to present the problem clearly[272], the Panel proceeded to determine whether the second part of the claim − the assertion of an alleged failure to conduct "an evaluation of all relevant economic factors and indices having a bearing on the state of the domestic industry at issue" − complied with the requirements of Article 6.2 of the DSU.[273]

5.98. Noting that Article 3.4 of the Anti-Dumping Agreement sets forth a mandatory list of factors that must be evaluated in each case[274], the Panel found that the panel request, on its face, suggested that the failure by the KTC to evaluate one or more of these factors constituted a violation of Articles 3.1 and 3.4. To the Panel, this formulation indicated "how or why" Japan considered the measures at issue to be inconsistent with the specific WTO obligations in question, namely those in Articles 3.1 and 3.4 of the Anti-Dumping Agreement.[275] Furthermore, the Panel considered that the "allegations in Japan's [written] submissions that the KTC failed to evaluate two of the specific factors listed in Article 3.4 (the ability to raise capital or investments, and the magnitude of the margin of dumping) may be viewed as *arguments* seeking to demonstrate the *claim* set out in the panel request".[276] The Panel therefore found this part of claim 3 to be within its terms of reference.[277] This finding is not challenged on appeal.

5.99. However, the Panel noted that, over the course of the proceedings, Japan advanced three other allegations of violations of Articles 3.1 and 3.4[278], specifically that: (i) the KTC did not establish a logical link between its findings on the volume and price effects under Article 3.2 and its finding of adverse impact under Article 3.4; (ii) with respect to certain factors listed in Article 3.4, the KTC failed to demonstrate any explanatory force of dumped imports for understanding domestic-industry trends; and (iii) the KTC attached a high degree of importance to the relevant factors highlighting negative aspects, while disregarding or downplaying without any explanation the factors suggesting that the Korean industry was not suffering injury.[279] The Panel found that the panel request did not indicate or suggest that Japan's claim regarding Korea's analysis of the impact of the imports under investigation on the domestic industry extends to include these allegations.[280] The Panel found, accordingly, that Japan's claim concerning the state of the domestic industry, under Articles 3.1 and 3.4, was limited to the allegation that the KTC failed to evaluate two of the specific factors listed in Article 3.4, but did not include any other allegations.[281]

5.100. On appeal, Japan argues that the Panel erred in finding that part of its claim under Articles 3.1 and 3.4 was not within its terms of reference. Japan argues that, even though its claim expressly identified Articles 3.1 and 3.4 as the provisions at issue[282], the Panel failed to consider fully and carefully the "nature and scope" of the obligation under Article 3.4, and instead focused only on Article 3.1 as a general obligation.[283]

5.101. Japan also argues that the Panel failed to consider the nature of the measure, as its claim refers specifically to the "analysis of the impact of the imports"[284], and the Korean investigating authorities should have been able to fully understand this claim.[285] Japan then argues that the Panel

[271] Panel Report, para. 7.166.
[272] Panel Report, para. 7.167.
[273] Panel Report, para. 7.168.
[274] Panel Report, para. 7.168 (referring to Panel Reports, *Thailand − H-Beams*, para. 7.225; *Argentina − Poultry Anti-Dumping Duties*, para. 7.314).
[275] Panel Report, para. 7.169. (emphasis original)
[276] Panel Report, para. 7.170. (emphasis original)
[277] Panel Report, para. 7.175.
[278] Panel Report, para. 7.172.
[279] Panel Report, para. 7.172.
[280] Panel Report, para. 7.173.
[281] Panel Report, para. 7.175.
[282] Japan's appellant's submission, para. 210.
[283] Japan's appellant's submission, para. 211 (referring to Panel Report, paras. 7.167 and 7.172-7.173).
[284] Japan's appellant's submission, para. 214. See also ibid., para. 215.
[285] Japan's appellant's submission, para. 218.

improperly relied on the term "how or why".[286] Finally, Japan reiterates that the Panel improperly relied on Japan's arguments in its written submissions.[287]

5.102. Korea replies that Article 3.4 is a multifaceted provision that contains many separate yet interrelated obligations, and requires the complainant to be as precise and specific as possible in providing a brief summary of the legal basis of the complaint in the panel request.[288] To Korea, the Panel did not ignore the obligation in Article 3.4 to examine the impact of the dumped imports on the domestic industry.[289] Rather, it is the lack of any specific description of the three allegations in question that led the Panel to consider that the claim failed to explain "the requisite *how* or *why*" pursuant to Article 6.2 of the DSU.[290] Korea also argues that the Panel did not err by failing to consider the nature of the measure.[291] Korea further argues that the Panel did not improperly rely on the term "how or why", because it is evident from the Panel Report that the Panel was aware of the distinction between claims and arguments.[292] Finally, Korea argues that the Panel correctly examined the panel request on its face to find that the allegations concerning the lack of assessment of certain injury factors were covered by the language of the panel request, but that three specific additional claims were not.[293]

5.103. We indicated in section 5.1.1 above that, in assessing whether a panel request comports with the requirements of Article 6.2 of the DSU, a panel must examine a panel request on its face, taking into consideration the circumstances of each case. We also explained that, in order to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly, the panel request must plainly connect the challenged measure with the obligation alleged to have been breached. In this regard, as we indicated, a complainant must, at a minimum, list the provisions of the covered agreement alleged to have been breached. However, there may be situations in which simply referring to these provisions falls short of meeting the legal standard under Article 6.2 of the DSU, for example, where the provision at issue establishes multiple obligations.[294]

5.104. We observe that, in the present instance, Japan has identified Articles 3.1 and 3.4 of the Anti-Dumping Agreement as the provisions alleged to have been breached, such that it meets the minimum requirement identified above. However, whether the identification of these provisions will suffice will depend on the particular circumstances at issue. The Panel, as we recall, considered that three "allegations" raised by Japan under these provisions are outside its terms of reference. To the Panel, the language in the panel request "does not cover these three additional allegations", and "a general reference to the language in Article 3.1 in itself is not sufficient to present the problem … clearly" with respect to these additional allegations.[295] As we indicated in section 5.1.2 above, however, whether Japan's paraphrasing of Article 3.1, together with the remainder of the narrative contained in the panel request, complies with the requirements of Article 6.2 should be assessed on a case-by-case basis, depending on the relevant circumstances relating to each claim.

5.105. We note that Japan challenges under claim 3 only the portion of the measure at issue that relates to the Korean investigating authorities' "analysis of the impact of the imports under investigation on the domestic industry". Thus, similar to claims 1 and 2, Japan's present claim has identified the specific aspect of the measure at issue with sufficient precision.

[286] Japan's appellant's submission, paras. 222-223. To Japan, the Panel's mistaken belief that the use of this phrase by the Appellate Body obliges the complainant to include arguments in its panel request also contributed to its incorrect conclusion that only the limited "allegation" concerning the two specific factors (the ability to raise capital or investments, and the magnitude of the margin of dumping) was properly within its terms of reference and that all other aspects of Japan's claim regarding Article 3.4 were outside its terms of reference. (Ibid.)

[287] Japan's appellant's submission, paras. 224-228.

[288] Korea's appellee's submission, para. 341.

[289] Korea's appellee's submission, para. 345.

[290] Korea's appellee's submission, para. 346. (emphasis original)

[291] Korea's appellee's submission, para. 351. See also ibid., para. 350.

[292] Korea's appellee's submission, para. 353.

[293] Korea's appellee's submission, para. 359.

[294] See para. 5.6 above.

[295] Panel Report, para. 7.173.

5.106. Regarding the nature of the provisions, Article 3.4 of the Anti-Dumping Agreement provides:

> The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

5.107. Article 3.4 thus requires an investigating authority to "derive an understanding of *the impact of* subject imports", or, in other words, the relationship between the dumped imports and the state of the domestic industry.[296] For purposes of this inquiry, Article 3.4 requires the authorities to evaluate "all relevant economic factors and indices having a bearing on the state of the industry". Article 3.4 "then lists certain factors that 'are deemed to be relevant in every investigation and which must always be evaluated by the investigating authorities'".[297] Moreover, the examination under Article 3.4 is subject to the "overarching principle" set out in Article 3.1 that the examination must be "objective" and be based on "positive evidence".[298]

5.108. Thus, Article 3.4, together with Article 3.1, establishes a distinct obligation that essentially requires the investigating authorities to examine objectively the impact of the dumped imports on the domestic industry on the basis of positive evidence concerning all relevant economic factors and indices having a bearing on the state of the domestic industry. While there may be many factors informing this assessment, a complainant is not required to identify or otherwise refer to the different factors that it considers an investigating authority would have failed to consider, or failed to consider properly. This is because, as indicated in section 5.2.1 above, in order to plainly connect the measure at issue with the provision alleged to have been breached, a complainant is required to provide only a brief summary of the legal basis of the complaint, that is, the claim and not arguments in support thereof.[299] In this regard, we agree with the Panel that the "allegations in Japan's [written] submissions that the KTC failed to evaluate two of the specific factors listed in Article 3.4 (the ability to raise capital or investments, and the magnitude of the margin of dumping) may be viewed as *arguments* seeking to demonstrate the *claim* set out in the panel request."[300]

5.109. We do not, however, understand the distinction drawn by the Panel between the "arguments" pertaining to the above two factors listed in Article 3.4, on the one hand, and the other "allegations" advanced by Japan under Article 3.4 during the course of the panel proceedings, which the Panel excluded from its terms of reference, on the other hand.[301] These allegations relate to the Korean investigating authorities' failure to link their findings on volume and price effects to their examination of the impact of the dumped imports, failure to demonstrate the explanatory force of the dumped import for the state of the domestic industry, and disregard of economic factors suggesting a lack of injury.[302] As we see it, the allegations that the Panel found not to be within its terms of reference describe the reasons why Japan considers the Korean investigating authorities to have inappropriately considered the impact of the dumped imports and/or the factors listed in Article 3.4, contrary to the requirements of objective examination and positive evidence under Article 3.1. Thus, they serve to explain precisely the manner in which the Korean investigating authorities would have

[296] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.205 (quoting Appellate Body Report, *China – GOES*, para. 149). (emphasis original)

[297] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.203 (quoting Appellate Body Report, *US – Hot-Rolled Steel*, para. 194, in turn referring to Appellate Body Report, *Thailand – H-Beams*, fn 36 to para. 128).

[298] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.203 (referring to Appellate Body Report, *US – Hot-Rolled Steel*, paras. 196-197).

[299] See para. 5.31 above.

[300] Panel Report, para. 7.170. (emphasis original)

[301] See Panel Report, paras. 7.169-7.174. See also para. 5.99 above.

[302] See para. 5.99 above. See also Panel Report, para. 7.172. In our view, the first two allegations concern the alleged failure to assess properly the relationship between the dumped imports and certain economic factors listed in Article 3.4 for purposes of understanding the impact of such imports, and the third allegation concerns the respective weight the authorities would have attributed to the factors they had examined.

breached the single, distinct obligation established by Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

5.110. In particular, we note that the second of these allegations is that, with respect to certain factors listed in Article 3.4, the Korean investigating authorities failed to demonstrate any explanatory force of dumped imports for understanding domestic-industry trends. We recall that in *China – HP-SSST (Japan) / China – HP-SSST (EU)*, the Appellate Body indicated:

> We do not see, in Japan's panel request, a claim under Articles 3.1 and 3.4 of the Anti-Dumping Agreement regarding [the Chinese investigating authorities'] alleged failure to examine whether dumped imports provided "explanatory force" for the state of the domestic industry. *The reference to "explanatory force" is drawn from the Appellate Body's interpretation of Article 3.4* in its report in *China – GOES*. This reference formed part of the Appellate Body's reasoning in interpreting Article 3.4 in that dispute and *should not be read to create an obligation that is distinct from that expressed in Article 3.4.* Accordingly, we view Japan's submissions, insofar as they refer to "explanatory force", as setting out arguments, based on the Appellate Body's reasoning in *China – GOES*, in support of Japan's claims under Article 3.4. These claims were properly within the Panel's terms of reference.[303]

5.111. In sum, Japan's claim 3 identifies the portion of the measure at issue that relates to the Korean investigating authorities' "analysis of the impact of the imports under investigation on the domestic industry" and thus identifies with sufficient precision the specific aspect of the measure at issue. Claim 3 also identifies Articles 3.1 and 3.4 of the Anti-Dumping Agreement as the provisions alleged to have been breached. Article 3.4, together with Article 3.1, establishes a distinct obligation that essentially requires the investigating authorities to examine objectively the impact of the dumped imports on the domestic industry on the basis of positive evidence concerning all relevant economic factors and indices having a bearing on the state of the domestic industry. Japan's claim 3 thus "provide[s] a brief summary of the legal basis of the complaint sufficient to present the problem clearly" within the meaning of Article 6.2 of the DSU. The three allegations that the Panel found to be outside its terms of reference, like Japan's other arguments under claim 3, serve to explain the manner in which the Korean investigating authorities would have breached the distinct obligation established by Articles 3.1 and 3.4, such that Japan was not required to include this level of detail in its panel request.

5.112. For the foregoing reasons, we find that the Panel erred in finding that these three allegations were not within its terms of reference. We therefore reverse the Panel's finding, in paragraph 7.175 of the Panel Report, that "all other allegations of inconsistency with Article 3.4 argued by Japan are not properly within the Panel's terms of reference", and, in paragraph 8.1.d of the Panel Report, that "Japan's claim under Articles 3.1 and 3.4 of the Anti-Dumping Agreement concerning the impact of the dumped import on the state of the domestic industry" was not within the Panel's terms of reference, and find the three allegations described above to be within the Panel's terms of reference.[304]

5.3.2.4 Whether the Panel erred in finding that Japan's claim 4 was within its terms of reference

5.113. Claim 4 in Japan's panel request states that the measure at issue is inconsistent with Korea's obligations under:

> Articles 3.1 and 3.5 of the [Anti-Dumping] Agreement because Korea failed to demonstrate that the imports under investigation were, through the effects of dumping, causing injury to the domestic industry based on an objective examination of the alleged causal relationship between the imports under investigation and the alleged injury to

[303] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.191. (emphasis added; fn omitted)

[304] The reversal does not concern the Panel's finding, also contained in the above-mentioned paragraphs, that Japan's allegations that the Korean investigating authorities failed to evaluate two of the specific factors listed in Article 3.4 (the ability to raise capital or investments, and the magnitude of the margin of dumping) comply with the requirements of Article 6.2 of the DSU and are within the Panel's terms of reference, given that this finding is not subject to appeal.

> the domestic industry, on the basis of all relevant positive evidence before the authorities[.]

5.114. The Panel indicated that there are two aspects to Japan's claim, namely that: (i) Korea failed to conduct an objective examination of the alleged causal relationship on the basis of all relevant positive evidence before the authorities; and (ii) Korea failed to demonstrate any causal relationship between the dumped imports and the injury to the domestic industry. The Panel then indicated that, with regard to the first aspect, a general reference to the language of Article 3.1, in itself, is not normally sufficient to present the problem clearly. However, the Panel noted that Japan's claim is qualified by the second aspect, namely, its assertion that Korea failed to demonstrate any causal relationship between the dumped imports and the injury to the domestic industry on the basis of all of the evidence before the investigating authority.[305] The Panel recalled that Article 3.5, and particularly its first sentence, requires the demonstration that the dumped imports are causing injury to the domestic industry. In the Panel's view, "Japan's presentation of the problem in its panel request [was] unequivocal" and, "despite its brevity, the panel request [made] it clear that Japan's claim focuse[d] on the alleged failure to demonstrate" causation.[306] Thus, the Panel found Japan's formulation to meet the minimum requirement to connect the challenged measure with the obligation at issue, so that the respondent party and other WTO Members were aware of the nature of the complaint.[307]

5.115. The Panel then considered that the allegations raised in Japan's submissions regarding a lack of correlation in the trends of volumes, prices, and profits could be considered to be arguments in support of its claim that the Korean investigating authorities failed to demonstrate any causal relationship between the dumped imports and injury to the domestic industry.[308] Accordingly, the Panel considered that Japan's claim that the KTC failed to demonstrate any causal relationship between the dumped imports and the injury to the domestic industry, and thus acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement, was within its terms of reference.[309]

5.116. On appeal, Korea argues that claim 4 simply paraphrases the legal obligation of Article 3.5 without explaining how or why Japan considers this obligation to have been breached by Korea[310], and is therefore deficient in providing a summary sufficient to present the problem clearly.[311] Korea argues that Article 3.5 is a multifaceted provision[312], but that nothing in Japan's panel request allows Korea to know which of these legal obligations Japan's complaint is related to and "how and why" it considered Korea to have acted inconsistently with these legal obligations.[313] To Korea, the Panel failed to examine the nature of the provision at issue or to explore the way in which the panel request on its face linked the specific findings of the Korean investigating authorities to one of the many aspects of the legal obligation of Article 3.5.[314]

5.117. Japan responds that its claim expressly identifies Articles 3.1 and 3.5 of the Anti-Dumping Agreement as the specific provisions at issue, and also identifies the obligation to make a determination about causation based on all relevant positive evidence regarding the "causal relationship".[315] Therefore, Japan argues that the language used in claim 4 presents the problem clearly, in light of the nature and scope of the particular obligations.[316] In response to Korea's argument that Article 3.5 is multifaceted, Japan indicates that this is precisely why Japan presented three distinct claims under Article 3.5 in its panel request. Given that Japan's other two causation

[305] Panel Report, paras. 7.232-7.233.
[306] Panel Report, para. 7.233.
[307] Panel Report, para. 7.233.
[308] Panel Report, para. 7.234.
[309] Panel Report, para. 7.235.
[310] Korea's other appellant's submission, para. 60.
[311] Korea's other appellant's submission, para. 62.
[312] Korea indicates in this regard that the provision requires an investigating authority to: demonstrate that "dumped" imports caused injury; demonstrate that the dumped imports caused injury "through the effects of dumping"; demonstrate that a "causal" relationship exists between the dumped imports and the injury; examine "all … relevant" evidence that was properly "before the authorities"; also examine "any known factors other than the dumped imports"; and not "attribute" injuries caused by these other factors to the dumped imports. (Korea's other appellant's submission, para. 64)
[313] Korea's other appellant's submission, para. 64.
[314] Korea's other appellant's submission, para. 64.
[315] Japan's appellee's submission, para. 28.
[316] Japan's appellee's submission, para. 29.

claims (claims 5 and 6) focus on different aspects of Article 3.5, Japan submits that it is hard to see how Korea could have been confused about the separate scope of Japan's claim 4 about "causal relationship".[317]

5.118. We indicated in section 5.1.1 above that in assessing whether a panel request comports with the requirements of Article 6.2 of the DSU, a panel must examine a panel request on its face, taking into consideration the circumstances of each case. We also indicated that, in order to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly, the panel request must plainly connect the challenged measure with the obligation alleged to have been breached. In this regard, a complainant must, at a minimum, list the provisions of the covered agreement alleged to have been breached, although there may be situations in which simply referring to these provisions falls short of meeting the legal standard under Article 6.2 of the DSU, for example, where the provision at issue establishes multiple obligations.[318]

5.119. With regard to claim 4, although the Panel began by stating that "a general reference to the language of Article 3.1 in itself is not normally sufficient to present the problem clearly"[319], the Panel did not end its analysis there. Rather, the Panel went on to analyse the relevant circumstances of this claim. The Panel observed that claim 4, on its face, contains two aspects, and that the first aspect − relating to the alleged failure to conduct an objective examination on the basis of positive evidence − is qualified by the second aspect, that is, the assertion that Korea failed to demonstrate any causal relationship. The Panel then analysed the nature of the obligation regarding the demonstration of the causal relationship established by Article 3.5 and noted that Japan's panel request "unequivocal[ly]" presents the "problem" as one that relates to the failure to demonstrate this causal relationship.[320]

5.120. In our view, the Panel's analysis reflects its consideration of both the nature of the measure and that of the obligation at issue consistently with the applicable standard under Article 6.2 of the DSU. We observe that Japan's claim 4 relates specifically to the Korean investigating authorities' alleged failure "to demonstrate that the imports under investigation were … causing injury to the domestic industry". The relevant aspect of the measure at issue concerned by this claim thus relates to the demonstration of causation.

5.121. With regard to the nature of the provisions, Article 3.5 of the Anti-Dumping Agreement provides that:

> It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade-restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

5.122. Thus, Article 3.5, together with Article 3.1, establishes obligations that are multilayered. First, it "must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement", a demonstration that "shall be based on an examination of all relevant evidence before the authorities". In addition, in situations where dumped imports and other known factors are causing injury to the domestic industry at the same time, the investigating authority must undertake the non-attribution analysis set out in Article 3.5. This non-attribution analysis *may* include the factors listed in the latter part of

[317] Japan's appellee's submission, para. 30.
[318] See para. 5.6 above.
[319] Panel Report, para. 7.233.
[320] Panel Report, para. 7.233.

Article 3.5. For these reasons, we agree with Korea that that Articles 3.5 is a "multi-faceted provision".[321] At the same time, we note that Japan agrees with this proposition.[322]

5.123. As Japan explains, it presents three claims under Articles 3.1 and 3.5, each with its distinct scope. Japan's claim 4, on its face, is about the alleged failure to demonstrate the causal relationship on the basis of an "objective examination" and "all relevant … evidence before the authorities"[323] as required under Article 3.5, in particular its second sentence, as well as under Article 3.1. As further discussed below[324], claim 5 concerns the alleged inconsistency of the Korean investigating authorities' non-attribution analysis, and claim 6 concerns the alleged flaws in price effects, volume, and impact analysis that independently undermined the Korean investigating authorities' causation determination. Thus, we do not share Korea's view that "[n]othing in Japan's panel request allows Korea to know which of these legal obligations [under Article 3.5] Japan's complaint is related to."[325]

5.124. Our above analysis thus indicates that Japan has specified in the narrative of its claim which aspect of Articles 3.1 and 3.5 of the Anti-Dumping Agreement the present claim concerns, together with the relevant aspect of the measure at issue. Japan's claim, while brief, has plainly connected the challenged measure with the provision alleged to have been breached such that Japan's claim 4 complies with the requirements of Article 6.2 of the DSU.

5.125. To the extent that Korea suggests that something more would have been required in the panel request to indicate "how or why" Japan argues that the Korean investigating authorities are alleged to have breached the requirement in Article 3.5[326], we understand Korea to be requesting further elaboration explaining the alleged violation. However, as we indicated in section 5.2.1 above, in order to plainly connect the measure at issue with the provision alleged to have been breached, a complainant is required to provide only the legal basis, that is, the claim, underlying its complaint and not arguments in support of this claim.[327] For these reasons, we agree with the Panel that the allegations raised in Japan's submissions − a lack of correlation in the trends of volumes, prices, and profits − can be considered arguments in support of its claim that the Korean investigating authorities failed to demonstrate any causal relationship between the dumped imports and injury to the domestic industry.[328]

5.126. In sum, Japan's claim 4 identifies Articles 3.1 and 3.5 of the Anti-Dumping Agreement as the provisions alleged to have been breached, and relates specifically to the Korean investigating authorities' alleged failure to demonstrate that the imports under investigation were causing injury to the domestic industry. While Article 3.5, together with Article 3.1, establishes obligations that are multilayered, Japan has indicated which aspect of the obligations set forth in Articles 3.1 and 3.5 is alleged to have been breached. Japan's claim 4, on its face, is about the alleged failure to demonstrate the causal relationship on the basis of an "objective examination" of "all relevant … evidence before the authorities" as required under Article 3.5, in particular its second sentence, as well as under Article 3.1. Thus, Japan's claim 4 "provide[s] a brief summary of the legal basis of the complaint sufficient to present the problem clearly" within the meaning of Article 6.2 of the DSU.

5.127. For the foregoing reasons, we find that the Panel did not err in finding that Japan's claim 4 was within its terms of reference. Consequently, we uphold the Panel's finding in paragraphs 7.235 and 8.2.c of the Panel Report.

5.3.2.5 Whether the Panel erred in finding that part of Japan's claim 5 was within its terms of reference

5.128. Claim 5 in Japan's panel request states that the measure at issue is inconsistent with Korea's obligations under:

[321] Korea's other appellant's submission, para. 64.
[322] Japan's appellee's submission, para. 30.
[323] Japan's panel request, claim 4; Article 3.5 of the Anti-Dumping Agreement, second sentence.
[324] See sections 5.3.2.5 and 5.3.2.6 below.
[325] Korea's other appellant's submission, para. 64.
[326] Korea's other appellant's submission, para. 64.
[327] See para. 5.31 above.
[328] Panel Report, para. 7.234.

> Articles 3.1 and 3.5 of the [Anti-Dumping] Agreement because Korea failed to consider adequately all known factors other than the imports under investigation that were injuring the domestic industry at the same time and therefore incorrectly attributed injury caused by these other factors to the imports under investigation[.]

5.129. The Panel found that the panel request provided a brief explanation of how or why Japan considers the measure at issue to be violating the specific WTO obligations in question, with respect to the alleged failure of the Korean investigating authorities to examine certain known factors *adequately*.[329] In this context, the Panel considered that the allegations in Japan's submissions that the Korean investigating authorities considered three known factors other than the dumped imports that could be injuring the domestic industry in isolation, and yet failed to examine them adequately, may be seen as arguments seeking to demonstrate the claim set out in the panel request.[330] Korea appeals these findings of the Panel.[331]

5.130. Korea submits that, contrary to what the Panel found with respect to many of the other claims presented in Japan's panel request, the Panel effectively considered that, for claim 5, it suffices to paraphrase the obligation contained in the relevant provisions to meet the requirements of Article 6.2 of the DSU.[332] In Korea's view, "[t]here was no narrative explanation of any kind in Japan's panel request that would allow Korea, third parties or the Panel … to understand the nature and scope of this claim."[333] Korea, therefore, argues that the Panel's findings reveal an error of law in the manner in which the Panel applied the requirements of Article 6.2 of the DSU to the facts of this case, as well as internal contradictions and inconsistencies that violate the requirements of Article 11 of the DSU.[334]

5.131. Japan responds that the language used in claim 5 presents the problem clearly in light of the nature and scope of the obligations at issue. Japan maintains that claim 5 draws on the specific language from the third sentence of Article 3.5, and makes it clear that this claim concerns the inconsistency of the measure at issue with the obligation to "examine any known factors other than the dumped imports which at the same time are injuring the domestic industry" and to ensure that such injury is not attributed to the dumped imports.[335] In response to Korea's argument that there was no narrative explanation of any kind in Japan's panel request, Japan argues that each of its three causation claims addressed a particular element of Articles 3.1 and 3.5. As such, given that there are two other claims addressing causation, Japan argues that "it is hard to see why Korea was confused about the separate scope of Japan's claim 5 concerning other factors and non-attribution."[336]

5.132. Japan's claim 5, similar to its claim 4, concerns the determination of causation by the Korean investigating authorities within the meaning of Article 3.5 of the Anti-Dumping Agreement. Unlike claim 4, however, claim 5 relates to a specific aspect of the causation determination, namely the Korean investigating authorities' examination of the non-attribution factors. As we indicated in paragraph 5.122 above, Article 3.5, together with Article 3.1, establishes obligations that are multilayered. However, in the narrative of its claim, by challenging the failure "to consider adequately all known factors other than the imports", Japan has also identified precisely which aspect of the provisions its claim concerns, namely the requirement not to attribute to the dumped imports the injuries caused by any known factors other than the dumped imports. Thus, by identifying the specific aspects of both the measure at issue and the provision concerned, Japan's claim 5 plainly connects the challenged measure with the provisions of the covered agreements alleged to have been breached, thereby providing a brief summary of the legal basis of its complaint sufficient to present the problem clearly.

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[329] Panel Report, paras. 7.240-7.241.

[330] Panel Report, para. 7.241.

[331] The Panel found, however, that claim 5 "does not extend to cover the allegation that the KTC failed to consider some known factors *at all*" because, in the Panel's view, nothing in the panel request hints that the KTC failed to consider any known factors causing injury. (Panel Report, para. 7.242 (emphasis original)) This finding is not subject to appeal.

[332] Korea's other appellant's submission, paras. 34 and 68.

[333] Korea's other appellant's submission, para. 68.

[334] Korea's other appellant's submission, para. 35. See also section 5.3.2.7 below.

[335] Japan's appellee's submission, para. 37.

[336] Japan's appellee's submission, para. 39.

5.133. To the extent that Korea suggests that something more would have been required in the panel request to indicate how or why Japan alleges that the Korean investigating authorities breached the non-attribution requirement in Article 3.5, we understand Korea to be requesting further elaboration on the reasons for the alleged violation. For example, Korea contends that Japan's claim, as described in the panel request, does not explain whether the claim "was focused on an allegation/claim of not examining other factors at all; or, of not examining certain factors that were known in an adequate manner …; or, of a failure to conduct an adequate examination of the impact of the known factors".[337] However, narrations of this kind appear to concern the different ways in which the Korean investigating authorities may have breached the obligation and would have required Japan to substantiate its claim with arguments in the panel request. This, however, is not required under Article 6.2 of the DSU.[338] For the same reasons, we agree with the Panel that the allegations in Japan's written submissions, that the Korean investigating authorities considered three known factors other than the dumped imports that could be injuring the domestic industry in isolation and failed to examine them adequately, may be seen as arguments seeking to substantiate the claim set out in the panel request.[339]

5.134. Finally, we recall that the Panel found other allegations raised by Japan under claim 5 not to be within the scope of its terms of reference, namely that the Korean investigating authorities failed to consider some known factors *at all*.[340] Given that neither participant has appealed this aspect of the Panel Report, we do not address the Panel's findings concerning these allegations.

5.135. In sum, Japan's claim 5 identifies Articles 3.1 and 3.5 of the Anti-Dumping Agreement as the provisions alleged to have been breached and relates to a specific aspect of the causation determination, namely the Korean investigating authorities' examination of the non-attribution factors. While Articles 3.1 and 3.5 establish obligations that are multilayered, Japan has identified which aspect of the provisions its claim concerns, namely the requirement not to attribute to the dumped imports the injuries caused by any known factors other than the dumped imports. Thus, Japan's claim 5 "provide[s] a brief summary of the legal basis of its complaint sufficient to present the problem clearly" within the meaning of Article 6.2 of the DSU.

5.136. For the foregoing reasons, we find that the Panel did not err in finding that part of Japan's claim 5, with regard to Korea's alleged failure to consider adequately all known factors other than the dumped imports as causing injury, was within its terms of reference. Consequently, we uphold the Panel's finding, in paragraphs 7.241 and 8.2.d of the Panel Report, that Japan's claim under Articles 3.1 and 3.5 of the Anti-Dumping Agreement, insofar as it relates to the alleged failure of the Korean investigating authorities to examine certain known factors adequately and their examination of those factors in isolation, is properly within the Panel's terms of reference.[341]

5.3.2.6 Whether the Panel erred in finding that Japan's claim 6 was within its terms of reference

5.137. Claim 6 in Japan's panel request states that the measure at issue is inconsistent with Korea's obligations under:

> Articles 3.1 and 3.5 of the [Anti-Dumping] Agreement because Korea's demonstration of causation lacks any foundation in its analyses of the volume of the imports under investigation, the effects of the imports under investigation on prices, and/or the impact of the imports under investigation on the domestic industry at issue, irrespective and independent of whether Korea's flawed analysis of the volume and/or flawed analysis of the effects of the imports under investigation on prices, on the one hand, and Korea's flawed analysis of the impact of the imports under investigation on the domestic

[337] Korea's other appellant's submission, para. 70.
[338] See para. 5.31 above.
[339] Panel Report, para. 7.241.
[340] Panel Report, para. 7.242.
[341] Our upholding of the Panel's above finding does not concern the Panel's finding, contained in paragraph 7.243, that "[a]ny other allegations in this regard are not within the Panel's terms of reference", given that such finding is not subject to appeal.

> industry on the other, would be inconsistent with, respectively, Articles 3.1 and 3.2 of the AD Agreement and Articles 3.1 and 3.4 of the AD Agreement[.]

5.138. The Panel noted that, "[o]n its face, Japan's panel request allege[d] that Korea's demonstration of causation lack[ed] any foundation in its analyses of volume of dumped imports, effects of imports on prices, and the impact of those imports on the domestic industry."[342] The Panel recalled the requirement under Article 3.5 that an investigating authority demonstrate that the dumped imports are, through the effects of dumping as set forth in Articles 3.2 and 3.4, causing injury. Thus, the Panel considered:

> [T]he narrative in Japan's panel request, albeit brief, [was] sufficiently precise on its face to present the problem clearly, namely that, in Japan's view, the KTC's causation determination [was] undermined by certain aspects of its volume, price effects, and impact analyses whether or not those aspects [were] inconsistent with Article 3.1, 3.2, or 3.4 of the Anti-Dumping Agreement.[343]

5.139. The Panel then addressed Korea's argument that the term "irrespective and independent" in Japan's panel request made it unclear whether it set forth a new "claim" and, if so, what the legal basis of this claim would be. The Panel indicated that this claim was independent in nature. The Panel explained that, if it were to find that the Korean investigating authorities' consideration of volume and price effects and examination of impact were inconsistent with Articles 3.1, 3.2, and/or 3.4, such inconsistencies would support finding a consequential violation of Articles 3.1 and 3.5, and there would be no need to go on to consider Japan's independent claim of inconsistency with Articles 3.1 and 3.5. However, if the Panel were to reject all of Japan's allegations of inconsistency under Articles 3.1, 3.2, and 3.4, in light of the term "irrespective and independent", the Panel would need to go on to examine whether the KTC's determination of a causal relationship was inconsistent with Article 3.5 because of the alleged flaws in the KTC's analysis of volume, price effects, and impact in that determination.[344] The Panel noted that the nature of the independent claim in the latter decision scenario was "less evident", but that it could not preclude the possibility that an investigating authority's determination of causation may be inconsistent with Article 3.5 due to inadequacies in its analysis of the volume, price effects, or impact of dumped imports, even if these did not demonstrate a violation of Articles 3.2 and/or 3.4.[345] The Panel thus understood Japan's claim to "rest on the following premises":

a. certain aspects of the KTC's volume, price effects, and impact analyses were "flawed";

b. these "flaws" were either unrelated to the obligations under Articles 3.1, 3.2, and 3.4, or did not, in themselves, constitute violations of Articles 3.1, 3.2, and 3.4; and

c. these "flaws" nevertheless have a sufficient impact on the KTC's causation determination to require the conclusion that the determination is inconsistent with Articles 3.1 and 3.5.[346]

5.140. The Panel then sought to confirm its above analysis by reviewing Japan's subsequent submissions. On the basis of its review, the Panel considered it "clear" that Japan had asserted "an independent claim that aspects of the KTC's consideration of the volume and price effects, and examination of the impact, of dumped imports preclude the finding of a causal relationship consistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement".[347]

5.141. On appeal, Korea argues that Japan's claim is "unclear at even the most general level and was therefore clearly insufficient to present the problem clearly in order to allow Korea to start preparing its defense".[348] Korea contends that the Panel did not engage in any analysis, but made a conclusory finding[349] and developed its own theory about what Japan's "independent claim" could

[342] Panel Report, para. 7.218.
[343] Panel Report, para. 7.218.
[344] Panel Report, para. 7.219.
[345] Panel Report, para. 7.221.
[346] Panel Report, para. 7.221.
[347] Panel Report, para. 7.226.
[348] Korea's other appellant's submission, para. 74.
[349] Korea's other appellant's submission, paras. 24-25 (referring to Panel Report, para. 7.128).

mean.[350] Noting that the Panel found Japan's claim to rest on a number of "premises", Korea submits that none of these premises are referenced in Japan's claim 6.[351] In particular, the Panel considered Japan's panel request to allege certain "flaws" in the Korean investigating authorities' volume, price effects, and impact analyses, and, not knowing from the panel request what they are, the Panel considered it necessary to "confirm" its understanding of the nature of Japan's claim by reviewing Japan's written submissions.[352] However, the Panel found no new, separate, or additional arguments in the submissions other than the ones referring back to Japan's arguments relating to the claims under Articles 3.1, 3.2, and 3.4, which contradicts Japan's assertion of an "independent" claim.[353] Korea furthermore reiterates that there is no explanation of the "how or why" of this allegedly independent causation claim in the panel request, and Japan was effectively again paraphrasing the obligation in Article 3.5.[354]

5.142. Japan responds that claim 6 is properly within the Panel's terms of reference. Japan suggests that, as each of its causation claims refers to one specific obligation within Articles 3.1 and 3.5 of the Anti-Dumping Agreement, there is no ambiguity or misunderstanding, and each claim presents the problem clearly given the nature and scope of the obligations.[355] To Japan, when compared with claims 4 and 5, it is clear that claim 6 focuses on a different obligation, that is, the ultimate conclusion of causation, and whether this conclusion had a foundation in the underlying facts about volume, price effects, and impact on the domestic industry.[356] Japan then argues that this claim "makes quite explicit that it is not just a consequential claim".[357] Further, Japan indicates that its claim plainly connects the measure at issue to the alleged inconsistency such that Korea should have been able to understand the claim fully.[358] Finally, Japan submits that the Panel's determination that the claim was within its terms of reference was based on the language of the panel request, and not on any subsequent submissions by Japan, and the fact that the Panel examined Japan's subsequent submissions does not mean that the problem was not presented in a sufficiently clear form in the panel request.[359]

5.143. Japan's claim 6, similar to its claims 4 and 5 discussed above, concerns a specific aspect of the Korean measure, namely the determination of causation by the Korean investigating authorities within the meaning of Article 3.5 of the Anti-Dumping Agreement. At the same time, unlike claims 4 and 5, the plain wording of claim 6 indicates that this claim concerns more specifically the alleged "lack[]" of "foundation" for the causation determination in the Korean investigating authorities' volume, price effects, and impact analyses.

5.144. As indicated in paragraph 5.122 above, Articles 3.1 and 3.5 of the Anti-Dumping Agreement establish obligations that are multilayered. However, Japan has identified in the narrative of its claim the particular aspect of the provisions its claim relates to. By indicating that "Korea's demonstration of causation lacks any foundation in its analyses of the volume of the imports under investigation, the effects of the imports under investigation on prices, and/or the impact of the imports under investigation on the domestic industry at issue", Japan's claim 6 relates to the demonstration of the causal relationship between the dumped imports and the domestic industry as provided in the first sentence of Article 3.5. The wording of claim 6 also indicates that this claim is brought "irrespective and independent of" whether such "flawed" volume, price effects, and impact analyses would be inconsistent with Articles 3.1, 3.2, and 3.4.

5.145. Thus, the reference to Articles 3.1 and 3.5, along with the narrative of claim 6 on its face, identifies with sufficient precision which part of Articles 3.1 and 3.5 Japan's claim 6 concerns, so as

[350] Korea's other appellant's submission, para. 25.
[351] Korea's other appellant's submission, para. 26 (quoting Panel Report, para. 7.221). See also ibid., para. 78.
[352] Korea's other appellant's submission, para. 26. See also ibid., paras. 80-81.
[353] Korea's other appellant's submission, para. 27. See also ibid., para. 82.
[354] Korea's other appellant's submission, para. 84.
[355] Japan's appellee's submission, para. 47.
[356] Japan's appellee's submission, para. 48.
[357] Japan's appellee's submission, para. 49. (emphasis original)
[358] Japan's appellee's submission, para. 52 (referring to OTI's Final Report (Panel Exhibit KOR-2b (BCI)), pp. 80-84).
[359] Japan's appellee's submission, para. 54. Japan indicates that Korea takes issue with the manner in which Japan presented arguments in support of its claim, but in doing so, Korea confuses the distinction between the "brief summary" of the claim and the arguments in support of that claim. (Ibid., para. 55)

to meet the minimum requirement under Article 6.2 of the DSU. We therefore share the Panel's view that "the narrative in Japan's panel request, albeit brief, is sufficiently precise on its face to present the problem clearly, namely that, in Japan's view, the KTC's causation determination is undermined by certain aspects of its volume, price effects, and impact analyses whether or not those aspects are inconsistent with Article 3.1, 3.2, or 3.4 of the Anti-Dumping Agreement."[360]

5.146. Korea argues that the Panel itself was uncertain as to the precise nature of Japan's claim 6 and developed its own theory regarding the "premises" underlying Japan's claim.[361] As we see it, however, in the findings referred to by Korea[362], the Panel was responding to Korea's argument regarding the alleged ambiguity of the term "irrespective and independent" in Japan's panel request. Specifically, the Panel explained its understanding of this phrase and its implications for the resolution of the "independent" claim, in light of the possible outcome of the claims under Articles 3.2 and 3.4 of the Anti-Dumping Agreement. According to the Panel, if the claims under Articles 3.2 and 3.4 were to result in findings of inconsistency, there would be no need to examine claim 6 further, given that a consequential violation of Article 3.5 would flow from such findings of inconsistency. In contrast, if there were to be no findings of inconsistency under Articles 3.2 and 3.4, the Panel considered that it would need to examine claim 6 precisely because, according to the panel request, this claim is raised regardless of whether an inconsistency with Articles 3.2 and 3.4 was found to exist and is, in that sense, "independent". It was in this context that the Panel indicated that the nature of the independent claim may be "less evident" in comparison to a consequential claim, and explained what it regarded as the "premises" of Japan's claim.[363] In other words, the "contingent" nature of claim 6 that the Panel referred to concerns the uncertainty as to how the claim would be *resolved*, rather than the uncertainty inherent in the text of the panel request.

5.147. In any event, we observe that these considerations are not essential for the assessment of the consistency of the claim with the requirements of Article 6.2 of the DSU. Whether a claim is related to, contingent on, or independent from another claim does not detract from the requirement under Article 6.2 of the DSU to consider a panel request on its face to determine whether it provides the legal basis of the complaint sufficient to present the problem clearly. In our view, the consideration of the interrelationship between claims is one that pertains more to the merits of these claims. In this regard, we recall that the Appellate Body indicated in *Australia − Apples* that, "[f]or a matter to be within a panel's terms of reference—in the sense of Articles 6.2 and 7.1 of the DSU—a complainant must identify 'the specific measures at issue' and the 'legal basis of the complaint sufficient to present the problem clearly'"[364], and that, by contrast, "the question of whether the measures identified in the panel request *can violate*, or *cause the violation of,* the obligation … is a substantive issue to be addressed and resolved on the merits."[365]

5.148. Korea also maintains that, due to the use of the phrase "lacks any foundation" in Japan's claim 6, the only kinds of claims and arguments that can fall within the purview of Japan's claim 6 are claims and arguments that the KTC's causation analysis was not based at all on its own volume, price effect, or impact analyses. Yet Japan has raised no such claims or arguments.[366] We note, however, that, in order to reach this understanding of Japan's claim, Korea must read in isolation the phrase "lacks any foundation". As we indicated, the Panel properly assessed the narrative in Japan's claim 6 by considering it in its totality and by relying on the above-referenced "premises", such that a reading of this claim, as a whole, does not support Korea's understanding.

5.149. Finally, Korea contends that the Panel erred by relying on Japan's subsequent submissions to confirm its above understanding regarding the nature of the independent claim[367], and thus failed to adhere to the principles that the panel request must be examined on its face as it existed at the time of filing, and that any defects in the panel request cannot be cured in subsequent submissions during the panel proceedings.[368] We recall that, according to the Panel, the various arguments raised

[360] Panel Report, para. 7.218.
[361] Korea's other appellant's submission, paras. 77-78 (referring to Panel Report, para. 7.221).
[362] See Panel Report, paras. 7.219-7.221.
[363] Panel Report, para. 7.221.
[364] Appellate Body Report, *Australia − Apples*, para. 423.
[365] Appellate Body Report, *Australia − Apples*, para. 425. (emphasis original)
[366] Korea's other appellant's submission, para. 88.
[367] Korea's other appellant's submission, paras. 80-81.
[368] Korea's other appellant's submission, para. 81 (referring to Appellate Body Report, *US − Carbon Steel*, para. 127).

by Japan in support of claim 6 concern a number of "elements" in the Korean investigating authorities' volume, price-effects, and impact analyses that "disprove" the existence of a causal relationship.[369] The Panel therefore considered it "clear" that Japan has asserted an independent claim under Articles 3.1 and 3.5.[370] In our view, therefore, the Panel consulted Japan's subsequent submissions, not to "cure" an alleged defect in Japan's panel request, but merely to confirm its understanding of Japan's panel request on the basis of its text, in accordance with the requirements of Article 6.2 of the DSU.

5.150. In sum, Japan's claim 6 identifies Articles 3.1 and 3.5 of the Anti-Dumping Agreement as the provisions alleged to have been breached, and concerns a specific aspect of the Korean measure, namely the determination of causation by the Korean investigating authorities within the meaning of Article 3.5. While Articles 3.1 and 3.5 establish obligations that are multilayered, Japan has identified in the narrative of its claim the particular aspect of the provisions its claim relates to. By indicating that "Korea's demonstration of causation lacks any foundation in its analyses of the volume of the imports under investigation, the effects of the imports under investigation on prices, and/or the impact of the imports under investigation on the domestic industry at issue", Japan's claim 6 indicates that it takes issue with the demonstration of the causal relationship between the dumped imports and the domestic industry as provided in the first sentence of Article 3.5 of the Anti-Dumping Agreement. Thus, the Panel rightly took the view that the narrative in Japan's panel request is sufficiently precise to present the problem clearly. In addition, whether a claim is related to, contingent on, or independent from another claim does not detract from the requirement under Article 6.2 of the DSU to consider the panel request on its face to determine whether it provides the legal basis of the complaint sufficient to present the problem clearly.

5.151. For the foregoing reasons, we find that the Panel did not err in finding that Japan's claim 6 was within its terms of reference. Consequently, we uphold the Panel's finding in paragraphs 7.226 and 8.2.b of the Panel Report.

5.3.2.7 Whether the Panel acted inconsistently with Article 11 of the DSU in assessing the consistency of Japan's panel request with Article 6.2 of the DSU

5.152. Korea claims on appeal that, in reaching its findings under Article 6.2 of the DSU regarding Japan's claims under Articles 3.1 and 3.5 of the Anti-Dumping Agreement, the Panel failed to conduct an "objective assessment of the matter" as required by Article 11 of the DSU. Korea argues that "[t]he Panel failed to provide an adequate and reasoned explanation supporting its finding that the paraphrasing of the obligations under Articles 3.1 and 3.5 of the Anti-Dumping Agreement sufficed to present the problem clearly, when that same paraphrasing was not considered to be sufficient in the context of most of the other claims included in Japan's panel request."[371] To Korea, "[t]he Panel's application of the standard [under] Article 6.2 of the DSU to the facts in the context of the three causation claims [is] internally inconsistent and not supported by coherent reasoning"[372], and reflects "an inappropriate desire on the part of the Panel to salvage at least some of Japan's claims".[373] In contrast, Korea argues that the Panel "correctly made the exact opposite findings in the context of all other claims it rejected under Article 6.2 DSU".[374]

5.153. Japan replies that the Panel's finding that the causation claims under Articles 3.1 and 3.5 of the Anti-Dumping Agreement were within its terms of reference is correct and does not reflect the lack of an objective assessment. To Japan, Korea's suggestion that the Panel was internally incoherent and inconsistent is "really just repackaging Korea's objection to the merits of what the

[369] Panel Report, paras. 7.223-7.225.
[370] Panel Report, para. 7.226.
[371] Korea's other appellant's submission, para. 261.
[372] Korea's other appellant's submission, para. 261. For instance, Korea notes that the Panel "noted the high degree of 'succinctness', acknowledged that the problem was not presented clearly as it was required to seek 'confirmation' in the written submissions, expressed its own uncertainty about the meaning of the 'independent' nature of the third causation claim and generally failed to provide any explanation of why paraphrasing the obligations under Articles 3.1 and 3.5 was sufficient to present the problem clearly" when it reached "the exact opposite conclusion with respect to, for example the claims under Articles 3.1 and 3.2 or 6.9 of the Anti-Dumping Agreement". (Ibid.)
[373] Korea's other appellant's submission, para. 262.
[374] Korea's other appellant's submission, para. 262.

Panel found".[375] Japan submits that "the mere fact that the Panel reached different conclusions on different issues does not establish a violation of Article 11 of the DSU."[376] Moreover, "[e]ven if the Panel made one or more errors that reflected the Panel's misunderstanding of Article 6.2 of the DSU, those errors do not establish the lack of an objective assessment of the matter."[377] Japan further argues that Korea's position is "rather extreme" since it "goes so far as to argue that none of Japan's claims should have been found to be within the terms of reference".[378]

5.154. Article 11 of the DSU imposes on panels an obligation to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements". In certain disputes, panels have been found to breach their obligations under Article 11 of the DSU due to their internally inconsistent reliance on, or examination of, the evidence before them.[379] Furthermore, the Appellate Body indicated that a claim that a panel has acted inconsistently with its obligations under Article 11 of the DSU is a "serious allegation"[380] that impugns a panel's assessment of its jurisdiction[381], and that must stand on its own rather than being made as a subsidiary argument in support of a claim that a panel erred in its application of a WTO provision.[382]

5.155. In the present dispute, the Panel found that, with respect to Japan's claims under Articles 3.1, 3.2, 3.4, 4.1, and 6.9 of the Anti-Dumping Agreement, by merely paraphrasing the provisions concerned, Japan's panel request was not sufficient to meet the requirements of Article 6.2 of the DSU. Korea takes issue with the fact that, when the Panel applied the same provision of the DSU to assess the sufficiency of Japan's panel request with respect to its claims under Articles 3.1 and 3.5, the Panel found that merely paraphrasing these provisions was sufficient to meet the requirements of Article 6.2. Korea therefore argues that the Panel's reasoning is internally incoherent and inconsistent.

5.156. Thus, Korea's challenge is not directed at the Panel's alleged inconsistency in the appreciation of evidence, but rather at its alleged inconsistency in applying the legal standard under Article 6.2 of the DSU to Japan's different claims in its panel request. In this context, therefore, the Appellate Body's findings in past disputes do not lend support to Korea's argument.[383] This is because, in those disputes, the incoherence or inconsistency that amounted to a violation of Article 11 of the DSU related to the manner in which the panel engaged with the evidence and facts before it, rather than how the panel interpreted or applied a legal provision.

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[375] Japan's appellee's submission, para. 137.

[376] Japan's appellee's submission, para. 137.

[377] Japan's appellee's submission, para. 137.

[378] Japan's appellee's submission, para. 138 (referring to Korea's other appellant's submission, para. 262).

[379] For example, in *US − Upland Cotton (Article 21.5 − Brazil)*, the Appellate Body found that the panel's "internally incoherent treatment of the same class of quantitative evidence … vitiates the conclusion it drew based on the financial data submitted by the parties". (Appellate Body Report, *US − Upland Cotton (Article 21.5 − Brazil)*, para. 294) In *EC and certain member States − Large Civil Aircraft*, the Appellate Body found that the panel's analysis revealed certain inconsistencies because the panel relied on certain benchmarks that it had previously dismissed as unsuitable for assessing the existence of a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement. (Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, paras. 882-894) In *Russia − Commercial Vehicles*, the Appellate Body noted that, after finding that the methodology used by the investigating authority to examine price effects under Article 3.2 of the Anti-Dumping Agreement was flawed, the panel subsequently found that the same methodology was capable of supporting the investigating authority's finding of price suppression. (Appellate Body Report, *Russia − Commercial Vehicles*, paras. 5.55-5.64 and 5.78-5.79) In the latter two disputes, the Appellate Body found that the panel's internally inconsistent reasoning "cannot be reconciled with [its] duty to make an objective assessment" of the matter under Article 11 of the DSU. (Appellate Body Reports, *EC and certain member States − Large Civil Aircraft*, para. 894; *Russia − Commercial Vehicles*, para. 5.79)

[380] Appellate Body Reports, *China − Rare Earths*, para. 5.227 (quoting Appellate Body Report, *EC − Poultry*, para. 133).

[381] Appellate Body Report, *EC − Fasteners (China) (Article 21.5 − China)*, para. 5.292 (referring to Appellate Body Reports, *US − 1916 Act*, para. 54; *Mexico − Corn Syrup (Article 21.5 − US)*, para. 36).

[382] Appellate Body Reports, *Chile − Price Band System (Article 21.5 − Argentina)*, para. 238; *US − Steel Safeguards*, para. 498; *US − Zeroing (EC) (Article 21.5 − EC)*, para. 401; *EC − Fasteners (China)*, para. 442; *US − COOL*, para. 301; *China − Rare Earths*, para. 5.173; *Argentina − Import Measures*, para. 5.173.

[383] See *supra*, fn 379.

5.157. As we have indicated above, the consistency of a claim with the requirements of Article 6.2 of the DSU is to be determined on the face of the panel request, on a case-by-case basis, taking into consideration the circumstances of each case. We have found above that the Panel erred in its application of this legal standard in finding that Japan's claims under Articles 3.1 and 3.2 of the Anti-Dumping Agreement, part of its claim under Articles 3.1 and 3.4 of that Agreement, and its claim under Articles 3.1 and 4.1 of that Agreement, respectively, were not within its terms of reference. In contrast, we have found that the Panel did not err in its application of Article 6.2 of the DSU in finding that Japan's three claims under Articles 3.1 and 3.5 of the Anti-Dumping Agreement were within its terms of reference.[384] Thus, the contrasting findings under Article 6.2 of the DSU regarding the different claims raised by Japan, which Korea contends are "internally inconsistent"[385], reflect the Panel's error in its application of this provision with regard to some of Japan's claims, rather than a lack of an objective assessment as required by Article 11 of the DSU. In any event, insofar as Japan's claims under Articles 3.1 and 3.5 are concerned, we have found no error in the Panel's finding pursuant to Article 6.2 of the DSU that such claims were within its terms of reference. Thus, we disagree with Korea's contention that the Panel acted inconsistently with its obligation under Article 11 of the DSU in assessing the consistency with Article 6.2 of the DSU of Japan's claims under Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

5.158. Furthermore, we observe that in making this claim under Article 11 of the DSU, Korea essentially identifies the same alleged errors by the Panel as those developed in its claim that the Panel erred in its application of Article 6.2 of the DSU in finding that Japan's claims 4, 5, and 6 are within the Panel's terms of reference. As such, therefore, Korea's claim that the Panel acted inconsistently with Article 11 of the DSU is subsidiary to its other claims of error by the Panel, and therefore does not "stand on its own", as a claim under Article 11 of the DSU would be required to.[386] For the foregoing reasons, we find that the Panel did not act inconsistently with Article 11 of the DSU in assessing the consistency of Japan's panel request with Article 6.2 of the DSU.

5.3.3 Magnitude of margin of dumping

5.159. Japan appeals the Panel's conclusion that Japan failed to demonstrate that the KTC's evaluation of the magnitude of the margin of dumping was inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.[387] Japan claims that the Panel erred in its interpretation and application of these provisions and requests the Appellate Body to reverse the Panel's conclusion.[388] In response, Korea maintains that the Korean investigating authorities properly evaluated in a substantive manner the magnitude of the margin of dumping as part of its overall evaluation of injury.[389] On this basis, Korea requests the Appellate Body to uphold the Panel's conclusion at issue.[390]

5.160. Before examining Japan's claim of error on appeal, we summarize the Panel's relevant findings and conclusions under Articles 3.1 and 3.4. We then set out our understanding of the relevant aspects of Articles 3.1 and 3.4 and examine the merits of Japan's claim of error on appeal.

5.3.3.1 The Panel's findings

5.161. Before the Panel, Japan argued that the KTC's finding regarding the magnitude of the margin of dumping "has no factual support, and is contradicted by the fact that the prices of the dumped imports were consistently higher than domestic like product prices".[391] In response, Korea argued that "[the] KTC reasonably concluded that the magnitude of the dumping margins was not

[384] See sections 5.3.2.4-5.3.2.6 above.
[385] Korea's other appellant's submission, para. 265.
[386] See para. 5.154 above and *supra* fn 382.
[387] Japan's appellant's submission, para. 255 (referring to Panel Report, paras. 7.187-7.191).
[388] Japan's appellant's submission, paras. 255-268.
[389] Korea's appellee's submission, para. 424.
[390] Korea's appellee's submission, paras. 410 and 424.
[391] Panel Report, para. 7.144.b (referring to Japan's first written submission to the Panel, paras. 177-178).

insignificant and that such magnitude had a significant impact on the interaction between the sales prices of the dumped imports and the like product."[392] The KTC's finding at issue states:

> As discussed previously, the final dumping margins of the dumped products were ranged between 11.66% and 31.61%, which means the size of dumping margin is not insignificant. Accordingly, such dumping appears to have had significant impact on the sales price of the dumped products and that of the like product.[393]

5.162. In its examination of Japan's claim, the Panel first noted that "Article 3.4 does not require that the magnitude of the margin of dumping be evaluated in any particular manner or be given any particular weight."[394] However, the Panel also found that "an evaluation of the magnitude of the margin of dumping in the assessment of the impact of dumped imports on the domestic industry must 'be undertaken as a substantive matter'."[395] Specifically, "[a]n investigating authority is required to evaluate the magnitude of the margin of dumping and to assess its relevance and the weight to be attributed to it in the injury assessment."[396] According to the Panel, a simple "listing of the margins of dumping" in other aspects of an investigation "is not sufficient to demonstrate that the magnitude of the margin of dumping was evaluated within the meaning of Article 3.4".[397]

5.163. In applying Article 3.4 to the facts of this dispute, the Panel found that "the KTC did more than merely list or indicate the existence of margins of dumping of a particular magnitude in its determination."[398] Specifically, in light of the KTC's findings set out above, the Panel found that the KTC "observed that the dumping margins were significant, and consequently that dumping had had a significant impact on prices of both the dumped product and the domestic like product".[399] Therefore, the Panel found that the KTC's findings are "sufficient to demonstrate that it evaluated the magnitude of the margins of dumping 'as a substantive matter'".[400]

5.164. Japan argued before the Panel that "an investigating authority is *required* to undertake some form of counterfactual analysis, specifically in this case by adding the dumping margin to the actual prices of the dumped imports, or comparing the magnitude of the dumping margin with the level of overselling."[401] In response, Korea contended that "Japan is not able to refer to any textual or jurisprudential" basis to support such a counterfactual analysis.[402] The Panel rejected Japan's argument, recalling that "there is no guidance in the Anti-Dumping Agreement regarding methodology for the evaluation of economic factors in the context of Article 3.4", and, as such, there is no textual basis for Japan's argument.[403] The Panel also found that, "even assuming that such an analysis might be relevant, a question which is for an investigating authority to consider in the first instance, Japan has failed to demonstrate what specific factual circumstances made such an analysis obligatory in this case."[404] On this basis, the Panel concluded that Japan failed to establish that the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping

[392] Korea's first written submission to the Panel, para. 231. Korea further contended that "[the] KTC examined this factor and explained the basis for finding that the magnitude of the dumping detrimentally affected the domestic industry." (Korea's second written submission to the Panel, para. 109 (fn omitted))

[393] Panel Report, para. 7.188 (quoting KTC's Final Resolution (Panel Exhibit KOR-1b (BCI)), p. 26).

[394] Panel Report, para. 7.189.

[395] Panel Report, para. 7.189 (quoting Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.162).

[396] Panel Report, para. 7.189 (quoting Panel Report, *China – X-Ray Equipment*, para. 7.183).

[397] Panel Report, para. 7.189 (referring to Panel Reports, *Argentina – Poultry Anti-Dumping Duties*, para. 7.321; *China – X-Ray Equipment*, paras. 7.183-7.184; *Russia – Commercial Vehicles*, para. 7.161; *China – HP-SSST (Japan) / China – HP-SSST (EU)*, paras. 7.161-7.162).

[398] Panel Report, para. 7.190.

[399] Panel Report, para. 7.190.

[400] Panel Report, para. 7.191.

[401] Panel Report, para. 7.191 (referring to Japan's response to Panel question Nos. 45 and 46, paras. 91 and 95). (emphasis original)

[402] Korea's second written submission to the Panel, para. 111.

[403] Panel Report, para. 7.191.

[404] Panel Report, para. 7.191.

Agreement with respect to the examination of the impact of the dumped imports on the state of the domestic industry.[405]

5.3.3.2 Whether the Panel erred in its interpretation of Articles 3.1 and 3.4 of the Anti-Dumping Agreement

5.165. Article 3.4 of the Anti-Dumping Agreement provides:

> The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

5.166. The first sentence of Article 3.4 requires an examination of the *impact* of dumped imports on the domestic industry. Article 3.4 is thus concerned with "the relationship between subject imports and the state of the domestic industry".[406] Hence, the provision contemplates that "an investigating authority must derive an understanding of *the impact of* subject imports" on the domestic industry[407], which "requires an examination of the 'explanatory force' of subject imports for the state of the domestic industry".[408] However, under Article 3.4, an investigating authority is "*not* required to *demonstrate* that dumped imports are causing injury to the domestic industry, which is an analysis specifically mandated by Article 3.5".[409]

5.167. As noted, the focus of the examination required under Article 3.4 is on the *state of the domestic industry*.[410] This examination "*shall* include an evaluation of *all* relevant economic factors and indices having a bearing on the state of the industry".[411] This provision lists 15 factors that must be evaluated for this purpose[412], one of which is the magnitude of the margin of dumping. As provided in the last sentence of Article 3.4, the list of 15 factors is not exhaustive, nor can one or several of these factors necessarily give decisive guidance. Rather, the examination stipulated under Article 3.4 requires a holistic evaluation of "*all* relevant economic factors and indices having a bearing on the state of the industry" as a whole. Article 3.4 thus does not require an individual or separate finding of the relationship between the magnitude of the margin of dumping and the state of the domestic industry.

5.168. The obligation under Article 3.4 is further informed by the overarching obligation in Article 3.1[413], which requires that a determination of injury "be based on positive evidence and involve an objective examination". Based on the obligations under Articles 3.1 and 3.4 set out above, the Appellate Body has stated that "Article 3.4, read together with Article 3.1, instructs investigating authorities to evaluate, objectively and on the basis of positive evidence, the importance and the weight to be attached to all the relevant factors."[414] Apart from the parameters described above, Articles 3.1 and 3.4 do not prescribe a particular methodology for the evaluation of, or relevance or

[405] Panel Report, para. 7.192. In reaching this conclusion, the Panel also rejected Japan's argument that the KTC's evaluation of another factor listed in Article 3.4, i.e. the domestic industry's ability to raise capital or investment, was conclusory and without any factual support. (Panel Report, paras. 7.144.a and 7.181-7.186) These findings of the Panel are not subject to appeal. (Japan's appellant's submission, para. 255)

[406] Appellate Body Report, *China − GOES*, para. 149.

[407] Appellate Body Reports, *China − HP-SSST (Japan) / China − HP-SSST (EU)*, para. 5.205 (quoting Appellate Body Report, *China − GOES*, para. 149). (emphasis original)

[408] Appellate Body Reports, *China − HP-SSST (Japan) / China − HP-SSST (EU)*, para. 5.205 (quoting Appellate Body Report, *China − GOES*, para. 149).

[409] Appellate Body Reports, *China − HP-SSST (Japan) / China − HP-SSST (EU)*, para. 5.205 (referring to Appellate Body Report, *China − GOES*, para. 150). (emphasis original)

[410] Appellate Body Reports, *China − HP-SSST (Japan) / China − HP-SSST (EU)*, para. 5.204.

[411] Emphasis added.

[412] Appellate Body Report, *Thailand − H-Beams*, paras. 125 and 128.

[413] Appellate Body Report, *Thailand − H-Beams*, paras. 90 and 106.

[414] Appellate Body Reports, *China − HP-SSST (Japan) / China − HP-SSST (EU)*, para. 5.207.

weight to be attributed to, any one factor.[415] Thus, Articles 3.1 and 3.4 do not prescribe a particular relevance or weight to be attributed to the magnitude of the margin of dumping *per se* in the overall assessment of the impact of dumped imports on the domestic industry.

5.169. We recall the Panel's statement that Article 3.4 requires that "an evaluation of the magnitude of the margin of dumping in the assessment of the impact of dumped imports on the domestic industry must 'be undertaken as a substantive matter'" and that "[a]n investigating authority is required to evaluate the magnitude of the margin of dumping and to assess its relevance and the weight to be attributed to it in the injury assessment."[416] In our view, the Panel's articulation of the legal standard under Article 3.4, insofar as the magnitude of the margin of dumping is concerned, comports with a proper interpretation of the provision as set out above.

5.170. On appeal, Japan argues that "[a]n evaluation of the magnitude of the margins of dumping plays an important role when examining the explanatory force of the dumped imports for the state of the domestic industry."[417] According to Japan, "[t]o address the ultimate question under Article 3.5, the assessment of the relevance of the magnitude of the margin of dumping and the weight to be attributed to that margin under Article 3.4 must take into account the relationship among the dumping margins, the actual prices of the dumped imports, and the prices of the domestic like products in the market."[418] Thus, in Japan's view, "an investigating authority *must* evaluate the dumping margin in light of the interaction of the prices between the dumped imports and the domestic like products"[419], and the Panel erred in its interpretation to the extent it suggested otherwise.[420]

5.171. In response, Korea contends that the Panel correctly interpreted Articles 3.1 and 3.4 by "reject[ing] the mere listing approach and confirm[ing] that a more substantive analysis [of the magnitude of the margin of dumping] was required".[421] However, Korea submits that there is no basis in the text of Article 3.4 for Japan's argument that "something more was legally required" and that in any event, Japan "fail[ed] to clarify what that 'something substantive' should be in addition to the substantive evaluation as undertaken by the KTC".[422]

5.172. We recall that Article 3.4 requires an evaluation of "*all* relevant economic factors and indices having a bearing on the state of the industry".[423] As such, while Article 3.4 requires an examination of the explanatory force of subject imports on the state of the domestic industry through an evaluation of *all* the relevant factors *collectively*, it does not follow that a particular factor should be evaluated in a particular manner or given a particular relevance or weight. We do not preclude that, in light of the particular circumstances of a case, an investigating authority may find it useful or even necessary to assess the relationship between the magnitude of dumping margins and prices of dumped and domestic like product in order to derive an understanding of the impact of subject imports on the state of the domestic industry. However, we do not consider that such an assessment is always required in order to evaluate the magnitude of the margin of dumping pursuant to Article 3.4. We therefore consider that the Panel correctly found that "there is no guidance in the Anti-Dumping Agreement regarding methodology for the evaluation of economic factors in the context of Article 3.4" and that there is no textual basis for Japan's argument that an evaluation must be done in the particular manner suggested by Japan.[424]

5.173. In support of its contention, Japan relies on the negotiating history of the Anti-Dumping Agreement, namely comments expressed during the Uruguay Round negotiations stating that the causal link between dumping and material injury to the domestic industry is tenuous where the margins of price undercutting by dumped imports are substantially higher than the dumping

[415] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.204.
[416] Panel Report, para. 7.189. (fns omitted)
[417] Japan's appellant's submission, para. 258.
[418] Japan's appellant's submission, para. 258.
[419] Japan's appellant's submission, para. 262. (emphasis added)
[420] Japan's appellant's submission, para. 256.
[421] Korea's appellee's submission, para. 418.
[422] Korea's appellee's submission, para. 419.
[423] Emphasis added.
[424] Panel Report, para. 7.191.

margins.[425] We find this argument unpersuasive. First, the quoted comments relate to the question of causation, addressed in Article 3.5, not the examination of the impact under Article 3.4.[426] Second, those comments do not suggest that a particular method should be applied for evaluating the magnitude of the margin of dumping in an examination of the impact of the dumped imports on the domestic industry. They merely reflect situations in which the comparisons between the dumping margins and the margins of underselling by dumped imports may be relevant for assessing the causal link between the dumped imports and injury. Third, the situations referred to in those comments are based on hypothetical fact patterns that are distinguishable from the facts in the current case and are thus further limited in their relevance to the case before us.[427]

5.174. In sum, we find that Articles 3.1 and 3.4 require an investigating authority to evaluate the magnitude of the margin of dumping and to assess its relevance and the weight to be attributed to it in the injury assessment. However, we do not consider that these provisions require any one of the listed factors, such as the magnitude of the margin of dumping, to be evaluated in a particular manner or given a particular relevance or weight, in examining the impact of the dumped imports on the domestic industry. Based on the above considerations, we find that the Panel did not err in its interpretation of Articles 3.1 and 3.4 of the Anti-Dumping Agreement with respect to the evaluation of the magnitude of the margin of dumping.

5.3.3.3 Whether the Panel erred in its application of Articles 3.1 and 3.4 of the Anti-Dumping Agreement with respect to the KTC's findings on the magnitude of the margin of dumping

5.175. Japan challenges the Panel's application of Article 3.4 of the Anti-Dumping Agreement to the KTC's findings with respect to the magnitude of the margin of dumping, arguing that the KTC's findings were not based on an objective examination and positive evidence.[428] In particular, Japan recalls that, according to the Panel, the KTC's findings that the "size of the dumping margin is not insignificant" and that "such dumping appears to have had a significant impact" on prices were sufficient for purposes of conducting an evaluation of the magnitude of the margin of dumping under Article 3.4.[429] Japan challenges this finding by the Panel, and argues that the KTC's findings were "not explained at all".[430] According to Japan, "[t]he dumping margin alone is insufficient, because whether and to what extent the dumping margin may have any impact on the domestic prices depends on the degree of competition between the dumped imports and the domestic like products."[431] In Japan's view, "[t]he fact that Article 3.4 does not specify any particular method does not mean the [investigating] authorities need do nothing."[432]

5.176. In response, Korea argues that "[the] KTC had already established that domestic prices of the like products were substantially suppressed by the selective low pricing and aggressive marketing behavior of the Japanese respondents" and that "[s]uch aggressive marketing was supported by the dumped imports' substantial dumping margins."[433] Korea also argues that "[the]

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[425] Japan's appellant's submission, paras. 259-261 and fns 365-366 thereto (quoting MTN.GNG/NG8/W/10, p. 7; MTN.GNG/NG8/W/51/Add.1, p. 5, paras. 22-23).

[426] See Japan's appellant's submission, paras. 259-260. Specifically, we note that the quoted comment by Korea (MTN.GNG/NG8/W/10, p. 7) was made in connection with Articles 3.2 and 3.4 of the Tokyo Round Agreement in Implementation of Article VI of the General Agreement on Tariffs and Trade, BISD 26S/171, entered into force 1 January 1980, which were provisions addressing the volume of the dumped imports and the effect of the dumped imports on prices and causation, respectively. Similarly, we note that the quoted comment by Hong Kong (MTN.GNG/NG8/W/51/Add. 1, p. 5, paras. 22-23) was made in connection with Article 3.4 of the Anti-Dumping Code addressing causation.

[427] For instance, the quoted comment by Korea illustrates a situation where the margin of dumping is *de minimis* (1%) and the margin of price underselling by dumped imports is 30%. (See Japan's appellant's submission, para. 259 (quoting MTN.GNG/NG8/W/10, p. 7)) The quoted comments also assume that the margins of dumping and the margins of underselling are comparable (for example, in the quoted comment by Korea, a 1% dumping margin was compared with a 30% underselling margin to conclude that the underselling margin would have been 29% in the absence of dumping). (Ibid.) Japan has not established that either of the above scenarios is analogous to the facts in the anti-dumping investigation at issue.

[428] Japan's appellant's submission, para. 265.

[429] Japan's appellant's submission, para. 263. (fn omitted)

[430] Japan's appellant's submission, para. 264.

[431] Japan's appellant's submission, para. 265.

[432] Japan's appellant's submission, para. 265.

[433] Korea's appellee's submission, para. 422.

OTI verified that the domestic industries could have raised the sales price of the like product to the level of the reasonable sales prices if there had been no dumping, based on the magnitude of dumping margins and the range of 'reasonable sales prices'."[434] Thus, in Korea's view, "[the] KTC reasonably concluded that the magnitude of the dumping margins was not insignificant and that such magnitude had a significant impact on the interaction between the sales prices of the dumped imports and the like product."[435] On this basis, Korea argues that the Panel was correct in finding that the KTC engaged in a substantive analysis of the magnitude of the margin of dumping as required under Article 3.4.[436]

5.177. As we recall, the Panel found that "the KTC did more than merely list or indicate the existence of margins of dumping of a particular magnitude in its determination."[437] Indeed, the KTC's findings set out by the Panel confirm the Panel's finding that the KTC "observed that the dumping margins were significant, and consequently that dumping had had a significant impact on prices of both the dumped product and the domestic like product".[438] As such, we do not consider that the KTC did "nothing" or that its evaluation of the magnitude of the margin of dumping was limited to the "dumping margin alone", as asserted by Japan.

5.178. Japan further contends that the KTC's findings regarding the magnitude of the margin of dumping were "not explained at all"[439] and that the impact that the dumping margin may have on the domestic prices depends on "the degree of competition between the dumped imports and the domestic like products".[440] As noted above, we do not rule out that, in light of the particular circumstances of a case, an investigating authority may find it useful or even necessary to assess the relationship between the dumping margins and prices for purposes of evaluating the magnitude of the dumping margin under Article 3.4. In this regard, as Japan argues, "the degree of competition between the dumped imports and the domestic like products"[441] may shed some light on the investigating authority's understanding of the impact of dumped imports on the domestic industry when evaluating the magnitude of the margin of dumping. In the present case, however, the KTC considered the competitive relationship between the dumped imports and the domestic like product and found that there was evidence of instances of "fierce" competition.[442] The Panel found no errors in the KTC's finding concerning the competitive relationship.[443] Thus, in light of the competitive relationship between the dumped imports and the domestic like product found by the KTC, we do not consider that Japan has established that the KTC's findings regarding the magnitude of the margin of dumping were "not explained at all"[444] or that the Panel erred in finding that the KTC's findings are "sufficient to demonstrate that it evaluated the magnitude of the margins of dumping 'as a substantive matter'".[445]

5.179. Finally, we turn to Japan's argument that the KTC was required to conduct "some form of counterfactual analysis".[446] According to Japan, the investigating authority should pay particular attention to the "impact of the margin of dumping" when examining the magnitude of the margin of dumping under Article 3.4[447], a factor that is particularly important in understanding "what the state of the domestic industry would have been without any dumping".[448] The Panel assessed Japan's argument and found that, "even assuming that such an analysis might be relevant, a question which

[434] Korea's appellee's submission, para. 422. (fn omitted)
[435] Korea's appellee's submission, para. 422.
[436] Korea's appellee's submission, paras. 421 and 423-424.
[437] Panel Report, para. 7.190.
[438] Panel Report, para. 7.190.
[439] Japan's appellant's submission, para. 264.
[440] Japan's appellant's submission, para. 265.
[441] Japan's appellant's submission, para. 265.
[442] Panel Report, para. 7.294.
[443] Panel Report, para. 7.295.c. The Panel reached this finding in the context of its review of the KTC's consideration of diverging price trends, which we examine in section 5.3.4.1.2.2 below.
[444] Japan's appellant's submission, para. 264.
[445] Panel Report, para. 7.191.
[446] Panel Report, para. 7.191 (referring to Japan's response to Panel question Nos. 45 and 46, paras. 91 and 95). According to Japan, such counterfactual analysis may be conducted either by adding the dumping margin to the actual prices of the dumped imports, or by comparing the magnitude of the dumping margin with the level of overselling. (Ibid.) See also Japan's appellant's submission, para. 258 (referring to Appellate Body Report, *US − Tax Incentives*, fn 177 to para. 5.77).
[447] Japan's appellant's submission, para. 266.
[448] Japan's appellant's submission, para. 267.

is for an investigating authority to consider in the first instance, Japan has failed to demonstrate what specific factual circumstances made such an analysis obligatory in this case."[449] On appeal, Japan contends that, "in a case where import prices are overselling the domestic prices, the [investigating] authorities cannot assume without more that the 'margin of dumping' is having any impact on the domestic industry at all."[450]

5.180. In the present case, Japan relies on the overselling by the dumped imports as the basis for requiring a counterfactual analysis. However, we recall that, before specifically evaluating the magnitude of the dumping margin, the KTC had already considered the price effects of the dumped imports and assessed the interactions between the imported and domestic prices.[451] In particular, the Panel did not find any error in the KTC's finding that there was evidence of competition between the dumped imports and the domestic like product in the Korean market for valves[452], notwithstanding the average price overselling by the dumped imports. Thus, we do not consider that the Korean investigating authorities "assume[d] without more that the 'margin of dumping' [was] having any impact on the domestic industry".[453] While a counterfactual analysis may be useful in certain circumstances, we consider that Japan has not established that the existence of overselling in this case necessarily renders a counterfactual analysis obligatory under Article 3.4.[454] As such, we find that the Panel did not err in finding that "Japan has failed to demonstrate what specific factual circumstances made [the proposed counterfactual] analysis obligatory in this case."[455]

5.181. In sum, we find that Japan has failed to substantiate that: (i) the Korean investigating authorities did not evaluate the magnitude of the margin of dumping as required under Articles 3.1 and 3.4; and (ii) the Korean investigating authorities were required to conduct a counterfactual analysis in light of the facts of the case. Based on the above considerations, we uphold the Panel's finding, in paragraphs 7.189-7.192 and 8.3.a of the Panel Report, that Japan failed to establish that the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement with respect to their evaluation of the magnitude of the margin of dumping.

5.3.4 Causation

5.182. We now turn to examine Japan's appeal and Korea's other appeal concerning the Panel's findings under Articles 3.1 and 3.5 of the Anti-Dumping Agreement. We recall that before the Panel, Japan raised three claims with respect to Articles 3.1 and 3.5 of the Anti-Dumping Agreement. First, Japan argued that the KTC failed to demonstrate the existence of a causal link between the dumped imports and the state of the domestic industry in the absence of sufficient correlation between the trends in volumes, prices, and the domestic industry's profits (claim 4).[456] Second, Japan argued that the KTC failed to undertake a proper non-attribution analysis inasmuch as it failed to conduct an objective analysis of certain known factors other than the dumped imports allegedly causing injury to the domestic industry at the same time as dumped imports and failed to examine at all some other known factors (claim 5).[457] Finally, Japan claimed that the KTC's causation determination was undermined by its flawed analyses of the volume of the dumped imports, the price effects, and the impact of the dumped imports on the state of the domestic industry, "irrespective and independent" of whether the Panel found the KTC's analyses of the volume, price effects, and impact of the dumped imports on the domestic industry to be inconsistent with Articles 3.2 and 3.4 of the Anti-Dumping Agreement (claim 6).[458] The Panel referred to this as the "independent" causation claim.

[449] Panel Report, para. 7.191.
[450] Japan's appellant's submission, para. 267.
[451] Panel Report, para. 7.115 (referring to KTC's Final Resolution (Panel Exhibit KOR-1b (BCI)), p. 19).
[452] Panel Report, para. 7.295.c.
[453] Japan's appellant's submission, para. 267.
[454] In response to questioning at the oral hearing, Japan acknowledged that the counterfactual analysis it proposed in this case would have been imperfect at best, given that there were multiple exporters with different margins of dumping.
[455] Panel Report, para. 7.191.
[456] Panel Report, para. 7.196.
[457] Panel Report, para. 7.198. On appeal, Japan does not challenge the Panel's findings in this regard. (Japan's appellant's submission, fn 384 to para. 273)
[458] Panel Report, para. 7.195 (referring to Japan's first written submission to the Panel, paras. 192-196; second written submission to the Panel, paras. 153-154).

5.183. The Panel chose first to address Japan's claim 6, followed by Japan's claims 4 and 5. The Panel's findings on Japan's claims 4 and 6, set out above, are subject to appeal.

5.184. With respect to claim 6, Japan and Korea each appeal different aspects of the Panel's findings. We begin our analysis with Korea's claim on appeal that the Panel erred in its interpretation and application of Article 3.5 of the Anti-Dumping Agreement by subsuming all of the obligations of Articles 3.2 and 3.4 of the Anti-Dumping Agreement under that provision in addressing Japan's "independent" causation claim. Next, we address Japan's claim on appeal that the Panel erred in its approach to resolving Japan's "independent" causation claim by failing to consider volume, price effects, and impact as essential building blocks for any finding of causation under Article 3.5. Then, we turn to examine Japan's claim that the Panel erred under Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement by failing to consider Japan's rebuttal arguments on the issue regarding the "reasonable sales price" in the context of Japan's "independent" causation claim. Thereafter, we address the claims raised by Korea concerning the Panel's findings on price comparability and overselling in addressing Japan's "independent" causation claim. We then turn to Korea's claim that the Panel erred under Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement in failing to make an objective assessment of the matter. Finally, we address Japan's claim on appeal that the Panel improperly refused to address the lack of meaningful correlation in the context of the obligation under Article 3.5 and, therefore, erred in its approach to resolving Japan's claim 4 regarding the failure to demonstrate a causal relationship.

5.3.4.1 Japan's "independent" causation claim (claim 6)

5.3.4.1.1 Whether the Panel erred in its interpretation or application of Article 3.5 by subsuming all of the obligations of Articles 3.2 and 3.4 under Article 3.5 of the Anti-Dumping Agreement

5.185. As noted, the Panel chose first to address Japan's "independent" causation claim. In that respect, the Panel considered that Japan raised an "*independent* [claim] of violation of Article 3.5 with respect to Korea's flawed volume, price effects, and impact analyses, even if the Panel should find that those flaws do not constitute violations of Articles 3.2 and 3.4".[459] The Panel found that it could not preclude the possibility that an investigating authority's determination of causation may be inconsistent with Article 3.5 of the Anti-Dumping Agreement due to inadequacies in its analysis of the volume, price effects, or impact of dumped imports, even if these did not demonstrate a violation of Articles 3.2 and/or 3.4 of the Anti-Dumping Agreement.[460] However, the Panel also noted that "[w]hile [Japan's] claim may be independent, Japan makes no new, separate or additional arguments in support of that claim, simply referring back to certain of the arguments it made in support of its claims under Articles 3.1, 3.2, and 3.4 to support its independent claim of inconsistency with Articles 3.1 and 3.5."[461] For the purposes of assessing Japan's independent causation claim, the Panel decided to limit its examination to those specific aspects of the KTC's consideration of the volume and price effects, and its examination of the impact of dumped imports identified by Japan in its submissions as independently demonstrating the inconsistency of the KTC's determination of causation under Article 3.5.[462]

5.186. The Panel found that Japan failed to demonstrate that the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement because their causation determination was undermined by alleged flaws in their consideration of the significance of the increase in the volume of the dumped imports.[463] The Panel found the Korean investigating authorities to have acted inconsistently with Articles 3.1 and 3.5 by failing to: (i) ensure price comparability when they compared the individual transaction prices of certain models of dumped imports with the average prices of corresponding models of the domestic like product (the relevant price comparisons)[464]; and (ii) adequately explain their consideration of the price-suppressing and -depressing effects of dumped imports in their determination of causation, in light of the undisputed fact that the prices of the dumped imports were higher than those of the domestic like

[459] Panel Report, para. 7.217. (emphasis original)
[460] Panel Report, para. 7.221.
[461] Panel Report, para. 7.222.
[462] Panel Report, para. 7.227.
[463] Panel Report, para. 7.258.
[464] Panel Report, paras. 7.272 and 7.323.a.

product throughout the period of trend analysis on the basis of both the average price of the product as a whole and the average prices of representative models.[465] The Panel, however, found that the different magnitude of the price decreases from 2012 to 2013 and the opposing price movements from 2011 to 2012 do not, in and of themselves, demonstrate that the KTC's determination of a causal relationship is inconsistent with Articles 3.1 and 3.5.[466] Finally, the Panel found that Japan failed to demonstrate that the Korean investigating authorities' determination of causation is, with respect to the analysis of the impact of dumped imports on the domestic industry and independently of any inconsistencies with Article 3.4, inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.[467]

5.187. On appeal, Korea contends that the Panel "effectively" interpreted Article 3.5 of the Anti-Dumping Agreement as setting forth an independent, comprehensive obligation to examine the volume, price effects, and consequent impact of the dumped imports as part of the causation obligation of Article 3.5.[468] Korea submits that the Panel "walks through the exact same questions of volume, price and overall impact that one would normally consider in the analyses under Articles 3.2 and 3.4" of the Anti-Dumping Agreement.[469] Article 3.5, according to Korea, deals with a related but different and separate inquiry that concerns the existence of a causal relationship between the injury, as established under Articles 3.2 and 3.4, on the one hand, and the dumped imports, on the other hand.[470] Thus, Korea submits that the reference to paragraphs 2 and 4 in the first sentence of Article 3.5 does not call for redoing the examination under these paragraphs or rendering them redundant.[471]

5.188. In response, Japan submits that Korea is wrong to read the overall obligation in Article 3.5 too narrowly.[472] According to Japan, "[t]he analysis under Article 3.5 does not duplicate the analysis under Article 3.2, but rather extends the analysis and addresses distinct but critically important issues."[473] For instance, Japan submits that "the Panel was correct to conclude that a thorough and objective examination of the price effects of imports serves as a critical and essential building block for any finding of causation under Articles 3.1 and 3.5."[474] Japan contends that the first sentence of Article 3.5 in using the terms "through the effects of dumping" makes clear that while "Articles 3.2 and 3.4 are important building blocks, … they do not end the analysis."[475]

5.189. Article 3.5 of the Anti-Dumping Agreement provides, in relevant part:

> It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports.

5.190. The first sentence of Article 3.5 requires a demonstration that dumped imports are causing injury within the meaning of the Anti-Dumping Agreement "through the effects of dumping, as set forth in paragraphs 2 and 4", i.e. Articles 3.2 and 3.4 of the Anti-Dumping Agreement. Article 3.2 instructs an investigating authority to "consider" whether there has been a significant increase in the volume of dumped imports, and to "consider" the effect of the dumped imports on prices, namely whether there has been a significant price undercutting, price depression, or price suppression by the imported products vis-à-vis domestic like products.[476] Under Article 3.2, an investigating

[465] Panel Report, paras. 7.322 and 7.323.c.
[466] Panel Report, paras. 7.296 and 7.323.b.
[467] Panel Report, para. 7.348.b.
[468] Korea's other appellant's submission, para. 186.
[469] Korea's other appellant's submission, para. 186.
[470] Korea's other appellant's submission, para. 184.
[471] Korea's other appellant's submission, para. 185.
[472] Japan's appellee's submission, para. 85.
[473] Japan's appellee's submission, para. 81.
[474] Japan's appellee's submission, para. 79.
[475] Japan's appellee's submission, para. 68 (quoting Article 3.5 of the Anti-Dumping Agreement). (emphasis added by Japan; additional fn omitted)
[476] See also Appellate Body Report, *China – GOES*, para. 129.

authority considers the explanatory force of dumped imports for, *inter alia*, the occurrence of price effects, but it is not required to make "a definitive determination" on the volume of dumped imports and the effect of such imports on domestic prices.[477] Article 3.4 in turn requires an investigating authority to "examin[e]" the impact of dumped imports on the domestic industry on the basis of "an evaluation" of all relevant economic factors and indices that have a bearing on the state of the industry. As clarified by the Appellate Body, while "Article 3.4 requires an examination of the 'explanatory force' of subject imports for the state of the domestic industry"[478], an investigating authority is not required to demonstrate under that provision whether subject imports are causing injury to the domestic industry.[479]

5.191. Rather, the demonstration that "dumped … imports are causing injury '*through* the effects of' dumping … '[a]s set forth in paragraphs 2 and 4'" is to be conducted by the investigating authority under the aegis of Article 3.5.[480] The use of the phrase "as set forth in paragraphs 2 and 4" in Article 3.5 makes it clear that "proper assessment[s]" under Articles 3.2 and 3.4 are "necessary building block[s]"[481], which "*contribute*[] *to*", rather than replicate, the "overall determination" of injury and causation that is required under Article 3.5.[482] The first sentence of Article 3.5 thus suggests that these "building blocks" form part of and are "linked through a causation analysis between subject imports and the injury to the domestic industry, taking into account all factors that are being considered and evaluated".[483] In requiring a "demonstrat[ion] that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury", the causation inquiry under Article 3.5 calls for a holistic assessment by an investigating authority that links together the considerations under Article 3.2 and the examination conducted under Article 3.4 in order to reach a definitive determination regarding the existence of a *causal relationship* between dumped imports and injury to the domestic industry. In this context, the inquiries under Articles 3.2 and 3.4 "should not be viewed in isolation", as they are "necessary components"[484] and form part of the "logical progression of inquiry leading to an investigating authority's ultimate injury and causation determination".[485]

5.192. The use of the word "demonstrate[]" in Article 3.5 in contrast to the words "consider" in Article 3.2 and "examination" in Article 3.4 indicates that Article 3.5 establishes a standard that is distinct from Articles 3.2 and 3.4, inasmuch as Article 3.5 is concerned with the establishment of the causal link between dumped imports and injury.[486] Moreover, the second sentence of Article 3.5 provides that the demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on "an examination of *all relevant evidence* before the authorities".[487] The use of the phrase "all relevant evidence" means that Article 3.5 covers a broad basket of evidence that encompasses, and is not limited to, the evidence relating to the inquiries

[477] Appellate Body Report, *China − GOES*, paras. 130 and 136. The Appellate Body explained that "[i]nterpreting Article[] 3.2 … as requiring a consideration of the relationship between subject imports and domestic prices does not result in duplicating the causation analysis under Article[] 3.5." (Appellate Body Report, *China − GOES*, para. 147)

[478] Appellate Body Reports, *China − HP-SSST (Japan) / China − HP-SSST (EU)*, para. 5.205 (quoting Appellate Body Report, *China − GOES*, para. 149).

[479] Appellate Body Report, *China − GOES*, para. 150.

[480] Appellate Body Report, *China − GOES*, para. 128. (emphasis original)

[481] Appellate Body Reports, *China − HP-SSST (Japan) / China − HP-SSST (EU)*, para. 5.162.

[482] Appellate Body Report, *China − GOES*, para. 149. (emphasis original)

[483] Appellate Body Report, *China − GOES*, para. 128. (fn omitted)

[484] Appellate Body Reports, *China − HP-SSST (Japan) / China − HP-SSST (EU)*, para. 5.141 (referring to Appellate Body Report, *China − GOES*, para. 128).

[485] Appellate Body Report, *China − GOES*, para. 128.

[486] The Appellate Body indicated that the word "consider" in Article 3.2 stands in contrast with the word "demonstrate" in Article 3.5 that requires an investigating authority to make "a definitive determination regarding the causal relationship between subject imports and injury to the domestic industry". (Appellate Body Report, *China − GOES*, para. 130 and fn 217 thereto)

[487] Emphasis added.

under Articles 3.2 and 3.4.[488] This suggests that Article 3.5 has a broader scope of examination than Articles 3.2 and 3.4.[489]

5.193. The overall context provided by Article 3 of the Anti-Dumping Agreement thus makes it clear that the various paragraphs of Article 3, together, provide an investigating authority with the relevant framework and disciplines for conducting an injury and causation analysis.[490] Articles 3.2 and 3.4 are provisions that are intended "to *develop* an investigating authority's overall examination" of injury and causation.[491] The "outcomes" of these inquiries in turn form "the basis for the overall causation analysis contemplated in Article[] 3.5".[492] In our view, reading these provisions in this manner comports with the fact that, while the inquiries foreseen under Articles 3.2, 3.4, and 3.5 are "interlinked elements of a single, overall analysis addressing the question of whether dumped imports are causing injury"[493], the inquiry under each provision has a distinct focus.[494]

5.194. These considerations suggest that claims regarding alleged deficiencies in an investigating authority's analyses of the volume and price effects, and its examination of the impact of the dumped imports on the state of the domestic industry, are reviewable by a panel under Articles 3.2 and 3.4, respectively, as these provisions contain the requirements pursuant to which the investigating authority conducts such analyses. In contrast, with respect to a claim under Article 3.5, a panel is tasked with reviewing an investigating authority's ultimate demonstration that the "dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury" to the domestic industry. In so doing, a panel is called upon to review whether the investigating authority properly linked the *outcomes* of its analyses conducted pursuant to Articles 3.2 and 3.4, taking into account the evidence and factors required under Article 3.5, in coming to a definitive determination regarding the causal relationship between dumped imports and injury to the domestic industry. A panel's review of a claim under Article 3.5, therefore, concerns the investigating authority's ultimate determination of causation on the basis of a proper linkage among the various components, in light of all evidence and factors set out in that provision. A panel's review does not, however, call for revisiting the question whether each of the interlinked components of this determination itself meets the applicable requirements set out in Article 3.2 or 3.4. Examining such consistency in the context of a claim under Article 3.5 would effectively require a panel to incorporate and apply requirements and disciplines set out in other paragraphs of Article 3, which are not contained in the text of Article 3.5. To that extent, we agree with Korea that the phrase "through the effects of dumping, as set forth in paragraphs 2 and 4" in Article 3.5 "is not a call [for a panel] to re-do the examination[s]" under Articles 3.2 and 3.4 of the Anti-Dumping Agreement.[495]

5.195. In the present dispute, we recall that the Panel excluded from its terms of reference Japan's claims regarding: (i) the inconsistency of the KTC's consideration of volume and price effects with Article 3.2; and (ii) the inconsistency of the KTC's examination of the impact of the dumped imports on the domestic industry with Article 3.4.[496] As such, the Panel did not examine and make findings on these claims under Articles 3.2 and 3.4 of the Anti-Dumping Agreement. The Panel, however, found it to be within its terms of reference to examine claim 6 in Japan's panel request, in which Japan contended that the KTC's causation determination was undermined by its flawed analyses of

[488] We agree with the Panel that evidence that does not fall squarely within the parameters of Articles 3.2 and 3.4 may be relevant and persuasive with respect to whether a causal relationship can be demonstrated under Article 3.5. (Panel Report, para. 7.248)

[489] The Appellate Body stated that "[t]he examination under Article[] 3.5 … by definition[] covers a broader scope than the scope of the elements considered in relation to price depression and suppression under Article[] 3.2". (Appellate Body Report, *China − GOES*, para. 147)

[490] Appellate Body Report, *China − GOES*, para. 128.

[491] Appellate Body Report, *China − GOES*, para. 144. (emphasis original)

[492] Appellate Body Report, *China − GOES*, para. 149.

[493] Appellate Body Reports, *China − HP-SSST (Japan) / China − HP-SSST (EU)*, para. 5.141.

[494] We recall that, in the context of Articles 3.2 and 3.5 of the Anti-Dumping Agreement, the Appellate Body found that "[w]hile the assessments under both Article[s] 3.2 and 3.5 are interlinked elements of the single, overall injury analysis, the inquiry under each provision has a distinct focus." (Appellate Body Report, *Russia − Commercial Vehicles*, para. 5.54 (referring to Appellate Body Reports, *China − HP-SSST (Japan) / China − HP-SSST (EU)*, para. 5.141))

[495] Korea's other appellant's submission, para. 185.

[496] We note that in the context of Japan's claim under Articles 3.1 and 3.4 of the Anti-Dumping Agreement, the Panel found that "Japan's claim concerning the state of the domestic industry, under Articles 3.1 and 3.4 of the Anti-Dumping Agreement, is limited to the allegation that the KTC failed to evaluate two of the specific factors listed in Article 3.4." (Panel Report, para. 7.175)

the volume of the dumped imports, the price effects, and the impact of the dumped imports on the state of the domestic industry, "irrespective and independent" of whether the Panel found the KTC's analyses of volume, price effects, and impact to be inconsistent with Articles 3.2 and 3.4.[497] In explaining its understanding of the phrase "irrespective and independent" in claim 6, the Panel noted that it "[could not] preclude the possibility that an investigating authority's determination of causation may be inconsistent with Article 3.5 due to inadequacies in its analysis of the volume, price effects, or impact of dumped imports, even if these do not demonstrate a violation of Articles 3.2 and/or 3.4".[498]

5.196. As discussed above, given that Articles 3.2 and 3.4 contain the requirements pursuant to which an investigating authority conducts its volume, price effects, and impact analyses, a claim of alleged deficiencies in such analyses is reviewable by a panel under these provisions. Furthermore, by virtue of the phrase "through the effects of dumping, as set forth in paragraphs 2 and 4" in the first sentence of Article 3.5, to the extent that a panel finds that an investigating authority's volume, price effects, and impact analyses are inconsistent with its obligations under Articles 3.2 and 3.4, such inconsistencies would likely undermine an investigating authority's overall causation determination and *consequentially* lead to an inconsistency with Article 3.5.[499] However, the "possibility" referred to above by the Panel appears to concern a different scenario, in which an investigating authority's analyses of the volume, price effects, and impact "do not" themselves demonstrate an inconsistency with Article 3.2 or Article 3.4, but nonetheless contain "inadequacies" that "independently" constitute a violation of Article 3.5. As noted above, the totality of the evidence and factors stipulated under Article 3.5, including the evidence underpinning an investigating authority's volume, price effects, and impact analyses, may be reviewed under Article 3.5 for the purpose of examining whether an investigating authority has demonstrated the requisite causal relationship. We do not exclude that, based on such a review, a panel might find that an investigating authority erred under Article 3.5 in its demonstration of causation due to its failure to link properly its consideration of volume and price effects, and its examination of the impact on the state of the domestic industry, even where these elements, individually, may not breach the obligations set out in Articles 3.2 and 3.4, respectively.[500] To that extent, we do not find the Panel to have erred in its approach merely because it identified the "possibility" referred to above and proceeded to examine Japan's "independent" causation claim as set out in claim 6 in Japan's panel request.

5.197. However, Korea contends that the Panel simply accepted Japan's assertion that such an "independent" claim may exist but failed to give any example of such a "less evident" theoretical possibility.[501] Rather, Korea contends that, in examining Japan's claim 6, the Panel "effectively" interpreted Article 3.5 as setting forth an independent, comprehensive obligation to examine the volume, price effects, and impact of the dumped imports as part of the causation obligation of Article 3.5.[502] We also note that Japan argues that the Panel failed to consider volume as an essential "building block" for causation by focusing too narrowly on the requirements of the first sentence of Article 3.2 and not on the proper analysis under Article 3.5 regarding causation.[503] Similarly, Japan asserts that the Panel failed to consider impact as an essential "building block" for causation by focusing too narrowly on the requirements of Article 3.2 concerning volume and price effects, and Article 3.4 regarding impact, and not on the proper analysis under Article 3.5 regarding causation.[504]

5.198. Thus, in order for us to determine whether, in applying Article 3.5 for the purpose of examining Japan's claim 6, the Panel erroneously "walk[ed] through" the exact same questions of volume, price effects, and overall impact that one would normally consider in the analyses under Articles 3.2 and 3.4[505], we review the Panel's findings under claim 6 in light of the claims and

[497] Panel Report, para. 7.195 (referring to Japan's first written submission to the Panel, paras. 192-196; second written submission to the Panel, paras. 153-154).

[498] Panel Report, para. 7.221.

[499] We note that such a consequential finding under Article 3.5 can be made to the extent that a complaining party advances a consequential claim in this regard.

[500] We note that Korea concedes that "the situation could arise if the WTO-consistent volume, price and impact analyses, while individually correct, do not hold together for example because of a lack of coincidence in trends between these factors." (Korea's other appellant's submission, para. 188)

[501] Korea's other appellant's submission, paras. 187-188.

[502] Korea's other appellant's submission, para. 186.

[503] Japan's appellant's submission, para. 277 (referring to Panel Report, para. 7.258).

[504] Japan's appellant's submission, para. 289 (referring to Panel Report, para. 7.347).

[505] Korea's other appellant's submission, para. 186.

arguments raised on appeal by Japan and Korea. We begin with Japan's argument that the Panel erred in its approach to resolving claim 6 by failing to consider volume as an essential building block for any finding of causation.

5.3.4.1.2 Whether the Panel erred in its approach to resolving Japan's claim 6

5.3.4.1.2.1 Whether the Panel failed to consider volume as an essential building block for any finding of causation

5.199. On appeal, Japan contends that the Panel rejected its argument by focusing too narrowly on the requirements of the first sentence of Article 3.2 of the Anti-Dumping Agreement regarding volume, and not on the proper analysis under Article 3.5 of the Anti-Dumping Agreement regarding causation.[506] According to Japan, in order to determine whether the KTC conducted a proper causation analysis under Article 3.5, it was for "the Panel to consider [the volume-related] facts and other facts as part of a holistic analysis of the KTC's finding of causation and how the KTC explained that finding".[507] Japan submits that the Panel did not do so and, instead, quoted the KTC's discussion of facts under the first sentence of Article 3.2, and then quoted the KTC's "overall evaluation".[508] Japan submits that the KTC's "overall evaluation" about causation did not discuss any of the contrary facts and ignored the overall POI.[509]

5.200. In response, Korea avers that while Japan contends that the Panel approached Article 3.5 "too narrowly", Japan does not explain "how or why that was the case and what the Panel should have done".[510] Korea asserts that it is difficult to understand the "error of law" that the Panel allegedly committed.[511] In any event, Korea contends that the Panel did not just check a box but examined the volume analysis of the KTC as part of its injury analysis.[512]

5.201. We recall that, before the Panel, Japan argued that "[t]he volume of subject imports increased only modestly in absolute terms and had decreased market share over the full 2010 to 2013 period", and that "this evidence … tended to disprove the existence of any 'causal relationship'."[513] The Panel noted that "Japan's allegation that certain flaws in the KTC's analysis of the volume of dumped imports 'independently' undermine its causation determination"[514] was based on the fact that: (i) the volume of dumped imports decreased during two years of the three-year period of trend analysis; and (ii) the volume of dumped imports increased only modestly in absolute terms and decreased in terms of market share in 2013 compared with 2010.[515] The Panel examined the KTC's consideration of the volume of dumped imports which, as Japan notes, was found in "the KTC discussion of facts under the first sentence of Article 3.2".[516] The Panel noted that the KTC "considered whether there was a significant increase in dumped imports in absolute terms, relative to domestic consumption, and relative to domestic production".[517] From each of these three perspectives, the KTC found that "the volume of the dumped imports decreased from 2010 to 2012, then increased sharply from 2012 to 2013."[518] According to the Panel, the KTC neither relied on nor was required to show a significant increase of dumped imports from 2010 to 2012 or over the entire period of trend analysis.[519] The Panel further found that the KTC "examined the trends in volume and market share on an end-point to end-point basis … [as well as on a] year-on-year [basis]"[520], and "did not ignore the decline in dumped imports from 2010 to 2012".[521]

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[506] Japan's appellant's submission, para. 277 (referring to Panel Report, para. 7.258).
[507] Japan's appellant's submission, para. 278.
[508] Japan's appellant's submission, para. 278 (referring to Panel Report, para. 7.252, in turn quoting KTC's Final Resolution (Panel Exhibit KOR-1b (BCI)), pp. 14 and 27).
[509] Japan's appellant's submission, para. 278.
[510] Korea's appellee's submission, para. 433 (quoting Japan's appellant's submission, para. 277).
[511] Korea's appellee's submission, para. 433.
[512] Korea's appellee's submission, para. 435.
[513] Japan's first written submission to the Panel, para. 194.
[514] Panel Report, para. 7.250.
[515] Panel Report, para. 7.251.
[516] Japan's appellant submission, para. 278 (fn omitted).
[517] Panel Report, para. 7.253.
[518] Panel Report, para. 7.253.
[519] Panel Report, paras. 7.254-7.257.
[520] Panel Report, para. 7.257.
[521] Panel Report, para. 7.254.

5.202. We note that Article 3.5 does not prescribe a particular methodology for evaluating the volume of imports for the purposes of demonstrating the causal link between dumped imports and injury to the domestic industry. Rather, Article 3.2, first sentence, requires an investigating authority to consider "whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption". Under Article 3.2, first sentence, these three methods do not operate to the mutual exclusion of each other and an investigating authority may opt to rely on one, two, or all of them for its analysis under that provision.

5.203. As we see it, the Panel's above analysis in the context of Japan's claim 6 reviewed the requirements set out in Article 3.2, first sentence, as opposed to those under Article 3.5 in addressing the *causation claim* at issue. Indeed, in the absence of any specific requirements concerning the volume of dumped imports, Article 3.5 could not have guided the Panel's assessment of whether the KTC adequately explained the decrease in the volume of imports from 2010 to 2012 in reaching its finding of a significant increase of the volume of dumped imports. Rather, in reviewing Japan's argument that the market share of dumped imports decreased on an end-point to end-point basis, the Panel relied on the requirements set out in Article 3.2, first sentence. Specifically, the Panel noted that the first sentence of Article 3.2 "sets out three parameters for the consideration of the volumes of the dumped import", and considered that "[t]he use of the disjunctive 'either ... or' in the first sentence of Article 3.2 suggests that an investigating authority need only to consider whether there is a significant increase either in absolute terms or in relative terms."[522] The Panel correctly explained that "[t]he results of the investigat[ing] authority's consideration from any of these perspectives can independently serve as a basis for its consideration of the ultimate causation question under Article 3.5."[523] However, in reviewing the *causation claim at issue*, the Panel, in our view, effectively incorporated the requirements in Article 3.2, first sentence, concerning the volume of dumped imports, in its assessment of a claim under Article 3.5. As discussed above, in reviewing a claim under Article 3.5, a panel is not called upon to revisit the question whether each of the interlinked components of this determination, such as the investigating authority's volume analysis, is itself consistent with the applicable requirements set out in Article 3.2. Rather, the task of a panel in addressing a claim under Article 3.5 is to review whether the investigating authority properly linked the *outcomes* of its analyses conducted pursuant to Articles 3.2 and 3.4 taking into account the evidence and factors required under Article 3.5, in coming to a definitive determination regarding the causal relationship between dumped imports and injury to the domestic industry. We find the Panel to have used the first sentence of Article 3.2 as "the template for its analysis"[524] of the causation claim at issue, rather than properly applying the requirements set out in Article 3.5. We therefore consider the Panel to have erred in its application of Article 3.5 of the Anti-Dumping Agreement.

5.204. This does not, however, conclude our examination regarding Japan's contention that it has demonstrated that the KTC's volume analysis contains flaws that "independently" undermined its causation determination. Japan contends that, while a finding of significant increase in the absolute level of imports over a one-year period might be sufficient to comply with the first sentence of Article 3.2 in certain cases, "the implications of the volume of imports for purposes of causation [analysis] under Article 3.5 become very different" if the increase: (i) is "merely regaining the historical level of imports"; and (ii) "actually represents a loss of market share".[525] However, we do not find specific arguments in Japan's submissions that substantiate the alleged "implications" of the import volume for the causation analysis under Article 3.5. Furthermore, although Japan rightly contends that the Panel, in the context of the causation claim at issue, was required to consider the volume-related facts and other facts "as part of a holistic analysis of the KTC's finding of causation and how the KTC explained that finding", Japan has not identified which "other facts" the Panel should have considered as part of "a holistic analysis" of the KTC's finding of causation.[526] We therefore do not consider Japan to have substantiated its "independent" claim that the KTC acted inconsistently with *the requirements of Articles 3.1 and 3.5* of the Anti-Dumping Agreement by focusing solely on one of the years of the three-year POI.

[522] Panel Report, fn 358 to para. 7.257.
[523] Panel Report, fn 358 to para. 7.257. (emphasis omitted)
[524] Japan's appellant's submission, para. 277.
[525] Japan's appellant's submission, para. 279.
[526] Japan's appellant's submission, para. 278.

5.3.4.1.2.2 Whether the Panel failed to consider price effects as an essential building block for any finding of causation

5.205. Before the Panel, Japan advanced three grounds in support of its claim that the KTC's analysis of the price effects of dumped imports "independently" undermined its causation determination, namely that: (i) there was a divergence between the trends in prices of dumped imports and domestic like product; (ii) dumped imports consistently and significantly oversold the domestic like product; and (iii) there was no competitive relationship between the dumped imports and the domestic like product, such that their prices were not comparable.[527] The Panel found that the KTC acted inconsistently with Articles 3.1 and 3.5 on the basis of the second and third grounds advanced by Japan.[528] Korea challenges these findings on appeal, which we consider in section 5.3.4.1.4 below.

5.206. As for diverging price trends, the Panel rejected Japan's arguments.[529] Japan appeals the Panel's findings and contends that the Panel: (i) "incorrectly viewed its findings about diverging price trends in isolation of its other findings about price comparability and price overselling"; and (ii) "incorrectly accepted allegations about the alleged fierce competition".[530] Japan avers that "[r]ather than considering the diverging price trends 'in themselves'", the Panel should have considered "the diverging price trends in the context of the lack of price comparability and the persistent and significant price overselling".[531]

5.207. In response, Korea submits that Japan's claim of legal error is unclear.[532] Korea avers that Japan does not take issue with the price-related findings that were in its favour but considers that: (i) "the Panel looked at other price-related issues in isolation, 'ignored its own findings', and thus essentially contradicted itself"; (ii) "the Panel 'never explained' how allegedly isolated examples demonstrated that all like products were in competition"; (iii) "the Panel never put its allegedly isolated examples in 'context'"; and (iv) "it is 'not an objective examination' of the Panel to consider facts in isolation."[533] Korea submits that "[a]ll of this appears to be more of an Article 11 DSU claim than a claim of legal error."[534]

5.208. Before the Panel, Japan argued that the prices of the dumped imports and that of the domestic like product diverged over the period of trend analysis, both on the basis of average sales price and on the basis of the price fluctuation index.[535] The Panel, therefore, understood Japan to assert that "these diverging price trends show[ed] that there was no market interaction between the dumped imports and the domestic like product", thus "undermining the KTC's price suppression and depression analyses, which in turn formed the basis of the ultimate determination under Article 3.5".[536] The Panel noted that the prices of the dumped imports and the domestic like product moved in generally the same direction from 2010 to 2011. However, from 2011 to 2012, the average price of dumped imports increased, while that of the domestic like product decreased.[537] The Panel recognized that "[a]n increase in the price of the dumped imports might be expected to be accompanied by an increase in domestic prices."[538] The Panel therefore considered that, in such a situation, it was expected of a reasonable investigating authority to explain why, nonetheless, it considers that the dumped imports affect the prices of domestic like product.[539] The Panel found that the KTC provided explanation in this regard.[540] The Panel further noted that, from 2012 to 2013,

[527] Panel Report, para. 7.259.
[528] Panel Report, para. 7.323.
[529] Panel Report, para. 7.296.
[530] Japan's appellant's submission, para. 283.
[531] Japan's appellant's submission, para. 284.
[532] Korea's appellee's submission, para. 439.
[533] Korea's appellee's submission, para. 439. (fns omitted)
[534] Korea's appellee's submission, para. 439.
[535] Panel Report, para. 7.273.
[536] Panel Report, para. 7.273.
[537] Panel Report, para. 7.277.
[538] Panel Report, para. 7.279.
[539] Panel Report, para. 7.279.
[540] Panel Report, para. 7.279. The Panel found that "the OTI attributed the increase in the dumped import prices to changes in the product mix of the dumped imports to higher-priced valves in the context of the divergence from 2011 to 2012." (Ibid.) The Panel noted that in certain product groups, "the prices of the dumped imports stagnated or decreased, in line with the price trends of the corresponding domestic like products." (Ibid., para. 7.295.a)

the average prices of both dumped imports and domestic like product declined, with average import prices declining to a greater extent.[541] In this respect, the Panel found that the difference in the decline "*in itself* [did] not demonstrate that the KTC erred in considering that the dumped imports and the domestic like products competed with each other".[542] Rather, the Panel found the KTC's explanation that the prices of the domestic industry were already at unsustainably low levels not to be unreasonable.[543]

5.209. As we see it, the Panel's analysis here focused on whether there was a competitive relationship between dumped imports and domestic like product despite diverging price trends, and whether the diverging price trends could, in and of themselves, undermine the causal relationship. We find this evident from the manner in which the Panel drew its conclusions concerning the diverging trends in the average prices of dumped imports and the domestic like product when it found that: (i) the different magnitude of the price decreases from 2012 to 2013 does not necessarily undermine the KTC's findings with respect to the *competitive relationship* between the dumped imports and the domestic like product[544]; (ii) the opposing price movements from 2011 to 2012 could suggest *a lack of competition* between the dumped imports and the domestic like product, and the KTC did not disregard this possibility in its analysis[545]; and (iii) the verified instances in which the dumped imports were sold at prices lower than those of the domestic like product support the view that *there was competition* in the Korean market for valves.[546] The Panel further explained that "[i]f there is evidence in the record which may call into question the nature and extent of the competitive relationship between dumped imports and the domestic like product, an investigating authority cannot disregard such evidence *in considering the effect of dumped imports on prices*."[547]

5.210. Thus, the Panel's above analysis reviewed the Korean investigating authorities' examination of the *relationship* between the prices of the dumped imports and those of the domestic like products, in order to ascertain the effects of the former on the latter. In our view, this corresponds to an examination properly conducted pursuant to Article 3.2, second sentence. The Panel's conclusion that the diverging price trends do not, in and of themselves, demonstrate that the KTC's determination of a causal relationship is inconsistent with Articles 3.1 and 3.5 was a mere consequence of its analysis as to whether the KTC's price-effects analyses were objective and reasoned, and compatible with the requirements set out in Article 3.2, second sentence. This, in our view, is further borne out from the manner in which the Panel addressed Korea's argument that the verified instances in which the dumped imports were offered to customers at prices similar to, or lower than, the prices of the domestic like product demonstrate "market interaction" between the dumped imports and the domestic like product.[548] In that context, the Panel found that the evidence of lower prices of imported products in sales of certain models or to certain customers, while in itself not determinative, did support the conclusion that there was competition between dumped imports and the domestic like product in the Korean market for valves, and "*which in turn lends support to the KTC's price suppression and depression findings*".[549] We note that the Korean investigating authorities' findings on the price-suppressing and -depressing effects of the dumped imports formed one of the bases for their ultimate determination of causation. However, the Panel's analysis of the issue of diverging price trends, in our view, was based on the applicable requirements under Article 3.2, rather than those concerning causation under Article 3.5, even though it was addressing a claim under Article 3.5. In so doing, the Panel effectively incorporated the requirements of Article 3.2, rather than applying properly the requirements set out in Article 3.5, when addressing Japan's causation claim under this provision. For these reasons, we find the Panel to have erred in its application of Article 3.5 of the Anti-Dumping Agreement.

5.211. This does not mean, however, that we consider Japan to have demonstrated that the KTC's examination of the diverging price trends necessarily rendered its causation determination inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement. Rather, apart from arguing that the Panel's review of the KTC's examination of diverging price trends was not properly done,

[541] Panel Report, para. 7.277.
[542] Panel Report, para. 7.278. (emphasis original)
[543] Panel Report, para. 7.278 (referring to KTC's Final Resolution (Panel Exhibit KOR-1b (BCI)), p. 18).
[544] Panel Report, para. 7.295.a.
[545] Panel Report, para. 7.295.a.
[546] Panel Report, para. 7.295.c.
[547] Panel Report, para. 7.275. (emphasis added)
[548] Panel Report, para. 7.291.
[549] Panel Report, para. 7.294. (emphasis added)

Japan has not demonstrated why the KTC's examination contains flaws that vitiate its causation determination *pursuant to the requirements set out in Articles 3.1 and 3.5*.

5.212. Specifically, contrary to Japan's argument[550], the Panel, at this stage of its analysis, did not come to a conclusion on how dumped imports affected domestic like product prices for the entire period of trend analysis. Rather, the Panel proceeded step by step, examining the trend in each year of the POI and the KTC's relevant explanation. Furthermore, the Panel observed that "[t]he KTC based its price suppression and depression findings in part on the 'fierce' competition between certain dumped imports and the domestic like product", evidenced by "SMC Korea's alleged price discrimination among different customers".[551] Japan submits that, in making this observation, the Panel never explained "how these isolated examples demonstrated that *all* domestic like products are in competition with the dumped imports" and thus "met the legal standard under either Article 3.2 or Article 3.5 to assess the effects of imports on the domestic like product as a whole".[552] However, while the Panel found that evidence of the alleged price discrimination supported the conclusion that there was competition between dumped imports and domestic like products, the Panel, importantly, acknowledged that it was not in itself determinative. Rather, the Panel noted that such evidence "lends support" to the KTC's findings of price suppression and price depression.

5.213. Moreover, the Panel found that "[t]he KTC's price suppression and depression findings *were not solely … based on a consideration of average price trends*", but also on "the alleged price discrimination among different customers with respect to specific products or product ranges, and the strengthened marketing activities of SMC Korea".[553] Thus, the Panel considered and analysed how isolated instances of lower priced sales affected the domestic like product prices as a whole. By arguing that "the Panel ignores the legal obligation to consider the effects on the prices of the domestic like product as a whole"[554], Japan attempts to view the Panel's assessment of its arguments regarding diverging price trends in isolation. The Panel's above analysis of the KTC's consideration of the diverging price trends reflects, in our view, a proper review pursuant to the requirements under Article 3.2. Therefore, we see no reason to disagree with such analysis in light of the applicable requirements under Article 3.2. However, in so doing, the Panel effectively incorporated the requirements of Article 3.2, rather than properly applying the requirements set out in Article 3.5, even though it was reviewing a claim under Article 3.5. We therefore consider the Panel to have erred in its application of Article 3.5 of the Anti-Dumping Agreement.

5.3.4.1.2.3 Whether the Panel failed to consider impact as an essential building block for any finding of causation

5.214. On appeal, Japan argues that the Panel's conclusion that the KTC need not establish a link between volume and price effects under Article 3.2 and the impact of the dumped imports on the domestic industry under Article 3.4 is wrong, and that the failure to establish this logical link "undermine[d]" the KTC's causation finding.[555] Japan asserts that the Panel rejected Japan's argument by focusing too narrowly on the requirements of Article 3.2 of the Anti-Dumping Agreement concerning volume and price and on Article 3.4 of the Anti-Dumping Agreement regarding impact, and not on the proper analysis under Article 3.5 regarding causation.[556]

5.215. Korea, in response, submits that this claim is "undeveloped" and "without merit" in light of the Panel's clear findings.[557] Korea contends that Japan does not explain what the Panel was required to evaluate other than to examine whether the authorities evaluated the impact in line with

[550] Japan contends that the legal standard is not whether the investigating authority has provided some explanation that is "not unreasonable" when viewed in isolation. (Japan's appellant's submission, para. 284) Rather, according to Japan, "the legal standard is whether the authority has reasonably explained why 'it considers that the dumped imports *affect domestic like product prices*.'" (Japan's appellant's submission, para. 284 (quoting Panel Report, para. 7.276) (emphasis added))

[551] Panel Report, para. 7.294.

[552] Japan's appellant's submission, para. 286. (italics original; underlining added)

[553] Panel Report, para. 7.295.d. (emphasis added)

[554] Japan's appellant's submission, para. 283.

[555] Japan's appellant's submission, para. 293 (referring to Panel Report, paras. 7.330 and 7.347.b).

[556] Japan's appellant's submission, para. 289.

[557] Korea's appellee's submission, para. 441 (referring to Panel Report, paras. 7.329-7.330).

Article 3.4, or what a "proper" analysis would consist of.[558] Instead, Korea points out that the Panel made findings "which follow[ed] established WTO jurisprudence" inasmuch as the Panel explained that "the 'logical progression of inquiry' does not mean that the examination of impact under Article 3.4 must be linked to the consideration under Article 3.2", but rather, "[t]hese two separate inquiries can be undertaken independently of each other, and brought together in the ultimate determination under Article 3.5."[559]

5.216. We recall that the Panel here was considering Japan's claim 6 under Articles 3.1 and 3.5 of the Anti-Dumping Agreement. Japan's claim rested on its argument that the KTC's failure to establish a "logical link" between its evaluation of certain factors having a bearing on the state of the domestic industry and its consideration of the volume of the dumped imports and the effect of the dumped imports on prices under Article 3.2 *for the purposes of its impact analysis under Article 3.4* rendered its causation analysis inconsistent with Article 3.5. The Panel explained that, "[w]hile there may be some overlap between the consideration of the effect of the dumped imports on domestic prices under the second sentence of Article 3.2 and the evaluation of 'factors affecting domestic prices' under Article 3.4", this does not mean that, as Japan seems to suggest, "a flawed price effects analysis will necessarily preclude a proper examination of the impact of the dumped imports on the domestic industry under Article 3.4."[560] The Panel also rejected Japan's argument that, by failing to examine two factors set out in Article 3.4, the Korean investigating authorities acted inconsistently with Article 3.5.[561] According to the Panel, since it had rejected the same argument with respect to the separate claim raised by Japan under Article 3.4, "[f]or the reasons set forth in that section", the Panel also rejected this argument under Article 3.5.[562]

5.217. We agree with the Panel that, "in order to properly examine the impact of dumped imports on the domestic industry *for purposes of Article 3.4*, an investigating authority [is not required to] link that examination with its consideration of the volume and the price effects of the dumped imports."[563] However, the Panel's analysis rejecting Japan's position described above is ultimately based on its understanding of the relationship between the inquiries contemplated under Articles 3.2 and 3.4.[564] Similarly, we do not see any reason to disagree with the Panel's finding that "there is no need 'to undertake a fully reasoned causation and non-attribution analysis' as part of Article 3.4."[565] Rather, the demonstration that subject imports are causing injury to the domestic industry "is an analysis specifically mandated by Article 3.5".[566] Thus, we do not consider Japan to have demonstrated an "independent" violation of Article 3.5 of the Anti-Dumping Agreement on the basis of its arguments that the Panel rejected. Nonetheless, the Panel's above analyses, including its reliance on the findings it made with respect to the separate claim raised under Article 3.4, further indicate that the Panel reviewed Japan's arguments in light of the requirement set out in Article 3.4 even though it was addressing a causation claim under Article 3.5. Thus, as we see it, the Panel's examination of the alleged flaws in the Korean investigating authorities' impact analysis primarily relates to the issue of whether the KTC's impact examination was in line with the requirements set out in Article 3.4, as opposed to those under Article 3.5, which, as we have explained above, does not foresee a panel revisiting the question whether an investigating authority's impact analysis is consistent with Article 3.4. In so doing, the Panel effectively incorporated the requirements of Article 3.4, rather than properly applying the requirements set out in Article 3.5, even though it was reviewing a claim under Article 3.5. We therefore consider the Panel to have erred in applying Article 3.5 of the Anti-Dumping Agreement.

[558] Korea's appellee's submission, para. 440.
[559] Korea's appellee's submission, para. 441 (quoting Panel Report, para. 7.329).
[560] Panel Report, fn 456 to para. 7.329.
[561] Panel Report, para. 7.325.
[562] Panel Report, para. 7.325.
[563] Panel Report, para. 7.330 (emphasis added).
[564] Panel Report, para. 7.330. The Panel also addressed Japan's arguments concerning the KTC's alleged failure to demonstrate explanatory force of the dumped imports on the state of the domestic industry and to properly take into account "positive" trends such that these considerations "disproved" the existence of causal link between the dumped imports and injury to the domestic industry. However, the Panel rejected these arguments. (Ibid., paras. 7.338-7.346) Japan has not challenged these findings on appeal in the context of its "independent" causation claim.
[565] Japan's appellant's submission, para. 290 (quoting Panel Report, para. 7.332)
[566] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.205 (referring to Appellate Body Report, *China – GOES*, para. 150).

5.3.4.1.3 Whether the Panel erred under Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement by failing to consider Japan's rebuttal arguments on the issue of "reasonable sales price"

5.218. On appeal, Japan contends that, "in accepting the KTC['s] explanation for the diverging price trends based on the constraints imposed by the so-called 'reasonable sales price', the Panel ignored Japan's rebuttal arguments about this issue."[567] Japan explains that "this issue became relevant when Korea used the 'reasonable sales price' affirmatively to justify the causation finding of its anti-dumping measure."[568] In Japan's view, "[o]nce Korea offered this proposed defense, Japan challenged this defense at length and the Panel had an obligation under the standard of review to address Japan's rebuttal."[569] According to Japan, the legal standard is the same under both Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement, and therefore the Panel ought to have considered alternative explanations.[570]

5.219. In response, Korea submits that "Japan does not actually quote any of the Panel's findings it considers to have been the result of a biased examination."[571] Korea submits that Japan makes a very serious accusation of bias by the Panel, based solely on the fact that the Panel did not deal with a rebuttal argument by Japan.[572] Korea states that "it is not sufficient under Article 11 [of the] DSU to claim that a certain argument was not addressed; let alone that it would be sufficient to claim that a Panel was biased simply because it allegedly did not address a 'rebuttal' argument."[573] Therefore, Korea submits that Japan has failed to demonstrate that the alleged disregard of this rebuttal argument constituted an egregious error that calls into question the good faith of the Panel.[574] Korea also points out that "the reason why the Panel did not address this argument is because Japan never made it in the context of its allegedly 'independent' causation claim."[575]

5.220. We recall that, under Article 11 of the DSU, a panel is required to consider all the evidence presented to it, assess the credibility of such evidence, determine the weight thereof, and ensure that the panel's factual findings have a proper basis in that evidence.[576] Within these parameters, "it is generally within the discretion of the [p]anel to decide which evidence it chooses to utilize in making findings."[577] A claim that a panel has failed to conduct an "objective assessment of the matter before it" is "a very serious allegation".[578] In a claim under Article 11 of the DSU, an appellant must identify specific errors[579] that are so material that, "taken together or singly"[580], they undermine the objectivity of the panel's assessment of the matter before it.[581]

5.221. In addition to Article 11 of the DSU, a panel reviewing a domestic authority's investigations under the Anti-Dumping Agreement is also subject to the standard of review set out in Article 17.6 of that Agreement. With respect to a panel's assessment of facts, "[t]he aim of Article 17.6(i) is to prevent a panel from 'second-guessing' a determination of a national authority when the establishment of the facts is proper and the evaluation of those facts is unbiased and objective."[582] Accordingly, "the task of a WTO panel is to examine whether the investigating authority has

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[567] Japan's appellant's submission, para. 295 (referring to Panel Report, para. 7.278; Japan's first written submission to the Panel, paras. 97-99; second written submission to the Panel, para. 53).
[568] Japan's appellant's submission, para. 295. (fn omitted)
[569] Japan's appellant's submission, para. 295 (referring to Japan's second written submission to the Panel, paras. 51-58; response to Panel question No. 98, paras. 48-51).
[570] Japan's appellant's submission, para. 294.
[571] Korea's appellee's submission, para. 447.
[572] Korea's appellee's submission, para. 447.
[573] Korea's appellee's submission, para. 447.
[574] Korea's appellee's submission, para. 447.
[575] Korea's appellee's submission, para. 447 (referring to Panel Report, para. 7.227).
[576] Appellate Body Reports, *China – Rare Earths*, para. 5.178 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 185).
[577] Appellate Body Reports, *US – COOL*, para. 299 (quoting Appellate Body Report, *EC – Hormones*, para. 135).
[578] Appellate Body Reports, *China – Rare Earths*, para. 5.227 (quoting Appellate Body Report, *EC – Poultry*, para. 133).
[579] Appellate Body Report, *EC – Fasteners (China)*, para. 442.
[580] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1318.
[581] Appellate Body Reports, *China – Rare Earths*, para. 5.179. See also Appellate Body Report, *EC – Fasteners (China)*, para. 499.
[582] Appellate Body Report, *Thailand – H-Beams*, para. 117.

adequately performed its investigative function, and has adequately explained how the evidence supports its conclusions."[583] However, "in light of the standard of review under the Anti-Dumping Agreement, … it is not for a panel to conduct a *de novo* review of the facts of the case or substitute its judgement for that of the investigating authority."[584] Rather, "a panel must examine 'whether, in the light of the evidence on the record, the conclusions reached by the investigating authority are reasoned and adequate'."[585]

5.222. We note that, in connection with Japan's claim under Articles 3.1 and 3.2 of the Anti-Dumping Agreement with respect to price effects, the Panel noted that "[t]he 'reasonable sales price' is a target domestic industry price constructed by the OTI."[586] The Panel noted that "the OTI appended two explanatory notes regarding the calculation of the reasonable sales price to the table reporting comparisons between the actual price and the reasonable sales price."[587] The explanatory note that does not contain BCI states:

> Note 1) Reasonable sales price = (manufacturing cost per unit + SG&A expenses per unit)/(1-reasonable operating profit ratio)[.][588]

5.223. The Panel further noted that "[i]n considering price suppression, the KTC referred to the difference between the 'reasonable sales price' and the actual average domestic prices in the Final Resolution."[589] However, because the Panel found that Japan's claim under Articles 3.1 and 3.2 of the Anti-Dumping Agreement with respect to price effects was outside its terms of reference, it did not address Japan's argument that "[t]he Korean [investigating] authorities never explained why the profit margins selected [to construct the reasonable sales price] were in fact a reasonable proxy for the prices that the Korean producers should have been able to charge as 'reasonable sales prices'."[590]

5.224. According to Japan, "[e]ven if … [it] did not focus on the 'reasonable sales price' as part of its original argument about causation" under its "independent" claim under Articles 3.1 and 3.5, "this issue became relevant when Korea used the 'reasonable sales price' affirmatively to justify the causation finding of its anti-dumping measure."[591] In support, Japan refers to paragraph 7.278 of the Panel Report, but, as Korea correctly points out, "in that paragraph there is no discussion on the use of 'reasonable sales price'."[592] Rather, in that paragraph, the Panel compared the actual average prices of dumped imports with those of domestic like products from 2010 to 2013, focusing, in particular, on 2013. Therefore, we are unable to see the error in the Panel's analysis that Japan is alluding to, especially when Japan did not make any arguments concerning the "reasonable sales price" or explain its relevance in that context and in the overall context of its "independent" causation claim.

5.225. Similarly, Japan contends that, although the Korean investigating authorities "described the formula being used, they never explained the basis for choosing the benchmark 'reasonable operating profit rate'".[593] In support, Japan refers to paragraphs 7.475 and 7.477 of the Panel Report. These paragraphs, however, contain the description of the "Relevant facts" underlying Japan's claim concerning disclosure of essential facts pursuant to Article 6.9 of the Anti-Dumping Agreement, as opposed to facts relating to Japan's claim 6 under Articles 3.1 and 3.5 of the Anti-Dumping Agreement. We thus fail to see how the facts described in the paragraphs referenced by Japan relate to the objectivity of the Panel's assessment of Japan's "independent"

[583] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.255.
[584] Appellate Body Report, *Russia – Commercial Vehicles*, para. 5.102 (referring to Appellate Body Reports, *US – Washing Machines*, para. 5.258; *US – Steel Safeguards*, para. 299; *Argentina – Footwear (EC)*, para. 121; *US – Anti-Dumping and Countervailing Duties (China)*, para. 379).
[585] Appellate Body Report, *Russia – Commercial Vehicles*, para. 5.102 (quoting Appellate Body Report, *US – Washing Machines*, para. 5.258, in turn quoting Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93).
[586] Panel Report, para. 7.116.
[587] Panel Report, para. 7.116.
[588] Panel Report, para. 7.116 (quoting OTI's Final Report (Panel Exhibit KOR-2b (BCI)), p. 57).
[589] Panel Report, para. 7.117.
[590] Japan's appellant's submission, para. 296.
[591] Japan's appellant's submission, para. 295.
[592] Korea's appellee's submission, para. 447.
[593] Japan's appellant's submission, para. 296 (referring to Panel Report, paras. 7.475 and 7.477).

causation claim such that the Panel could be said to have erred under Article 11 of the DSU and Article 17.6(i) of the Anti-Dumping Agreement.

5.226. For these reasons, we reject Japan's claim that the Panel failed to "respect the proper standard of review" and acted inconsistently with Article 11 of the DSU and Article 17.6(i) of the Anti-Dumping Agreement.[594]

5.227. We now turn to address the claims raised by Korea in its other appeal concerning the Panel's findings on price comparability and overselling in the context of Japan's "independent" causation claim.

5.3.4.1.4 Whether the Panel erred in its findings concerning price comparability and overselling when addressing Japan's claim 6 under Articles 3.1 and 3.5 of the Anti-Dumping Agreement

5.228. To recall, Japan advanced three grounds in support of its claim that the KTC's analysis of the price effects of dumped imports "independently" undermined its causation determination under Article 3.5 because: (i) there was a divergence between the trends in prices of dumped imports and domestic like product; (ii) dumped imports consistently and significantly oversold the domestic like product; and (iii) there was no competitive relationship between the dumped imports and the domestic like product, such that their prices were not comparable.[595] In section 5.3.4.1.2.2 above, we have reviewed Japan's appeal of the Panel's findings regarding the first ground.

5.229. With respect to the third ground, concerning price comparability, in the context of the transaction-to-average comparisons, the Panel noted that the KTC found price suppression and price depression based, *inter alia*, on individual transactions in which certain models of the dumped imports sold or offered to certain customers were priced lower than the average price of a corresponding model of the domestic like product.[596] The Panel considered that, in light of the possible effect on the comparisons made, an unbiased and reasonable investigating authority could not have properly compared these individual transaction prices with the average domestic like product price of a corresponding model without further consideration and explanation of the relevance or significance of the different time periods and quantities involved in these transactions.[597] The Panel noted that the KTC relied on the price differentials in these comparisons in finding that dumped imports had price-suppressing and -depressing effects on domestic prices, which in turn was one of the bases for its ultimate determination under Article 3.5.[598] The Panel concluded that the KTC acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement by failing to ensure price comparability.[599]

5.230. With respect to the second ground, regarding price overselling, the Panel considered that "whether the fact of consistent average price overselling demonstrates that the KTC's determination of causation was inconsistent with Articles 3.1 and 3.5 cannot be separated from a consideration of whether the KTC's overall analysis of price effects is reasonable, *in light of the consistent average price overselling by the dumped imports*."[600] The Panel considered that, while individual instances of "underselling" by dumped imports may indeed indicate price-suppressing or -depressing effects on the domestic like product prices as a whole, it questioned whether the KTC's analysis was sufficiently "robust to support its conclusions".[601] In particular, the Panel found that it was not clear that the KTC considered whether, and if so how, the individual instances of "underselling" with respect to certain models affected "the prices of other models of the domestic like product, the extent of total domestic sales affected by such 'underselling', or how these instances of 'underselling'

[594] Japan's appellant's submission, para. 297.
[595] Panel Report, para. 7.259.
[596] Panel Report, para. 7.270 (referring to KTC's Final Resolution (Panel Exhibit KOR-1b (BCI)), p. 19).
[597] Panel Report, para. 7.271.
[598] Panel Report, para. 7.272.
[599] Panel Report, para. 7.272.
[600] Panel Report, para. 7.301. (emphasis original)
[601] Panel Report, para. 7.303.

affected domestic like product prices as a whole".[602] The Panel also considered that examples or isolated instances of aggressive pricing behaviour will not, standing alone, suffice to support a finding of price-suppressing and -depressing effects of dumped imports on domestic like product prices as a whole.[603]

5.231. As we see it, the Panel's findings with respect to the issues of price comparability and price overselling are closely linked, inasmuch as the KTC relied on the relevant price comparisons to find price effects on the domestic like product as a whole, while dismissing the argument concerning the consistent overselling by the dumped imports. Indeed, as noted by the Panel, "[t]he KTC rejected this argument because, in its view, the average price overselling was the result of the differential pricing of dumped imports for different models or options and to different customers."[604] Instead, "the KTC focused on: (a) the lower prices of certain [imported] products to certain customers; and (b) the 'strengthened marketing activities' of the related importer SMC Korea as the two bases of its finding on price effects."[605] Ultimately, the Panel found that the KTC acted inconsistently with Articles 3.1 and 3.5 because: (i) the KTC failed to ensure price comparability in the transaction-to-average comparisons due to the different time periods and quantities involved[606]; and (ii) the KTC failed to explain how and why a subset of transactions for certain models was sufficient to establish price effects for the domestic like product as a whole, notwithstanding the consistent average price overselling by the dumped imports.[607]

5.232. On appeal, Korea advances two main grounds, claiming that: (i) the Panel relieved Japan of its burden to demonstrate that the KTC failed to ensure price comparability and, instead, made the case for Japan[608]; and (ii) the Panel imposed a price comparison requirement not found in Article 3.5 of the Anti-Dumping Agreement and that is more demanding than the standard under Article 3.2 of the Anti-Dumping Agreement.[609]

5.233. Korea's arguments thus centre on the issue of price comparability and call upon us to first examine the relevance of price comparability in the context of an investigating authority's injury determination under Article 3 of the Anti-Dumping Agreement. We recall that Article 3.1 provides that a determination of injury shall be based on positive evidence and involve an objective examination of "the effect of the dumped imports on prices in the *domestic market for like products*".[610] Article 3.2, second sentence, lists three price effects that are distinct from each other, in that, even if prices of the dumped imports do not significantly undercut those of the domestic like products, such imports may nevertheless have a price-suppressing or -depressing effect on domestic prices.[611] Article 3.2, second sentence, as the Panel also noted[612], does not, however, prescribe specific methodologies as to how an investigating authority is to consider whether there has been a significant price undercutting, price suppression, or price depression. Under Article 3.2, second sentence, an investigating authority therefore has a measure of discretion in how it chooses to assess price effects. The Appellate Body found, however, that "a failure to ensure price comparability" could not be considered to be consistent with the requirement under Article 3.1 that "a determination of injury be based on 'positive evidence' and involve an 'objective examination' of, *inter alia*, the effect of subject imports on the prices of domestic like products".[613] Thus, "if subject import and domestic prices were not comparable, this would defeat the explanatory force that subject import prices might have for the depression or suppression of domestic prices."[614] For this

[602] Panel Report, para. 7.303. The Panel recalled that WTO panels have considered that "a finding of price depression in a situation where dumped imports oversell the domestic like product requires an explanation of how the investigating authorities reached a conclusion of price depression in such a situation." (Ibid., fn 420 to para. 7.303 (referring to Panel Reports, *China − Autos (US)*, para. 7.272; *China − Cellulose Pulp*, para. 7.86))
[603] Panel Report, para. 7.318.
[604] Panel Report, para. 7.300.
[605] Panel Report, para. 7.300. (fn omitted)
[606] Panel Report, para. 7.272.
[607] Panel Report, para. 7.322.
[608] Korea's other appellant's submission, paras. 197-207.
[609] Korea's other appellant's submission, paras. 208-226.
[610] Emphasis added.
[611] Appellate Body Report, *China − GOES*, para. 137.
[612] Panel Report, para. 7.266.
[613] Appellate Body Report, *China − GOES*, para. 200.
[614] Appellate Body Report, *China − GOES*, para. 200. (fn omitted)

reason, the Appellate Body stated that "[a]s soon as price comparisons are made, price comparability necessarily arises as an issue."[615]

5.234. These considerations suggest that, to the extent that an investigating authority relies on price comparisons in its consideration of price effects of subject imports, price comparability needs to be ensured. Thus, where an investigating authority fails to ensure price comparability in price comparisons between dumped imports and the domestic like product, this undermines its findings of price effects under Article 3.2, to the extent that it relies on such price comparisons.

5.235. With these considerations in mind, we address each of Korea's arguments, starting with whether the Panel unduly relieved Japan of its burden of demonstrating that the KTC failed to ensure price comparability.

5.3.4.1.4.1 Whether the Panel erred in law by unduly relieving Japan of its burden of demonstrating that the KTC failed to ensure price comparability

5.236. Korea submits that the two aspects of the KTC's price-effects analysis that the Panel took issue with, namely (i) the KTC's comparison of individual transaction prices with average sales prices; and (ii) the KTC's justification of its price suppression and price depression findings in light of the average price overselling by the dumped imports, "are different from the question of price comparability that was raised by Japan and should thus not have been examined by the Panel given the lack of a *prima facie* case developed by Japan in this respect".[616] Korea recalls that, before the Panel, Japan challenged the competitive relationship between the dumped imports and the domestic like products, arguing that the two products were not in competition with each other in the Korean market for various reasons.[617] Korea submits that the Panel rejected Japan's argument that there was no competitive relationship between the two products and concluded, "in unequivocal terms, that '[t]he verified instances in which the dumped imports were sold at prices lower than those of the domestic like product support the view that there was competition in the Korean market for valves'".[618] Thus, Korea submits that, with Japan failing to make its *prima facie* case against the existence of competition between the dumped imports and the domestic like product, and thus against the price comparability between the dumped and domestic products, "the Panel's analysis should have ended right there."[619] By continuing to examine the issue of price comparability, Korea contends that "[t]he Panel shifted the burden of proof to Korea on a technical point that *was not* developed by Japan."[620]

5.237. Japan, for its part, contends that, contrary to Korea's argument, Japan did not limit its arguments to the existence of a general competitive relationship between dumped imports and the domestic like products. Therefore, according to Japan, the Panel correctly noted that Japan had stressed the points about price comparability in its arguments.[621] Furthermore, Japan argues that ensuring price comparability is an essential part of any proper finding of price effects under the second sentence of Article 3.2 or of causation under Article 3.5.[622] Japan contends that Korea misinterprets the obligation of the "effect of dumped imports on prices" under the second sentence of Article 3.2, and of a finding of "causing injury" under Article 3.5. Japan avers that the effect of dumped imports on domestic prices, and ultimately the question whether dumped imports are "causing injury", can be determined properly only when the investigating authority ensures that the prices being analysed are, in fact, comparable.[623]

5.238. Korea's contentions are based on the premise that Japan's arguments before the Panel concerning price comparability were limited to Japan's view that there was a lack of competitive relationship, or substitutability, between the dumped imports and domestic like products. In Korea's view, Japan's arguments do not encompass the issue of comparability between the specific transactions on which the Korean investigating authorities relied in reaching their finding of price

[615] Appellate Body Report, *China – GOES*, para. 200 (quoting Panel Report, *China – GOES*, para. 7.530).
[616] Korea's other appellant's submission, para. 198.
[617] Korea's other appellant's submission, para. 201 (referring to Panel Report, para. 7.259).
[618] Korea's other appellant's submission, para. 201 (quoting Panel Report, para. 7.295.c).
[619] Korea's other appellant's submission, para. 202.
[620] Korea's other appellant's submission, para. 198. (emphasis original)
[621] Japan's appellee's submission, para. 94.
[622] Japan's appellee's submission, para. 93.
[623] Japan's appellee's submission, para. 93.

suppression and price depression, which in turn was one of the bases for finding causation. However, the Panel, as we recall, noted Japan's argument that, *in its price-effects analysis*, the KTC failed to ensure price comparability between specific products or product segments of the dumped imports and the domestic like product.[624] The Panel specifically noted Japan's contention that "the KTC 'failed to consider the comparability of products it *used to reach its conclusions of price depression and suppression*, and equally failed to conduct an objective examination of the overall extent of price competition between subject imports and domestic products'."[625] Although Japan used the term "comparability of products", Japan also alluded to the KTC's failure to conduct an objective examination of the overall extent of price competition. For example, Japan contended before the Panel that the KTC never explained in its reports how the *conclusions of price suppression and price depression* were supported by the comparison between the prices of subject imports and the "high-end prices" of domestic like products.[626] In so doing, Japan, in our view, made out a *prima facie* case regarding the requirement on the KTC to ensure price comparability in its price-effects analysis under Article 3.2, second sentence. The Panel's understanding of Japan's arguments is thus well founded in view of the applicable requirements under Article 3.2, second sentence, which concerns price effects of dumped imports on the domestic like product.

5.239. Moreover, we note that it is undisputed that "the KTC undertook price comparisons."[627] In its price suppression and price depression analyses, the KTC compared, *inter alia*, individual resale transaction prices of the dumped imports to the average price of the corresponding model of the domestic like product, and concluded that the "sales price of the dumped products was much lower than the average sales price in the case of certain products or customers for which the degree of competition with the domestic industry was fierce".[628] Ultimately, the KTC relied on the price differentials in these comparisons in finding that dumped imports had price-suppressing and -depressing effects on domestic prices, which in turn was one of the bases for its ultimate determination of causation under Article 3.5.[629] In light of Japan's argument that the KTC failed to conduct an objective examination of the overall extent of price competition in reaching its *price suppression and price depression findings*, the Panel correctly considered that, to the extent an investigating authority's consideration of price suppression or price depression may involve comparison of prices, the investigating authority must ensure that the prices being compared are properly comparable.[630] However, the Panel's above analysis was more directly relevant in the context of Article 3.2, second sentence, rather than in that of Article 3.5. In so doing, the Panel effectively incorporated the requirements of Article 3.2, rather than applying properly the requirements set out in Article 3.5, even though the Panel was reviewing a claim under the latter provision. While we consider that the Panel's above findings pertain to a proper application of the requirements under Article 3.2, we find that they nonetheless constitute an error in the application of Article 3.5 of the Anti-Dumping Agreement.

5.3.4.1.4.2 Whether the Panel erred in law by imposing a price comparison requirement not contained under either Article 3.2 or Article 3.5 of the Anti-Dumping Agreement

5.240. Korea recalls that Article 3.5 of the Anti-Dumping Agreement refers to the effects of dumping "as set forth in paragraphs 2 and 4". Korea submits that, even assuming *arguendo* that this reference can be read as importing the obligation that is contained in Article 3.2 of the Anti-Dumping Agreement regarding the effects of the dumped imports on prices, "it cannot be read to introduce specific obligations about the method to be used when conducting this price effects analysis."[631] Korea recalls that, with respect to the KTC's consideration that certain sales of the dumped import models took place at prices below the average or high-end prices of the corresponding models of the domestic like product, the Panel found that "an unbiased and reasonable investigating authority could not have properly compared these individual transaction prices with the average domestic like product price of a corresponding model, without further

[624] Panel Report, para. 7.264.
[625] Panel Report, para. 7.264 (quoting Japan's second written submission to the Panel, para. 17). (emphasis added)
[626] Japan's comments on Korea's response to Panel question No. 88, para. 33.
[627] Panel Report, para. 7.267.
[628] Panel Report, para. 7.267.b (quoting KTC's Final Resolution (Panel Exhibit KOR-1b (BCI)), p. 19).
[629] Panel Report, para. 7.272.
[630] Panel Report, para. 7.266.
[631] Korea's other appellant's submission, para. 208.

consideration and explanation of the relevance or significance of these differences."[632] Korea submits that, in the context of an Article 3.2 consideration of the price effects of the dumped imports, "there is no basis for requiring such an additional analysis when no price undercutting finding is made."[633]

5.241. In response, Japan submits that the Panel properly applied the requirements of Articles 3.1 and 3.5 of the Anti-Dumping Agreement, and faulted the KTC for failing to recognize the extent to which the evidence of pervasive overselling of the domestic like product as a whole fatally undermined the KTC's finding of causation.[634] Japan submits that Korea's argument "misunderstands the obligations under Articles 3.1 and 3.5 and their relationship to the 'price effects' analysis required by Article 3.2".[635] Japan contends that the Panel correctly focused on the need to base conclusions about price suppression and price depression on the prices of the domestic like product as a whole.[636] Japan submits that the KTC noted the price overselling but, contrary to Korea's assertions, ignored the consistency and the significance of the overselling and did not discuss at all the implications of this fact for its analysis of price suppression.[637] Japan explains that the KTC failed to discuss the implications of these key facts.[638] Consequently, the KTC failed to explain how the subject imports had any explanatory power for the alleged suppression of the domestic prices.[639] Thus, Japan submits that these failures seriously undermined the KTC's conclusions about price suppression and, ultimately, about causation.[640]

5.242. As noted, Korea's arguments centre on the issue of price comparability in the context of an injury determination under Article 3 of the Anti-Dumping Agreement. Korea's arguments rest on the premise that there is no obligation under Article 3.2 to ensure price comparability, so long as an investigating authority does not make a finding of price undercutting. We have explained above that Article 3.2, second sentence, lists three price effects that are distinct from each other, in that, even if prices of the dumped imports do not significantly undercut those of the domestic like products, such imports may nevertheless have price-suppressing or -depressing effects on domestic prices.[641] We have also recalled the Appellate Body's finding that "a failure to ensure price comparability" cannot be considered to be consistent with the requirement under Article 3.1 that "a determination of injury be based on 'positive evidence' and involve an 'objective examination' of, *inter alia*, the effect of subject imports on the prices of domestic like products".[642] Thus, as the Appellate Body stated, "[a]s soon as price comparisons are made, price comparability necessarily arises as an issue."[643] Accordingly, we have noted that, to the extent an investigating authority relies on price comparison in its consideration of price effects of dumped imports, price comparability needs to be ensured. Thus, where an investigating authority fails to ensure price comparability in undertaking price comparisons between dumped imports and the domestic like product, this would undermine its finding of price suppression or depression under Article 3.2, to the extent that it relies on such price comparisons and not only when a finding of price undercutting is made, as Korea suggests.

5.243. In the present dispute, the Panel's findings challenged by Korea relate to the KTC's findings of price suppression and price depression pursuant to Article 3.2, second sentence. The Panel, as we recall, described the context in which the KTC relied on the transaction-to-average price underselling analysis and the "strengthened marketing activities" as follows:

> In the present case, interested parties argued during the domestic investigation that the fact that average dumped import prices were higher than those of the domestic like product throughout the period of trend analysis precluded a finding of price suppression or price depression. The KTC rejected this argument because, in its view, the average price overselling was the result of the differential pricing of dumped imports for different models or options and to different customers. Instead, the KTC focused on: (a) the

[632] Korea's other appellant's submission, para. 215 (referring to Panel Report, para. 7.271).
[633] Korea's other appellant's submission, para. 215.
[634] Japan's appellee's submission, para. 106.
[635] Japan's appellee's submission, para. 106.
[636] Japan's appellee's submission, para. 101.
[637] Japan's appellee's submission, para. 113.
[638] Japan's appellee's submission, para. 113.
[639] Japan's appellee's submission, para. 113.
[640] Japan's appellee's submission, para. 113.
[641] Appellate Body Report, *China – GOES*, para. 137.
[642] Appellate Body Report, *China – GOES*, para. 200.
[643] Appellate Body Report, *China – GOES*, para. 200 (quoting Panel Report, *China – GOES*, para. 7.530).

> lower prices of certain products to certain customers; and (b) the "strengthened marketing activities" of the related importer SMC Korea as the two bases of its finding on price effects.[644]

5.244. The Panel thus understood the Korean investigating authorities to have considered that individual cases of dumped import resale prices for some models that were lower than average domestic prices and high-end domestic prices for corresponding models to certain customers (i.e. individual instances of "underselling") led to price suppression and price depression of the domestic like product.[645] In this respect, we note that the Korean investigating authorities conducted and relied on these price comparisons, including evidence of price discrimination and aggressive pricing behaviour, to make the point that, despite the higher average prices of the imported products, a finding of price suppression and price depression could nonetheless be sustained by the evidence.[646] Similarly, the KTC examined and relied on the instances of price underselling to find that they "had the effect of suppressing increases in the price of the like product or causing decreases thereof".[647]

5.245. The Panel set out in a table what Korea referred to as a series of comparisons between individual resale transaction prices of two models of dumped imported valves and the average prices of corresponding models of the domestic like product reported in the OTI's Final Report. This table underlined those transactions in which the dumped import price to certain customers was lower than the average domestic price for the corresponding model produced and sold by the Korean producers.[648] The Panel found that the listed transactions "took place on different dates and involved different quantities".[649] The Panel observed that, in general, the lower the quantity involved in a transaction, the higher the unit price of the dumped imported valve(s). The Panel took the view that, in light of the possible effect on the comparisons made, an unbiased and reasonable investigating authority could not have properly compared these individual transaction prices with the average domestic like product price of a corresponding model without further consideration and explanation of the relevance or significance of these differences.[650] The Panel found that the evidence before it did not suggest that either the KTC or the OTI made any effort to consider differences or their potential consequences for price suppression and price depression in the determination of material injury caused by dumped imports, thereby casting doubt on the validity of these comparisons.[651]

5.246. According to Korea, the Panel was wrong to rely on the above-mentioned table as an "exclusive basis" to find fault with the KTC's price-effects analysis, because the table was nothing more than an indicator of the Japanese respondents' strategic low pricing that the KTC then went on to examine in more detail.[652] However, we note that the Korean investigating authorities relied on the outcome of these comparisons and, later, on the outcome of similar comparisons concerning 13 "representative models" to find price-suppressing and -depressing effects of the dumped imports. Indeed, as Korea stated before the Panel, "when SMC Korea [sold] the identical dumped product model to different customers" applying "widely different sales prices", it was "undercutting prices of domestic like product in individual transactions where it compete[d] with domestic producers"[653] and thus "force[d] domestic producers to react to the fierce competition from dumped imports by

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[644] Panel Report, para. 7.300. (fn omitted)

[645] Panel Report, para. 7.302 (referring to OTI's Final Report (Panel Exhibit KOR-2b (BCI)), pp. 100-101; Korea's response to Panel's question No. 88(b), para. 19; Record Data on the Dumped Imports' Individual Resale Transaction (Panel Exhibit KOR-57 (BCI))). The Panel clarified that it used the term "underselling" as "shorthand" for the situation in which "prices of a model of dumped imports in certain transactions were lower than those of the corresponding domestic like product" as opposed to price undercutting, which is one of the three price effects mentioned in the second sentence of Article 3.2 of the Anti-Dumping Agreement. (Ibid., fn 419 to para. 7.302)

[646] Panel Report, para. 7.316. See also ibid., para. 7.300.

[647] Panel Report, para. 7.300 (quoting KTC's Final Resolution (Panel Exhibit KOR-1b (BCI)), p. 19). (emphasis omitted)

[648] Panel Report, para. 7.270 and Table 1 (referring to OTI's Final Report (Panel Exhibit KOR-2b (BCI), pp. 100-101)).

[649] Panel Report, para. 7.271.

[650] Panel Report, para. 7.271.

[651] Panel Report, para. 7.271.

[652] Korea's opening statement at the oral hearing.

[653] Korea's response to Panel question no. 88, para. 22 (referring to OTI's Final Report (Panel Exhibit KOR-2b (BCI)), pp. 99-101 and fn 60).

reducing prices of domestic like product".[654] Moreover, the Panel recognized that "[i]n its Final Report, the OTI listed 'underselling' transactions for two models"[655] and that, later on, "Korea provided [Panel] Exhibit KOR-57, a list of comparisons of the prices of all of the resale transactions of the Japanese respondent SMC Korea during 2013 with the average and high-end prices of the corresponding models of the domestic like product."[656]

5.247. The KTC's transaction-to-average comparison analysis was thus aimed at assessing whether the prices of dumped imports were lower than the prices of domestic like products for determining price effects within the meaning of Article 3.2, second sentence. Price comparability thus became an important issue as the probative value of the comparison depended on the degree of price comparability and concerned the objectivity and evidentiary foundation of the KTC's price suppression and price depression findings under Articles 3.1 and 3.2. We agree with the Panel that the KTC was required to ensure price comparability in these price comparisons inasmuch as it relied on the price differentials to find that dumped imports had price-suppressing and -depressing effects on domestic prices. However, the Panel's above analysis was pertinent to a claim under Article 3.2, and in line with the requirements of that provision, rather than to a claim under Article 3.5, where a panel's task consists of reviewing an investigating authority's ultimate injury and causation determination.

5.248. Korea further argues that, in examining the KTC's findings concerning the consistent overselling of dumped imports, the Panel found that "a 'sufficiently robust' analysis" must include "considerations as to 'whether, and if so how, … individual instances of "underselling" with respect to certain models affected the prices of other models of the domestic like product, the extent of total domestic sales affected by such "underselling", or how these instances of "underselling" affected domestic like product prices as a whole'".[657] Korea submits that the Panel thus "impos[ed] a requirement to demonstrate how and to what extent underselling in certain competitive sales affected the prices of the domestic like product 'as a whole' or 'overall'", and that such a requirement has no basis in either Article 3.2 or Article 3.5 of the Anti-Dumping Agreement.[658]

5.249. In response, Japan submits that the Panel did not impose an unreasonable burden on the Korean investigating authorities. Rather, according to Japan, "[t]he Panel simply required some reasonable explanation grounded in facts that showed isolated examples of what were dissimilar transactions were in fact relevant to a finding of price effects for the product as a whole."[659] Japan submits that the Panel correctly focused on the need to base conclusions about price suppression and price depression on the prices of the domestic like product as a whole, since a finding of price effects for a subset of the domestic like products cannot be applied to all of the other domestic like products without positive evidence.[660]

5.250. We note that the KTC relied on individual instances of "underselling" to address the argument by the interested parties that the consistent overselling by dumped imports based on the average price would undermine findings of price suppression and price depression. In response to such an argument, the KTC relied on the transaction-to-average comparison analysis and the "strengthened marketing activities".[661] As noted by the Panel, the KTC found that "the sales price of the dumped products was much lower than the average sales price" in the case of "certain products or customers

[654] Korea's response to Panel question no. 88, para. 23.
[655] Panel Report, para. 7.304. (fn omitted)
[656] Panel Report, para. 7.305. We examine Korea's arguments challenging the Panel's examination of Panel Exhibit KOR-57 in section 5.3.4.1.5 below.
[657] Korea's other appellant's submission, para. 204 (quoting Panel Report, para. 7.303).
[658] Korea's other appellant's submission, para. 222. See also ibid., para. 205.
[659] Japan's appellee's submission, para. 100. (fn omitted)
[660] Japan's appellee's submission, para. 101.
[661] We note that Korea accepts that "[i]n response to arguments about lack of competition between the imported and domestic products as evidenced by the relatively high degree of overselling, [the] KTC examined the extent to which the fact that the average sales price of the dumped imports was higher than that of the like product undermined its conclusion about the price suppressive effects of the dumped imports." (Korea's other appellant's submission, para. 237) Korea also accepts that the OTI found many examples of cases where imported products were actually resold or offered for resale to customers in Korea at prices similar to or even lower than the domestic sales price of the like product. (Ibid., para. 238)

for which the degree of competition with the domestic industry was fierce, which had *the effect of suppressing increases in the price of the like product or causing decreases thereof*".[662]

5.251. The KTC thus introduced and relied on the evidence regarding the individual instances of "underselling" in order to respond to the interested parties' arguments concerning the existence of price overselling based on the average prices of all the products. The KTC reached the conclusion that these individual instances of "underselling" had the effect of *suppressing and depressing the prices* of domestic like product despite the overall overselling by the dumped imports. In assessing whether the KTC provided sufficient reasoning for the above conclusions, the Panel found that "it is not clear" that the KTC considered whether, and if so how, the individual instances of "underselling" with respect to certain models affected "the prices of other models of the domestic like product, the extent of total domestic sales affected by such 'underselling', or how these instances of 'underselling' affected domestic like product prices as a whole".[663]

5.252. In response to Korea's argument that Panel Exhibit KOR-57 demonstrated how the KTC considered the extent to which the domestic like product prices were affected by individual instances of dumped imports' pricing, the Panel queried whether Panel Exhibit KOR-57, in conjunction with the OTI's Final Report[664] and the KTC's Final Resolution, supported Korea's contention.[665] The Panel noted that Panel Exhibit KOR-57 is a list of 115,524 transactions that reports the product code, series, date, quantity, value, and unit price of resale transactions of certain models of the dumped imports, and the average price and the high-end price of corresponding models of the domestic like product.[666] The Panel observed that "[w]here the transaction resale price of the dumped imports is lower than the average price or the high-end price of the domestic like product, a notation of 'undercutting' is recorded for the particular transaction."[667] The Panel considered that Panel Exhibit KOR-57 shows that "the OTI compared dumped import resale prices in a large number of transactions in 2013 with the average price and the high-end price of the corresponding models of the domestic like product."[668] Apart from the above, the Panel found that "[Panel] Exhibit KOR-57 does not contain any other narrative."[669] Ultimately, the Panel found that "[t]he mere fact that there are some instances of 'underselling', even if there are many of them, does not necessarily indicate that the prices of the domestic like product is suppressed or depressed *as a whole* as a result."[670]

5.253. Although the Panel spoke of price suppression or depression of the domestic like product "as a whole", we do not consider the Panel to have imposed a legal requirement "to demonstrate how and to what extent underselling in certain competitive sales affected the prices of the domestic like product 'as a whole'", as Korea argues.[671] Rather, in the context of this case, the Panel examined the KTC's determination and, on that basis, "[understood] the KTC [to have] found [that] the effects of these individual instances were on domestic like product prices as a whole, and not only on the prices of certain models of the domestic like product".[672] Indeed, the Panel noted the KTC to have stated:

> The Commission finds that the dumped products suppressed price increases of the like product and caused decreases thereof, although the average sales price of the dumped products was higher than that of the like product.
>
> The average sales price of the dumped products was higher due to their price differentiation in accordance with models, option details or customers, but it was found that the sales price of the dumped products was much lower than the average sales price in the case of certain products or customers for which the degree of competition with the domestic industry was fierce, which had *the effect of suppressing increases in*

[662] Panel Report, para. 7.300 (quoting KTC's Final Resolution (Panel Exhibit KOR-1b (BCI)), p. 19). (emphasis added by the Panel)
[663] Panel Report, para. 7.303. (fn omitted)
[664] OTI's Final Report (Panel Exhibit KOR-2b (BCI)).
[665] Panel Report, para. 7.309.
[666] Panel Report, para. 7.310.
[667] Panel Report, para. 7.310.
[668] Panel Report, para. 7.310.
[669] Panel Report, para. 7.310.
[670] Panel Report, para. 7.311. (emphasis original)
[671] Korea's other appellant's submission, para. 222.
[672] Panel Report, para. 7.302.

> *the price of the like product or causing decreases thereof*. It was investigated that SMC Korea … consistently expanded its sales organizations and used its dominant position to attract distribution agents or discourage defections of its distribution agents, and thus *the domestic industry had to respond to such strengthened marketing activities of SMC Korea and become forced to decrease the sales price or refrain from increasing prices*.[673]

5.254. As we see it, this is the context in which the Panel analysed Panel Exhibit KOR-57 and found that it does not show whether, and if so how, the Korean investigating authorities examined the extent to which domestic like product prices were affected by the individual instances of lower dumped import prices, noting further that "this Exhibit does not identify the corresponding models of the domestic like product whose prices are being 'undersold', or the quantity or value of the sales of those models."[674] Indeed, without such information it is not clear how the Korean investigating authorities could have assessed the extent to which domestic like product prices were affected by the pricing of the dumped imports in the selected transactions, such that a finding of *price suppression and price depression* could be reached.[675] Nor could the Panel have refrained from examining whether the KTC took into account in its considerations and explanations the evidence of consistent price overselling and the relevant arguments raised by the interested parties.[676] Especially, when the Panel rightly recognized that "[c]onsideration of such questions would seem particularly warranted in the present case in light of the consistent … overselling by the dumped imports and the fact that the *average* prices of the models of dumped imports involved in these individual instances of 'underselling' were still higher than the average prices of the corresponding domestic models."[677] In the present dispute, we agree with the Panel that "[a]n explanation and analysis of how and to what extent the prices of the domestic like product are affected [was] necessary."[678]

5.255. However, consistent with our considerations above, we find that the Panel's analysis was pertinent to a claim under Article 3.2, and in line with the requirements of that provision, rather than to a claim under Article 3.5. We note that the Panel inquired whether "the KTC's finding of a causal relationship based in part on price suppressing and depressing effects of dumped imports, in light of consistent average price overselling by dumped imports, is one that could have been reached by a reasonable and objective investigating authority on the basis of the evidence and arguments before the KTC."[679] Our review indicates that the outcome of the Panel's inquiry depended on a proper analysis that applied the requirements under Article 3.2, second sentence, concerning the interplay between the price effects found and the average price overselling observed with respect to the dumped imports, as opposed to an analysis under Article 3.5. While we do not find any error in the Panel's analysis insofar as it relates to the applicable requirements set out in Article 3.2, the Panel effectively incorporated and applied the requirements of Article 3.2, rather than properly applying the requirements set out in Article 3.5, even though it was reviewing a claim under Article 3.5. As noted, under Article 3.5, a panel is called upon to review whether the investigating authority properly linked the *outcomes* of its analyses conducted pursuant to Articles 3.2 and 3.4, taking into account the evidence and factors required under Article 3.5, in coming to a definitive determination regarding the causal relationship between dumped imports and injury to the domestic industry. We therefore consider the Panel to have erred in its application of Article 3.5 of the Anti-Dumping Agreement.

5.3.4.1.5 Whether the Panel failed to make an objective assessment of the matter under Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement

5.256. On appeal, Korea raises several arguments under Article 11 of the DSU and Article 17.6(i) of the Anti-Dumping Agreement with respect to the Panel's substantive findings under Articles 3.1 and 3.5 of the Anti-Dumping Agreement concerning Japan's "independent" claim of causation. We address each of these arguments in turn.

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[673] Panel Report, para. 7.300 (quoting KTC's Final Resolution (Panel Exhibit KOR-1b (BCI)), p. 19). (emphasis added by the Panel)
[674] Panel Report, para. 7.310.
[675] Panel Report, para. 7.310.
[676] Panel Report, para. 7.299.
[677] Panel Report, para. 7.303. (emphasis original; fn omitted)
[678] Panel Report, para. 7.311. (fn omitted)
[679] Panel Report, para. 7.301.

5.257. First, Korea asserts that Japan's claim concerned the lack of competition between the imported and the domestic like products. Korea notes that the Panel rejected that claim and found in favour of Korea in this respect.[680] Korea submits that the Panel then "constructed" another claim that was not developed by Japan concerning the lack of "fair comparison" as a result of the transaction-to-average comparison of certain prices.[681] Therefore, Korea submits that, "[i]n so doing, the Panel made the case for Japan, determining that a violation existed based on a claim that was never made or developed, in violation of Article 11 of the DSU."[682]

5.258. We recall that we have already addressed Korea's arguments in support of its claim that the Panel erred in law by unduly relieving Japan of its burden to demonstrate that the KTC failed to ensure price comparability between the dumped imports and the domestic like products in its price-effects analysis.[683] In support of its present claim under Article 11 of the DSU, Korea makes the same arguments. Therefore, Korea's claim under Article 11 of the DSU is subsidiary to its claim concerning the Panel's failure to construe or apply correctly provisions of a covered agreement, in this case Articles 3.1 and 3.5 of the Anti-Dumping Agreement.[684]

5.259. Next, Korea asserts that the Panel "re-constructed [the] KTC's price effects analysis" by suggesting that the KTC made findings of price undercutting for the product and turned the price comparisons that were made to corroborate other information on the record into a determinative element of the price-effects analysis.[685] In so doing, Korea contends that "the Panel engaged in a *de novo* analysis in violation of Article 17.6 of the Anti-Dumping Agreement."[686]

5.260. We do not, however, find Korea to have pointed out the relevant passages from the Panel Report that, in its view, demonstrate that the Panel "re-constructed [the] KTC's price effects analysis". Nor do we find Korea to have articulated and substantiated its claim with specific arguments. To the contrary, we recall that the Panel specifically noted that "the KTC did not find price undercutting."[687] We are therefore not convinced that Korea has made out a case that the Panel engaged in a *de novo* analysis in violation of Article 17.6(i) of the Anti-Dumping Agreement.

5.261. Korea further submits that the Panel focused exclusively on the evidence relating to the instances of aggressive pricing and underselling, and disregarded all of the other evidence that was actually relied on by the Korean investigating authorities to support their finding of price suppression and price depression, including the evidence corroborating the existence of competition.[688] Thus, Korea contends that "[t]o reduce the price effects analysis effectively to a comparison of transaction-to-average prices and examples of strategic marketing, in the way the Panel did, is neither objective nor fair" when seen from the purview of Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement.[689]

5.262. In response, Japan submits that Korea provides no specifics at all.[690] Japan avers that Korea alleges evidence was ignored but does not cite to a single specific piece of allegedly ignored evidence.[691] Thus, according to Japan, "[i]t is not at all clear what 'evidence' Korea means in connection with its Article 11 claim."[692]

[680] Korea's other appellant's submission, para. 263.
[681] Korea's other appellant's submission, para. 263.
[682] Korea's other appellant's submission, para. 263.
[683] See section 5.3.4.1.4.1 above.
[684] See Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 337 (referring to Appellate Body Reports, *US – Steel Safeguards*, para. 498; *Australia – Apples*, para. 406).
[685] Korea's other appellant's submission, para. 263.
[686] Korea's other appellant's submission, para. 263.
[687] Panel Report, para. 7.269 (referring to KTC's Final Resolution (Panel Exhibit KOR-1b (BCI)), p. 18; Korea's first written submission to the Panel, para. 128).
[688] Korea's other appellant's submission, para. 264.
[689] Korea's other appellant's submission, para. 264.
[690] Japan's appellee's submission, para. 142.
[691] Japan's appellee's submission, para. 142.
[692] Japan's appellee's submission, para. 142.

5.263. The Appellate Body has stated that for a challenge under Article 11 of the DSU to succeed, an appellant must identify specific errors regarding the objectivity of the panel's assessment.[693] It is therefore "incumbent on a participant raising a claim under Article 11 … to explain *why* the alleged error *meets* the standard of review under that provision".[694] However, in this instance, while Korea argues that "the Panel willfully ignored and disregarded certain evidence that was presented by Korea supporting the determination of the dumped imports' price effects"[695], Korea fails to identify the evidence that the Panel allegedly ignored and disregarded. Nor do we find Korea to have explained why it considers the Panel to have conducted a *de novo* review inconsistently with Article 17.6(i) of the Anti-Dumping Agreement. Korea's argument that the Panel erred under Article 17.6(i) is the same as that presented in support of its claim under Article 11 of the DSU.[696] We are therefore not convinced that Korea has made a case for finding a violation of Article 11 of the DSU or Article 17.6(i) of the Anti-Dumping Agreement.

5.264. Next, Korea contends that the Panel made findings that were internally inconsistent and contradictory.[697] Korea submits that the Panel found, in paragraph 8.3 of the Panel Report, that Japan did not demonstrate that the causation analysis that the KTC made was inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.[698] Korea notes that the Panel made a similar finding of "no inconsistency with respect to the second important aspect of a causation analysis, relating to the examination of other known factors and non-attribution".[699] However, Korea avers that "without any explanation of how these contradictory and internally inconsistent findings can be squared", the Panel found, in paragraph 8.4 of the Panel Report, that the "causation analysis, as a result of flaws in their analysis of the effect of the dumped imports on prices in the domestic market", violated Articles 3.1 and 3.5.[700]

5.265. In response, Japan submits that this argument by Korea ignores the fact that the Panel was addressing three separate claims, each with a distinct focus.[701] Japan explains that its "claim 4 about causal relationship focused specifically on the lack of any correlations or any other evidence necessary to support a finding of causation", whereas, its "claim 5 about other factors focused on the distinct obligation of non-attribution."[702] According to Japan, "[t]hese claims both relate to causation, but do not overlap or supersede Japan's claim 6 about the ultimate conclusion about 'causing injury' notwithstanding the findings under Articles 3.2 and 3.4."[703]

5.266. We recall that before the Panel, Japan raised three claims with respect to Articles 3.1 and 3.5 of the Anti-Dumping Agreement. The Panel did not follow the sequence in which Japan listed these claims and, instead, commenced its evaluation with claim 6, i.e. the "independent" causation claim, followed by its evaluation of claims 4 and 5, respectively. The Panel then made a separate finding with regard to each of these claims. With respect to claim 4, Japan contended that the existence of any causal relationship between the dumped imports and the alleged injury was undermined because of insufficient correlation between the volume trends, price trends, profit trends, and the state of the domestic industry.[704] The Panel, in our view, correctly noted that this claim focuses on "the alleged failure to demonstrate the existence of a causal relationship between dumped imports and injury to the domestic industry"[705], in support of which Japan argued that "there is a lack of correlation in the trends of volumes, prices, and profits."[706] With respect to claim 5, Japan argued that the KTC acted inconsistently with Articles 3.1 and 3.5 "because Korea failed to consider

[693] Appellate Body Report, *US − Carbon Steel (India)*, para. 4.79 (referring to Appellate Body Report, *EC − Fasteners (China)*, para. 442).

[694] Appellate Body Report, *US − Carbon Steel (India)*, para. 4.79 (quoting Appellate Body Reports, *China − Rare Earths*, para. 5.178, in turn quoting Appellate Body Report, *EC − Fasteners (China)*, para. 442 (emphasis original)).

[695] Korea's other appellant's submission, para. 264.

[696] See Korea's other appellant's submission, paras. 285-286.

[697] Korea's other appellant's submission, para. 265.

[698] Korea's other appellant's submission, para. 265.

[699] Korea's other appellant's submission, para. 265.

[700] Korea's other appellant's submission, para. 265.

[701] Japan's appellee's submission, para. 143 (referring to Korea's other appellant's submission, para. 261).

[702] Japan's appellee's submission, para. 143.

[703] Japan's appellee's submission, para. 143.

[704] Panel Report, para. 7.351.

[705] Panel Report, para. 7.233.

[706] Panel Report, para. 7.234.

adequately all known factors other than the imports under investigation that were injuring the domestic industry at the same time and therefore incorrectly attributed injury caused by these other factors to the imports under investigation".[707] As the Panel noted, this claim by Japan concerned the KTC's evaluation of non-attribution factors under "the distinct obligation regarding non-attribution analysis, as set forth in the third and fourth sentences of Article 3.5".[708] The Panel's overall findings in paragraphs 8.3.b and 8.3.c[709] of the Panel Report concerned these two claims, respectively. Finally, the Panel's finding in paragraph 8.4.a[710] was with respect to Japan's claim 6, that the KTC's causation determination was undermined by its flawed analysis of the price effects, "irrespective and independent" of whether the Panel found the KTC's analysis of price effects to be inconsistent with Article 3.2 of the Anti-Dumping Agreement. For these reasons, we are not convinced that the Panel made internally inconsistent findings such that it acted inconsistently with Article 11 of the DSU.

5.267. Korea further contends that "even at the very basic level of the Panel's analysis of the facts relating to the price comparisons and … overselling, the Panel's analysis is not supported by the facts on the record and reflects a disregard of relevant, material evidence."[711] Korea submits that the biggest disregard of relevant evidence was committed by the Panel when it found that the "KTC did not find price undercutting" and thus, "the KTC did not rely on the results of any price comparisons between the average dumped import prices and the average domestic like product prices in injury determination."[712] Korea submits that, although it is true that the KTC did not find price undercutting, that does not mean that the KTC's comparison of average dumped import prices and average domestic like product prices cannot serve any purpose in its price suppression analysis.[713] Korea submits that it raised a timely objection against this error in its Comments on the Interim Report of the Panel but the Panel "simply disregarded the parties' comments"[714], and thereby erred under Article 11 of the DSU.[715]

5.268. In response, Japan submits that the Panel did not ignore the point regarding the comparison of average price trends.[716] Japan submits that Korea is trying to create an issue where none exists. According to Japan, in the part of the Panel Report referenced by Korea[717], the Panel specifically referred to the KTC's finding of price undercutting in the sense of the second sentence of Article 3.2.[718] Japan explains, "[s]ince there was no KTC finding of price undercutting, there was no

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[707] Panel Report, para. 7.236 (quoting Japan's panel request, p. 2).

[708] Panel Report, para. 7.238.

[709] The Panel found:

> With respect to those of Japan's claims that are within our terms of reference as set forth in paragraph 8.2 above, we conclude that Japan has *not* demonstrated that the Korean Investigating Authorities acted inconsistently with:
>
> ...
>
> b. Articles 3.1 and 3.5 of the Anti-Dumping Agreement with respect to their conclusion that the dumped imports, through the effects of dumping, were causing injury to the domestic industry; and
>
> c. Articles 3.1 and 3.5 of the Anti-Dumping Agreement with respect to their examination of known factors other than the dumped imports that were injuring the domestic industry at the same time.

(Panel Report, paras. 8.3.b-c) (emphasis original)

[710] The Panel found:

> With respect to those of Japan's claims that are within our terms of reference as set forth in paragraph 8.2 above, we further conclude that Japan *has demonstrated* that the Korean Investigating Authorities acted inconsistently with:
>
> a. Articles 3.1 and 3.5 of the Anti-Dumping Agreement in their causation analysis as a result of flaws in their analysis of the effect of the dumped imports on prices in the domestic market[.]

(Panel Report, para. 8.4.a) (emphasis original)

[711] Korea's other appellant's submission, para. 266.

[712] Korea's other appellant's submission, para. 268 (quoting Panel Report, para. 7.269).

[713] Korea's other appellant's submission, para. 268.

[714] Korea's other appellant's submission, para. 270 (referring to Korea's Comments on the Interim Report to the Panel, para. 38).

[715] Korea's other appellant's submission, para. 271.

[716] Japan's appellee's submission, para. 146.

[717] Japan's appellee's submission, para. 146 (referring to Korea's other appellant's submission, fn 190 to para. 269, in turn referring to Panel Report, para. 7.295).

[718] Japan's appellee's submission, para. 146 (referring to Panel Report, para. 7.269).

need for Japan to challenge or the Panel to address price comparability with regard to a method of analyzing price effects under the second sentence of Article 3.2 that the KTC did not use."[719]

5.269. We recall that the Panel noted that the KTC, in its price undercutting analysis, compared average dumped import prices to average domestic like product prices and concluded that dumped imports had not been sold at lower prices than the domestic like product, that is, there was no price undercutting.[720] The Panel observed that the KTC did not find price undercutting and thus, "the KTC did not rely on the results of any price comparisons between the average dumped import prices and the average domestic like product prices in its injury determination."[721] The Panel made this observation in the context of price undercutting and the relevance of such a finding with respect to the ultimate determination of injury to the domestic industry. Because the KTC made no price undercutting finding, it was logical that the Panel stated so. Importantly, in that light, the Panel considered that there was no need to decide whether the prices in those average-to-average comparisons were properly comparable.[722] However, in considering the issue of diverging price trends, we note that the Panel took into account the average-to-average comparisons when it found the KTC's explanations regarding the diverging price trends in 2011-2012 and 2012-2013 to be reasonable.[723] We are therefore not convinced that Korea has demonstrated that the Panel acted inconsistently with Article 11 of the DSU on this count.

5.270. Next, Korea recalls that it submitted Panel Exhibit KOR-57 to demonstrate how the KTC considered the extent to which the domestic like product was affected by individual instances of dumped imports' pricing.[724] Korea explains that Panel Exhibit KOR-57 constituted the entire data sheet on the basis of which the KTC conducted its transaction-to-average price comparisons for the purpose of its price suppression and price depression analysis.[725] Korea avers that the Panel correctly determined that Panel Exhibit KOR-57 was properly before it, but found that "[Panel] Exhibit KOR-57 does not, *in itself*, sufficiently demonstrate whether and how the OTI conducted the simulations and analyses, and reached the relevant conclusions as argued by Korea."[726] Korea submits that "the Panel was not even handed in its approach and applied an excessive degree of certainty and proof, refusing to draw any inferences from [Panel Exhibit] KOR-57" and thus admitted only what was immediately apparent from Panel Exhibit KOR-57.[727]

5.271. In response, Japan submits that "the Panel correctly rejected Korea's efforts to present *post hoc* justifications with no basis in the KTC Determination as written."[728] Japan argues that "the data and analysis contained in [Panel] Exhibit KOR-57 were not mentioned in the KTC's Final Resolution or the OTI's Final Report."[729] Japan adds that "even assuming *arguendo* the data in [Panel Exhibit] KOR-57 were actually 'examined' during the investigation", the KTC's examination did not address "the counterfactual question of whether the domestic prices would have been higher if the dumped imports had been at the normal value".[730] Japan further submits that "if [Panel] Exhibit KOR-57 revealed anything about price effects, it showed that the alleged instances of average-price-based price undercutting occurred only within a small proportion of the domestic like

[719] Japan's appellee's submission, para. 146.
[720] Panel Report, para. 7.267.a (referring to KTC's Final Resolution (Panel Exhibit KOR-1b (BCI)), p. 18).
[721] Panel Report, para. 7.269.
[722] Panel Report, para. 7.269.
[723] Panel Report, paras. 7.278-7.279.
[724] Korea's other appellant's submission, para. 272.
[725] Korea's other appellant's submission, para. 272. We recall that the Panel set out in a table what Korea referred to as a series of comparisons between individual resale transaction prices of models of dumped imported valves and the average prices of corresponding models of the domestic like product reported in the OTI's Final Report. The OTI underlined those transactions in which the dumped import price to certain customers was lower than the average domestic price for the corresponding model produced by the Korean producers. (Panel Report, para. 7.270, Table 1) See also Panel Report, para. 7.310.
[726] Korea's other appellant's submission, para. 274 (quoting Panel Report, para. 7.313 (emphasis original)).
[727] Korea's other appellant's submission, para. 277.
[728] Japan's appellee's submission, para. 147.
[729] Japan's appellee's submission, para. 148 (referring to Japan's comments on Korea's response to Panel question No. 88, para. 26).
[730] Japan's appellee's submission, para. 148 (referring to Japan's comments on Korea's response to Panel question No. 88, para. 27).

products" and "the KTC never linked isolated examples to the product as a whole."[731] Thus, Japan contends that it had pointed out that Panel Exhibit KOR-57 is deeply flawed.[732]

5.272. We have considered above the Panel's discussion of Panel Exhibit KOR-57 and agreed with the Panel's reading of that Exhibit.[733] To recall, the Panel explained that Panel Exhibit KOR-57 shows that "the OTI compared dumped import resale prices in a large number of transactions in 2013 with the average price and the high-end price of the corresponding models of the domestic like product."[734] However, the Panel found that Panel Exhibit KOR-57 does not show whether, and if so how, the OTI examined the extent to which domestic like product prices were affected by the individual instances of lower dumped import prices, noting that "this Exhibit does not identify the corresponding models of the domestic like product whose prices are being 'undersold', or the quantity or value of the sales of those models."[735] Therefore, the Panel considered that it is not clear how the Korean investigating authorities could have assessed the extent to which domestic like product prices were affected by the pricing of the dumped imports in the transactions concerned.[736]

5.273. That said, Korea's contention is that it would have been perfectly logical for the Panel to consider that the KTC, after having been rigorous enough to compare and check every one of the 115,524 resale transaction prices of the dumped imports in 2013 with the average and high-end prices of the corresponding domestic model, could be assumed to take the next step of conducting a simple wrap-up calculation to arrive at the observations as explained by Korea in its other appellant's submission.[737] Thus, Korea's argument that the Panel did not draw those conclusions that Korea suggested is squarely directed towards the Panel's weighing of evidence and the probative value accorded by the Panel to Panel Exhibit KOR-57. In making this argument, Korea essentially suggests that the Panel should have accorded to Panel Exhibit KOR-57 the same evidentiary weight that it would itself have accorded to it. The Appellate Body has consistently recognized that panels enjoy a margin of discretion in their assessment of the facts[738], which includes the discretion of a panel to decide which evidence it chooses to utilize in making its findings[739], and to determine how much weight to attach to the various items of evidence placed before it by the parties to the case.[740] The Panel did not commit an error under Article 11 of the DSU simply because it declined to accord to the evidence the weight that Korea believes should have been be accorded to it.[741]

5.274. Korea also contends that the Panel erred under Article 17.6(i) of the Anti-Dumping Agreement when it examined Japan's price-related issues under claim 6 in a *de novo* manner by, *inter alia*: (i) "creating and applying specific and excessively demanding requirements that must be met in an overselling situation"; and (ii) "imposing isolated findings on the authorities which it then examined independently and irrespectively of the analysis provided by [the] KTC".[742]

5.275. In response, Japan submits that the Panel did not create excessively demanding requirements.[743] Japan adds that the Panel properly focused on what the KTC and the OTI had actually said about their analyses.[744] Japan further submits that the Panel did not impose any isolated findings, noting that Korea does not present any arguments to support this allegation.[745]

5.276. Both of Korea's above arguments form the basis of separate claims that Korea has raised on appeal. We recall in this regard that Korea has challenged the Panel's findings on the grounds that:

[731] Japan's appellee's submission, para. 148 (referring to Japan's comments on Korea's response to Panel question No. 88, para. 27). (fn omitted)
[732] Japan's appellee's submission, para. 148.
[733] See section 5.3.4.1.4.2 above.
[734] Panel Report, para. 7.310.
[735] Panel Report, para. 7.310.
[736] Panel Report, para. 7.310.
[737] Korea's other appellant's submission, para. 277.
[738] See Appellate Body Reports, *EC − Asbestos*, para. 161; *EC − Hormones*, para. 132; *EC − Sardines*, para. 299; *Japan − Apples*, para. 222; *Korea − Dairy*, para. 137; *US − Wheat Gluten*, para. 151.
[739] Appellate Body Report, *EC − Hormones*, para. 135.
[740] Appellate Body Report, *Korea − Dairy*, para. 137.
[741] See Appellate Body Reports, *Australia − Salmon*, para. 267; *Japan − Apples*, para. 221; *Korea − Alcoholic Beverages*, para. 164.
[742] Korea's other appellant's submission, para. 282.
[743] Japan's appellee's submission, para. 153.
[744] Japan's appellee's submission, para. 153.
[745] Japan's appellee's submission, para. 155.

(i) the Panel unduly relieved Japan of its burden of demonstrating that the KTC failed to ensure price comparability[746]; (ii) the Panel imposed a price comparison requirement under Article 3.5 that is not based on the text of Article 3.5 and is more demanding than what is required under Article 3.2[747]; and (iii) the Panel found a violation under Articles 3.1 and 3.5 based on a partial analysis of the KTC's price-effects analysis that was made.[748] In the context of those claims, Korea has argued that the Panel examined different aspects of the price-effects findings of the KTC in clinical isolation[749]; the Panel imposed groundless analytical requirements, which, for most part, are excessively burdensome and impractical[750]; the Panel imposed an additional obligation of rigor in a price comparison analysis when no such rigor was required[751]; the Panel unduly focused on one aspect of the analysis relating to the explanatory force of the dumped imports concerning the examples of marketing practices and pricing[752]; and the Panel found the KTC's price-effects analysis to be inconsistent with Article 3.5 based solely on concerns over particular aspects of one part of the price-effects analysis, in isolation from all other evidence and findings made.[753] We have addressed these claims and arguments above. We recall that the Appellate Body has found that "a claim under Article 17.6(i) should not be made *merely* subsidiary to a claim that the panel erred in its application of a WTO provision."[754] In our view, Korea's claim that the Panel erred under Article 17.6(i) of the Anti-Dumping Agreement on the grounds described in paragraph 5.274 above is subsidiary to its earlier claims contending that the Panel erred in its application of Article 3.5 of the Anti-Dumping Agreement.

5.277. Finally, Korea contends that the Panel examined the price-related claim of Japan under Articles 3.1 and 3.5 of the Anti-Dumping Agreement in a *de novo* manner by "creating and using its own tables of the price trends, such as in figures 1-4" and thus acted inconsistently with Article 17.6(i) of the Anti-Dumping Agreement.[755]

5.278. Japan submits that there is nothing wrong with the Panel taking data on the Panel record and presenting graphs to illustrate what the numbers show.[756] According to Japan, the graphs simply provide a visualization of the data; they do not change the data and, therefore, there is nothing *de novo* about converting data to graphs.[757]

5.279. We observe that the source for Figures 1[758] and 2[759] in the Panel Report is the KTC's Final Resolution, which is not disputed by Korea. Figure 3[760] in the Panel Report is sourced from Korea's first written submission to the Panel, which is also not disputed by Korea. Neither do we understand Korea to dispute the source of the data contained in Figure 4 in the Panel Report, which, as the Panel stated, was derived from Panel Exhibit KOR-58.[761] Thus, Korea does not take issue with the correctness of the underlying data that the Panel used in presenting Figures 1 through 4 in the Panel Report, nor does Korea contend that, in presenting the Figures, the Panel misrepresented the underlying data. Accordingly, we fail to see how the Panel acted in a *de novo* manner inconsistently with Article 17.6(i) of the Anti-Dumping Agreement.

5.3.4.1.6 Conclusion with respect to claim 6

5.280. With respect to a claim under Article 3.5, a panel is tasked with reviewing an investigating authority's ultimate demonstration that "dumped imports are, through the effects of dumping, as

[746] Korea's other appellant's submission, paras. 197-207.
[747] Korea's other appellant's submission, paras. 208-226.
[748] Korea's other appellant's submission, paras. 227-243.
[749] Korea's other appellant's submission, para. 214.
[750] Korea's other appellant's submission, para. 215.
[751] Korea's other appellant's submission, para. 218.
[752] Korea's other appellant's submission, para. 223.
[753] Korea's other appellant's submission, para. 228.
[754] Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.47. (emphasis original)
[755] Korea's other appellant's submission, para. 282.
[756] Japan's appellee's submission, para. 154.
[757] Japan's appellee's submission, para. 154.
[758] Panel Report, Figure 1: Trends in average prices, p. 80.
[759] Panel Report, Figure 2: Trends in market share, p. 81.
[760] Panel Report, Figure 3: Price trends of representative models, p. 82.
[761] Panel Report, Figure 4: Comparison between the average prices of the dumped imports and the domestic like product on representative models basis, p. 93 (referring to Record Data and Analysis on the Representative Model (Panel Exhibit KOR-58 (BCI))).

set forth in paragraphs 2 and 4," causing injury to the domestic industry. In so doing, a panel is called upon to review whether the investigating authority properly linked the outcomes of its analyses conducted pursuant to Articles 3.2 and 3.4, taking into account the evidence and factors required under Article 3.5, in coming to a definitive determination regarding the causal relationship between dumped imports and injury to the domestic industry. A panel's review does not, however, call for revisiting the question whether each of the interlinked components of this determination itself meets the applicable requirements set out in Article 3.2 or Article 3.4. Examining such consistency in the context of a claim under Article 3.5 would effectively require a panel to incorporate and apply obligations and disciplines set out in other paragraphs of Article 3, which are not contained in the text of Article 3.5. We agree with Korea that the phrase "through the effects of dumping, as set forth in paragraphs 2 and 4" in Article 3.5 "is not a call [for a panel] to re-do the examination[s]" under Articles 3.2 and 3.4 of the Anti-Dumping Agreement.[762]

5.281. In the present dispute, under claim 6, Japan alleged that the KTC's causation determination was undermined by its flawed analyses of the volume of the dumped imports, the price effects, and the impact of the dumped imports on the state of the domestic industry, "irrespective and independent" of whether the Panel found the KTC's analyses of volume, price effects, and impact to be inconsistent with Articles 3.2 and 3.4 of the Anti-Dumping Agreement.

5.282. In addressing claim 6, the Panel first considered Japan's arguments with respect to the volume of dumped imports. The Panel noted that "Japan's allegation that certain flaws in the KTC's analysis of the volume of dumped imports 'independently' undermine[d] its causation determination"[763] was based on the fact that: (i) the volume of dumped imports decreased during two years of the three-year period of trend analysis; and (ii) the volume of dumped imports increased only modestly in absolute terms and decreased in terms of market share in 2013 compared with 2010.[764] The Panel rejected these arguments and found that Japan failed to demonstrate that the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement. In so doing, the Panel reviewed the Korean investigating authorities' analysis pursuant to the requirements set out in Article 3.2, first sentence, as opposed to those under Article 3.5. Thus, in reviewing the causation claim at issue, the Panel effectively incorporated the requirements in Article 3.2, first sentence, rather than properly applying the requirements set out in Article 3.5, in its assessment of the causation claim at issue. We therefore consider the Panel to have erred in its application of Article 3.5.

5.283. With respect to price effects in the context of claim 6, before the Panel, Japan advanced three grounds in support of its claim that the KTC's analysis of the price effects of the dumped imports "independently" undermined its causation determination, namely that: (i) there was divergence between the trends in dumped import and domestic like product prices; (ii) dumped imports consistently and significantly oversold the domestic like product; and (iii) there was no competitive relationship between the dumped imports and the domestic like product, such that their prices were not comparable.[765] The Panel found that the KTC acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement by "failing to ensure price comparability, in terms of the dates and sales quantities involved, when it compared the individual transaction prices of certain models of dumped imports with the average prices of corresponding models of the domestic like product".[766] Concerning overselling, the Panel found that the Korean investigating authorities failed to explain adequately their consideration of the price-suppressing and -depressing effects of dumped imports in their determination of causation, in light of the undisputed fact that the prices of the dumped imports were higher than those of the domestic like product throughout the period of trend analysis, and therefore acted inconsistently with Articles 3.1 and 3.5.[767] As for diverging price trends, the Panel found that the different magnitude of the price decreases from 2012 to 2013 and the opposing price movements from 2011 to 2012 do not, in and of themselves, demonstrate that the KTC's determination of a causal relationship was inconsistent with Articles 3.1 and 3.5.[768]

5.284. To the extent that an investigating authority relies on price comparisons in its consideration of the price effects of dumped imports, price comparability needs to be ensured. Thus, where an

[762] Korea's other appellant's submission, para. 185.
[763] Panel Report, para. 7.250.
[764] Panel Report, para. 7.251.
[765] Panel Report, para. 7.259.
[766] Panel Report, para. 7.272.
[767] Panel Report, para. 7.322.
[768] Panel Report, para. 7.296.

investigating authority fails to ensure price comparability in price comparisons between dumped imports and the domestic like products, this undermines its findings of price effects under Article 3.2, to the extent that it relies on such price comparisons. We agree with the Panel that the KTC was required to ensure price comparability in its price comparisons inasmuch as it relied on the price differentials in these comparisons to find that dumped imports had price-suppressing and -depressing effects on the domestic like product. Likewise, we agree with the Panel that, given the consistent overselling by the dumped imports and the fact that the average prices of the models of dumped imports involved in the individual instances of "underselling" were higher than the average prices of the corresponding domestic models, an explanation and analysis of how and to what extent the prices of the domestic like product are affected was necessary. That said, our review of the Panel's findings indicates that, for each of these arguments, the analyses carried out by the Panel were pertinent to a claim under Article 3.2 and were in line with the requirements of that provision, rather than to a claim under Article 3.5. In so doing, the Panel effectively incorporated the requirements of Article 3.2, rather than properly applying the requirements set out in Article 3.5, even though it was reviewing a claim under the latter provision. With respect to a claim under Article 3.5, a panel's review does not call for revisiting the question whether each of the interlinked components of the causation determination itself meets the applicable requirements set out under their respective provisions, such as, the consideration of price effects under Article 3.2. We therefore consider the Panel to have erred in its application of Article 3.5.

5.285. Finally, with respect to the examination of the impact of dumped imports in the context of claim 6, before the Panel, Japan relied on its argument that, because the KTC did not establish any logical connection between the effects of the dumped imports under Article 3.2 and the condition of the domestic industry for the purpose of its impact analysis under Article 3.4, its causation determination was undermined.[769] The Panel found that "'the logical progression of inquiry' does not mean that the examination of impact under Article 3.4 must be linked to the consideration under Article 3.2."[770] We agree with the Panel that, in order to examine the impact of dumped imports on the domestic industry properly *for purposes of Article 3.4*, an investigating authority is not required to link that examination with its consideration of the volume and the price effects of the dumped imports.[771] Similarly, we agree with the Panel's finding that "there is no need 'to undertake a fully reasoned causation and non-attribution analysis' as part of Article 3.4."[772] However, the Panel's examination of the alleged flaws in the Korean investigating authorities' impact analysis primarily relates to the issue of whether the KTC's impact examination was in line with the requirements set out in Article 3.4, as opposed to Article 3.5. In so doing, the Panel effectively incorporated the requirements of Article 3.4, rather than properly applying the requirements set out in Article 3.5, even though it was reviewing a claim under the latter provision. Article 3.5 does not foresee a panel revisiting the question whether an investigating authority's impact analysis is consistent with Article 3.4. We therefore consider the Panel to have erred in its application of Article 3.5.

5.286. In light of the foregoing considerations, with respect to claim 6, we reverse the Panel's finding, in paragraph 8.4.a of the Panel Report, that Japan has demonstrated that the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement in their causation analysis as a result of flaws in their analysis of the effect of the dumped imports on prices in the domestic market.

5.3.4.2 Japan's claim 4

5.3.4.2.1 Whether the Panel erred in its approach to resolving Japan's claim 4 about the failure to demonstrate a causal relationship focusing on the lack of correlation among various factors

5.287. Before the Panel, Japan argued that the KTC failed to demonstrate that the dumped imports were causing injury to the domestic industry since there was insufficient correlation between the volume trends, price trends, and profit trends and the state of the domestic industry to support the

[769] Japan's first written submission to the Panel, para. 195 (referring to ibid., section V.D).
[770] Panel Report, para. 7.329 (quoting Appellate Body Report, *China – GOES*, para. 128). (fn omitted)
[771] Panel Report, para. 7.330.
[772] Japan's appellant's submission, para. 290 (quoting Panel Report, para. 7.332).

existence of a causal relationship between the dumped imports and the injury to the domestic industry.[773]

5.288. The Panel found that Japan's arguments concerning volume trends and price trends were identical to its volume and price-effects-related arguments under its "independent" causation claim.[774] On the basis of the same considerations, the Panel dismissed these arguments.[775] Turning to Japan's arguments concerning profit trends, the Panel found that Japan failed to establish that insufficient correlation between dumped imports and trends in domestic-industry profits suffices to demonstrate that a reasonable and unbiased investigating authority could not have properly found the required causal relationship between the dumped imports and injury to the domestic industry in light of the facts and arguments that were before the KTC.[776] Ultimately, the Panel concluded that Japan failed to demonstrate that the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement by failing to demonstrate that the dumped imports, through the effects of dumping, were causing injury to the domestic industry.[777]

5.289. On appeal, Japan contends that the Panel dismissed Japan's arguments about volume correlation and price correlation by simply citing its own earlier findings on Japan's "independent" causation claim.[778] Japan submits that "[t]he first claim was about price/volume effect analysis or impact analysis, but the second claim was not."[779] Japan's avers that its "basic point was simply that the lack of sufficient correlation − that domestic industry volume and price trends did not correlate well with the import volume and price trends" and, therefore, "called into doubt the existence of any causal relationship".[780] Japan avers that its arguments in support of this claim relied on the Appellate Body's findings regarding the relevance of conditions of competition or correlation among trends when drawing inferences about causation in trade remedy cases.[781]

5.290. Korea, for its part, submits that, "[o]ther than a mere assertion about the Panel's alleged 'misinterpretation' of the Appellate Body guidance, Japan does not develop any legal arguments with respect to the Panel's analysis."[782] Korea notes that Japan argues that the Panel "improperly refused to address the lack of correlation", but this, according to Korea, suggests that Japan should have brought a claim under Article 11 of the DSU.[783]

5.291. We recall that the analysis under Article 3.5 concerns the demonstration of "the causal relationship between *subject imports* and *injury* to the domestic industry".[784] This demonstration shall be based on "an examination of all relevant evidence before the authorities". We agree with the Panel that evidence that does not fall squarely within the parameters of Articles 3.2 and 3.4 may nevertheless be relevant and persuasive with respect to whether a causal relationship can be demonstrated under Article 3.5.[785] A coincidence in time between upward trends in imports and a decline in the performance indicators of the domestic industry could be evidence of the existence of a causal link between increasing imports and material injury to the domestic industry.[786] However, while such a coincidence, by itself, cannot prove causation, its absence would create serious doubts as to the existence of a causal link and would require a very compelling analysis of why causation is still present.[787] Thus, the existence of a correlation, though indicative, is by no means dispositive of the existence of a causal link. Moreover, a lack of correlation does not preclude a finding that a causal link exists, provided that a very compelling explanation is provided.

[773] Panel Report, para. 7.351.
[774] Panel Report, paras. 7.353 and 7.356.
[775] Panel Report, paras. 7.353 and 7.356.
[776] Panel Report, para. 7.360.
[777] Panel Report, para. 7.361.
[778] Japan's appellant's submission, para. 299 (referring to Panel Report, paras. 7.353 and 7.356).
[779] Japan's appellant's submission, para. 299.
[780] Japan's appellant's submission, para. 300. (fn omitted)
[781] Japan's appellant's submission, para. 299 (referring to Appellate Body Reports, *US − Tyres (China)*, para. 192; *Argentina − Footwear (EC)*, para. 144; Panel Report, *China − X-Ray Equipment*, paras. 7.239-7.248).
[782] Korea's appellee's submission, para. 449 (quoting Japan's appellant's submission, para. 299).
[783] Korea's appellee's submission, para. 449 (quoting Japan's appellant's submission, para. 299).
[784] Appellate Body Report, *China − GOES*, para. 147. (emphasis original)
[785] Panel Report, para. 7.248.
[786] Appellate Body Report, *US − Tyres (China)*, para. 192.
[787] See Appellate Body Report, *Argentina − Footwear (EC)*, para. 144.

5.292. That said, with respect to the alleged lack of correlation in volume trends, the Panel noted that Japan contended that the existence of any causal relationship between the dumped imports and the alleged injury was undermined because: (i) the volume and the market share of the dumped imports decreased from 2010 to 2012 (i.e. during the first two years of the three-year period of trend analysis); and (ii) the domestic industry's market share remained stable in 2013 as compared with 2010.[788] In the context of Japan's "independent" causation claim, the Panel reviewed and rejected these two effectively identical arguments advanced by Japan in support of its allegation that certain flaws in the KTC's analysis of the volume of dumped imports "independently" undermined its causation determination.[789] On the basis of the same considerations, the Panel dismissed these arguments in the context of the present claim.[790]

5.293. We have considered above that, in addressing Japan's volume-related arguments in the context of claim 6, the Panel reviewed the requirements under Article 3.2, first sentence, as opposed to those under Article 3.5. We have explained that, in reviewing Japan's claim 6, the Panel effectively incorporated the requirements of Article 3.2, first sentence, rather than properly applying the requirements set out in Article 3.5. As further discussed above, in reviewing a claim under Article 3.5, a panel is not called upon to revisit the question whether each of the interlinked components of this determination, such as the investigating authority's volume analysis, is itself consistent with the applicable requirements set out in Article 3.2. Given that the Panel relied on the same considerations in rejecting Japan's arguments concerning the lack of correlation in volume trends in the context of the causation claim at issue (claim 4), we find the Panel's finding in this regard to be in error.

5.294. With respect to price trends, Japan submits that, whether measured based on simple averages or the price fluctuation index method, prices followed very different trends. From 2011 to 2012, subject import prices increased while domestic prices decreased, whereas from 2012 to 2013, subject import prices fell sharply, but domestic prices fell only slightly.[791] These diverging price trends, according to Japan, did not suggest the necessary causal relationship.[792]

5.295. In response, Korea submits that the KTC considered the development in prices of both the dumped imports and the domestic like products in a dynamic manner over the entire POI, year-by-year and end-point to end-point, using average import and resale prices as well as a price fluctuation index.[793] Korea contends that, on the basis of this comprehensive analysis, the KTC observed strong indications of price effects by the dumped imports on domestic prices throughout the entire POI, including in 2012 and 2013.[794] Korea also submits that, for these last two years of the POI, there were no "widely diverging" price trends since, for both dumped and domestic like products, average prices effectively stagnated in 2012 and decreased in 2013.[795] Korea therefore considers that Japan has failed to develop any legal argument about why the Panel's conclusions and reasoning were in error.[796]

5.296. We note that, in the context of the present causation claim (claim 4), the Panel stated that "Japan argues that the lack of parallelism between dumped import prices and domestic like product prices does not support the existence of a causal relationship between the dumped imports and the injury allegedly suffered by the domestic industry."[797] In particular, the Panel noted that Japan argued that: (i) dumped import prices increased from 2011 to 2012 while domestic like product prices decreased; and (ii) dumped import prices fell sharply from 2012 to 2013 whereas domestic like product prices decreased only slightly.[798] The Panel considered that Japan's arguments in support of this aspect of the causation claim at issue are identical to its price-effects-related

[788] Panel Report, para. 7.352.
[789] Panel Report, paras. 7.251 and 7.258. See also section 5.3.4.1.2.1 above.
[790] Panel Report, para. 7.353.
[791] Japan's appellant's submission, para. 303.
[792] Japan's appellant's submission, para. 303.
[793] Korea's appellee's submission, para. 299 (referring to Korea's first written submission to the Panel, paras. 77-92 and 97-112).
[794] Korea's appellee's submission, para. 299.
[795] Korea's appellee's submission, para. 299.
[796] Korea's appellee's submission, para. 455.
[797] Panel Report, para. 7.355.
[798] Panel Report, para. 7.355.

arguments under claim 6.[799] The Panel recalled that, in the context of claim 6, it had found that Japan failed to demonstrate that the Korean investigating authorities acted inconsistently with Article 3.5 with respect to their consideration of the absence of parallel price trends. Based on the same considerations, the Panel concluded that, in the causation claim at issue (claim 4), Japan had failed to establish that insufficient price correlation sufficed to demonstrate that a reasonable and unbiased investigating authority could not have properly found the required causal relationship between the dumped imports and injury to the domestic industry in light of the facts and arguments that were before the KTC.[800]

5.297. We recall that we have considered above that the Panel's analysis of the diverging trends in the context of Japan's claim 6 focused on whether there was a competitive relationship between dumped imports and domestic like products despite diverging price trends, and whether the diverging price trends could, in and of themselves, undermine the causal relationship under Article 3.5. Accordingly, we have found that the Panel's analysis reviewed the Korean investigating authorities' examination of the relationship between the prices of the dumped imports and those of the domestic like product, in order to ascertain the effects of the former on the latter, which, as explained, corresponds to an examination properly conducted pursuant to Article 3.2, second sentence. We have also considered that the Panel's conclusion that the diverging price trends do not, in and of themselves, demonstrate that the KTC's determination of a causal relationship is inconsistent with Articles 3.1 and 3.5 was a mere consequence of its analysis as to whether the KTC's price-effects analyses were objective and reasoned, and compatible with the requirements set out in Article 3.2, second sentence. Accordingly, we have found above that the Panel's analysis of the issue of diverging price trends was based on the applicable requirements under Article 3.2, rather than those concerning causation under Article 3.5, even though it was addressing a claim under the latter provision. Given that the Panel relied on the same considerations in rejecting Japan's arguments concerning the lack of correlation in price trends in the context of the causation claim at issue (claim 4), we find the Panel's finding in this regard to be in error.

5.298. Finally, concerning profit trends, Japan contends that "there was also insufficient correlation in the trends regarding the domestic industry's condition to 'demonstrate' a causal relationship."[801] Japan points out that the domestic industry's operating losses in 2012 and 2013 show that "regardless of whether subject imports had increasing or decreasing volumes, or whether subject imports had increasing or decreasing average prices, the domestic industry still lost money."[802] According to Japan, "these operating losses regardless of the presence of subject imports did not suggest the necessary causal relationship."[803] Japan argues that the Panel embraced, without any discussion, a logically inconsistent KTC explanation of profit trends.[804] Japan avers that the Panel pointed to the KTC's statements that domestic-industry profits fell in 2012 due to increased competition with imports, but "in 2012 the volume of imports was down, the market share of imports was down, and the average prices of imports were up."[805] Therefore, Japan fails to see any basis for "the assertion about 'increased competition' with imports in 2012, given these other facts that the KTC − and then the Panel − conveniently ignored".[806]

5.299. Korea, for its part, submits that "it is unclear what the legal error of the Panel would have been."[807] Korea submits that "Japan neglects to mention [the] KTC's well-grounded evaluation of the domestic industry's operating loss."[808] Korea points out that the KTC specifically acknowledged that the domestic industry's operating loss persisted from 2010 to 2012, but nonetheless found that "[t]he deterioration of the operating profit in 2012, after improving in 2011, was a result of the price reduction of the like product and the increase in the operating cost in response to the competition with the dumped products."[809] Korea contends that the KTC adequately evaluated the operating loss

[799] Panel Report, para. 7.356.
[800] Panel Report, para. 7.356.
[801] Japan's appellant's submission, para. 305.
[802] Japan's appellant's submission, para. 305.
[803] Japan's appellant's submission, para. 305.
[804] Japan's appellant's submission, para. 307.
[805] Japan's appellant's submission, para. 307. (fns omitted)
[806] Japan's appellant's submission, para. 307.
[807] Korea's appellee's submission, para. 457.
[808] Korea's appellee's submission, para. 459.
[809] Korea's appellee's submission, para. 459 (quoting KTC's Final Resolution (Panel Exhibit KOR-1b (BCI)), p. 23).

of the domestic industry within the context of its overall injury determination rather than in isolation, and concluded that the aggravation of the operating loss was attributable to the effect of the dumped imports.[810]

5.300. Japan's argument, in our view, appears to mischaracterize the KTC's findings. The KTC did not state that it found "increased" competition in 2012. Rather, as the Panel noted, the KTC acknowledged that the domestic industry's operating loss worsened from 2011 to 2012, at a time when dumped import prices increased and their volume and market share declined.[811] However, the Panel noted that the KTC explained that one of the reasons for the increased operating loss ratio was due to the increase of operating costs "in response to the competition with the dumped imports".[812] The Panel took into account these statements by the KTC in considering Japan's arguments, noting in particular that, according to the KTC, the worsening operating loss "was a result not only of the decrease in domestic like product prices (which it elsewhere in its report attributed to the effect of dumped imports), but also of the increase of operating costs".[813]

5.301. Therefore, contrary to Japan's argument, neither the Panel nor the KTC ignored the alleged lack of correlation between the domestic-industry profit, dumped import prices, and the volume and market share of the dumped imports. The Panel was mindful of the fact that the domestic industry's operating loss worsened from 2011 to 2012 when the average price of the dumped imports increased, and their volume and market share decreased. However, at the same time, the Panel found it reasonable for the Korean investigation authorities to consider that "[t]he average price of the dumped products increased in 2011 and 2012 not because their actual sales prices rose but mainly because the product composition was changed [such] that they were mainly composed of high-priced products."[814] As we see it, therefore, the Panel did not err in stating that "the KTC's consideration of the relationship between the operating losses of the domestic industry during the entire POI and the dumped imports is reasonable and grounded in the underlying facts."[815] Accordingly, we reject Japan's argument that "[t]he KTC['s] discussion of this … issue … was deficient", or that "the Panel should have recognized this deficiency."[816] To that extent, we do not see any error in the Panel's finding.

5.3.4.2.2 Conclusion with respect to claim 4

5.302. In light of the foregoing considerations, we uphold the Panel's finding, in paragraph 8.3.b of the Panel Report, that Japan has not demonstrated that the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement with respect to their conclusion that the dumped imports, through the effects of dumping, were causing injury to the domestic industry, insofar as Japan's argument regarding insufficient correlation between dumped imports and trends in domestic-industry profits is concerned.

5.3.5 Whether the Appellate Body can complete the legal analysis under Articles 3.1, 3.2, and 3.4 of the Anti-Dumping Agreement

5.303. We now turn to examine Japan's request that the Appellate Body complete the legal analysis with respect to Japan's claims under Articles 3.1, 3.2, and 3.4 of the Anti-Dumping Agreement and find that the Korean investigating authorities acted inconsistently with these provisions in the anti-dumping investigation at issue.

5.304. To recall, the Panel found that Japan's volume and price-related claims under Articles 3.1 and 3.2 were outside its terms of reference.[817] With respect to Japan's claim under Articles 3.1 and 3.4 regarding the impact of the dumped imports on the state of the domestic industry, the Panel found that Japan's claim is limited to the allegation that the KTC failed to evaluate two of the specific factors listed in Article 3.4, namely the ability to raise capital or investments and the magnitude of

[810] Korea's appellee's submission, para. 460.
[811] Panel Report, para. 7.358.
[812] Panel Report, para. 7.358.
[813] Panel Report, para. 7.358.
[814] Panel Report, para. 7.279 (quoting OTI's Final Report (Panel Exhibit KOR-2b (BCI)), p. 58).
[815] Panel Report, para. 7.360.
[816] Japan's appellant's submission, para. 308.
[817] Panel Report, paras. 7.94 and 7.131.

the margin of dumping, and that all other "allegations" of inconsistency with Article 3.4 were outside its terms of reference.[818] With regard to those claims and "allegations" excluded from its terms of reference, the Panel stated that it would neither consider them further nor resolve them.[819]

5.305. We recall that, in light of the limitation imposed by Article 17.6 of the DSU, the Appellate Body has completed the legal analysis with "a view to facilitating the prompt settlement and effective resolution of the dispute … when sufficient factual findings by the panel and undisputed facts on the panel record allowed it to do so".[820] However, in addition to the lack of factual findings by the panel and undisputed facts on the panel record, the Appellate Body has declined to complete the legal analysis in view of due process considerations[821], for example, where the panel had not examined a claim at all[822], or where there had not been a full exploration of the issues[823] or scrutiny of the relevant evidence by the panel.[824]

5.306. With these considerations in mind, we turn to address Japan's request for completing the legal analysis, starting with whether the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement regarding their consideration of the volume of dumped imports.

5.3.5.1 Whether the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement in their consideration of the volume of dumped imports

5.307. As noted, for each of the claims that the Panel found to be outside its terms of reference, the Panel Report contains a section entitled "Relevant facts" that immediately follows the summaries of the parties' arguments and precedes the Panel's legal analysis regarding its terms of reference under Article 6.2 of the DSU. The Panel proceeded in this manner with respect to Japan's claim under Articles 3.1 and 3.2 of the Anti-Dumping Agreement regarding the Korean investigating authorities' consideration of import volumes.[825] The Panel sourced the "Relevant facts" from the KTC's Final Resolution[826] and the OTI's Final Report[827], which form part of the Panel record. In addition to setting out the relevant passages from the KTC's Final Resolution and the OTI's Final Report, the Panel stated:

> In the underlying investigation, the KTC considered whether there was a significant increase in dumped imports in absolute terms, relative to domestic consumption, and relative to domestic production. The KTC found that, from each of these three perspectives, the volume of dumped imports decreased from 2010 to 2012, and then increased sharply from 2012 to 2013. With respect to the trends in market share, the KTC found that the decreasing trend from 2010 to 2012, reversed into a sharp increase in 2013; on an end-point to end-point basis from 2010 to 2013, however, the market share of the dumped imports decreased. In its ultimate determination, the KTC relied upon the significant increase in dumped imports from 2012 to 2013 as a factor in suppressing and depressing domestic prices, which in turn [led] to a deterioration of the state of the domestic industry.[828]

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[818] Panel Report, para. 7.175.
[819] Panel Report, paras. 7.94, 7.131, and 7.175.
[820] Appellate Body Report, *Colombia – Textiles*, para. 5.30. (fns omitted)
[821] See e.g. Appellate Body Reports, *Russia – Commercial Vehicles*, para. 5.141 (referring to Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.224; *EC – Seal Products*, paras. 5.63 and 5.69; *US – Anti-Dumping Methodologies (China)*, para. 5.178); *EC – Export Subsidies on Sugar*, para. 339; *Peru – Agricultural Products*, para. 5.157.
[822] See e.g. Appellate Body Report, *Russia – Pigs (EU)*, para. 5.141 (referring to Appellate Body Reports, *EC – Poultry*, para. 107; *EC – Asbestos*, paras. 79 and 82; *US – Section 211 Appropriations Act*, para. 343; *EC – Export Subsidies on Sugar*, para. 337).
[823] See e.g. Appellate Body Reports, *EC – Asbestos*, para. 81; *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.721; *EC – Seal Products*, para. 5.69; *Russia – Commercial Vehicles*, para. 5.141.
[824] See e.g. Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.157.
[825] Panel Report, paras. 7.81-7.84.
[826] KTC's Final Resolution (Panel Exhibit KOR-1b (BCI)).
[827] OTI's Final Report (Panel Exhibit KOR-2b (BCI)).
[828] Panel Report, para. 7.81.

5.308. Japan submits that this part of the Panel Report "sets forth all of the key facts needed to resolve this claim".[829] Japan asserts that the KTC "improperly" found a "significant increase" in the dumped imports even though the volume of such imports actually fell in two of the three years during the POI, and increased slightly on an absolute basis and decreased on a relative basis over the POI.[830] Japan also submits that "[t]his claim is also closely related to the claims the Panel did address."[831] In particular, Japan refers to "the Panel's discussion of the volume-related aspects of the causation claim".[832]

5.309. In response, Korea submits that the Panel did not undertake any analysis and did not make any factual findings under Articles 3.1 and 3.2. According to Korea, "[i]n paragraphs 7.81 to 7.84 [of its Report], the Panel merely summarized some but clearly not all of the 'relevant facts'."[833] Thus, Korea avers that "[g]iven the absence of any legal or factual findings, let alone sufficient factual findings, there is no basis for the Appellate Body to 'complete' the analysis since no analysis was ever initiated."[834]

5.310. Article 3.2 of the Anti-Dumping Agreement instructs an investigating authority "to 'consider' a series of specific inquiries".[835] With regard to the volume of subject imports, an investigating authority must consider whether there has been a significant increase in dumped imports in absolute terms or relative to domestic production or consumption. The Appellate Body has noted that Article 3.2 does not set out "a *specific* methodology that investigating authorities are required to follow when calculating the volume of 'dumped imports'."[836] However, "whatever methodology investigating authorities choose for determining the volume of dumped imports", it must ensure that the determination of injury is based on "positive evidence" and an "objective examination" of the volume of dumped imports.[837]

5.311. We recall that the Panel addressed the following arguments by Japan regarding the Korean investigating authorities' consideration of import volumes in the context of Japan's claim 6 under Articles 3.1 and 3.5 of the Anti-Dumping Agreement. The Panel reviewed Japan's arguments that the KTC's causation determination was undermined because: (i) the volume of dumped imports decreased in two years of the three-year period of trend analysis; and (ii) the volume of dumped imports increased only modestly in absolute terms and decreased in terms of market share in 2013 compared with 2010.[838] The Panel found that the KTC did not ignore the decline in dumped imports from 2010 to 2012. The Panel did not consider it unreasonable for the KTC to have relied on the 78.9% increase in the dumped imports from 2012 to 2013, the most recent period, which was the same year in which dumping was found.[839] The Panel also found that the fact that the market share of dumped imports did not increase on an end-point to end-point basis from 2010 to 2013 does not, in and of itself, preclude the conclusion reached by the KTC "that the increase in the absolute volume of imports, and in particular the significant increase from 2012 to 2013, combined with the price effects of the dumped imports, caused injury to the domestic industry".[840]

5.312. We note that certain arguments made by Japan in support of its present claim under Articles 3.1 and 3.2 are identical to those addressed by the Panel as described in the preceding paragraph. Japan argues that the KTC acted inconsistently with Articles 3.1 and 3.2 by "improperly" finding a "significant increase" in subject imports, even though the volume of such imports "actually fell in two out of three of the comparison periods, and ended the overall period up only slightly on an absolute basis and actually down on a relative basis".[841] Thus, like its argument in the context of

[829] Japan's appellant's submission, para. 128.
[830] Japan's appellant's submission, para. 137 (referring to Japan's first written submission to the Panel, paras. 128-131).
[831] Japan's appellant's submission, para. 129.
[832] Japan's appellant's submission, para. 130 (referring to Panel Report, paras. 7.250-7.258).
[833] Korea's appellee's submission, para. 188.
[834] Korea's appellee's submission, para. 188.
[835] Appellate Body Report, *China – GOES*, para. 129.
[836] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 113. (emphasis original)
[837] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 113.
[838] Panel Report, para. 7.251.
[839] Panel Report, para. 7.254.
[840] Panel Report, para. 7.257.
[841] Japan's appellant's submission, para. 137 (referring to Japan's first written submission to the Panel, paras. 128-131).

claim 6, Japan focuses on the alleged failure by the KTC to take into account the decrease of import volumes in absolute terms in the first two years of the POI, and the decrease of import volumes in relative terms, in finding that there was a "significant increase" in the volume of imports. However, in our view, the Panel did not accept the KTC's findings on its face. Rather, the Panel critically examined the KTC's findings concerning the volume of dumped imports. We do not consider that, for the Panel, the year in which dumping is found would suffice, without more, for the purposes of assessing injury. Nor do we understand the Panel to have *a priori* excluded from its consideration relevant evidence and information pertaining to the period prior to 2012. To the contrary, the Panel examined and found that "the KTC did not ignore the decline in dumped imports from 2010 to 2012" but "explained that, despite the decrease in imports in the first two years, there was a significant reversal in the trend from 2012 to 2013".[842] For the reasons set out in section 5.3.4.1.2.1, we have explained that the Panel's above analysis and findings properly reviewed the Korean investigating authorities' analysis pursuant to the requirements set out in Article 3.2, first sentence, as opposed to those under Article 3.5. In so doing, we do not find the Panel to have erred in applying the requirements contained in Article 3.2, first sentence, when reviewing the KTC's assessment of the volume of dumped imports. Indeed, in reviewing Japan's argument that the market share of dumped imports decreased on an end-point to end-point basis, the Panel correctly relied on the requirements set out in Article 3.2, first sentence.

5.313. However, we note that Japan's arguments in the context of its present claim under Articles 3.1 and 3.2 concerning the volume of dumped imports and regarding which it requests us to complete the legal analysis, encompass broader considerations than those contained in the above findings by the Panel, namely that: (i) the KTC improperly assumed a competitive relationship between domestic like products and subject imports; and (ii) the KTC improperly found a "significant increase" in subject imports without examining whether the increased imports actually replaced domestic like products through market competition.[843]

5.314. Turning to the first of these arguments, we note that Japan asserts that the KTC acted inconsistently with Articles 3.1 and 3.2 in failing to make "an objective examination of whether subject imports replaced domestic like products, so as to support a determination that the increase in import volume could *objectively* be described as 'significant'."[844] Japan also submits that the "findings" the OTI made on the issue of displacement were "vague and anecdotal"[845] and that these findings merely compared the price levels of the subject imports and domestic like products, without taking into consideration "the margins of dumping at issue viewed in light of the competitive relationship (or lack thereof) between subject imports and domestic products".[846]

5.315. In response, Korea submits that "Article 3.2 requires a quantitative examination of the volume of dumped imports as part of a more comprehensive injury analysis."[847] According to Korea, Japan's interpretation of what is required of investigating authorities under Article 3.2 with respect to considering the volume of dumped imports goes "far beyond the text of the provision as interpreted and applied in the jurisprudence".[848] Korea further argues that, in any event, the KTC in fact examined both "the increase in volume and the loss of market share of the domestic like product and thus established that in this particular case there was such displacement".[849]

5.316. We note that this argument was not raised by Japan before the Panel in the context of claim 6. Nor do we find anything in the "Relevant facts" section of the Panel Report that indicates that the Panel explored with the parties this issue of "replacement" raised by Japan. In this section, the Panel set out excerpts from the KTC's Final Resolution.[850] Our review of these excerpts shows that the KTC examined the market share of both sets of products as part of the examination into the increase of imported products in relative terms. However, these passages, in and of themselves,

[842] Panel Report, para. 7.254.
[843] Japan's appellant's submission, para. 137 (referring to Japan's first written submission to the Panel, paras. 132-133 and 137-141; second written submission to the Panel, paras. 98-112).
[844] Japan's appellant's submission, para. 141. (emphasis original)
[845] Japan's appellant's submission, para. 142.
[846] Japan's appellant's submission, para. 142 (referring to Japan's second written submission to the Panel, paras. 99-105).
[847] Korea's appellee's submission, para. 208.
[848] Korea's appellee's submission, para. 208.
[849] Korea's appellee's submission, para. 210.
[850] Panel Report, para. 7.82 (quoting KTC's Final Resolution (Panel Exhibit KOR-1b (BCI)), p. 14).

do not show whether the KTC found "replacement" of domestic like products by dumped imports in the manner asserted by Japan. Importantly, we note that Japan concedes that the Panel "did not address at all" Japan's point about the Korean investigating authorities' failure to show "any replacement of domestic shipments by imports".[851] Moreover, the Panel did not sufficiently explore the issue whether Article 3.2, first sentence, requires a showing that subject imports have replaced domestic like products. We also note that, while Japan characterizes the OTI's findings on "the issue of displacement [as] vague and anecdotal"[852], Korea contends that the KTC "in fact considered whether dumped imports displaced domestic sales by examining both volumes and market share developments".[853] Japan, however, submits that, in so doing, "[t]he Korean [investigating] authorities … presented only a numerical comparison of the volume, without examining market interactions by considering the competitive relationship between the dumped imports and domestic like products in conjunction with the margins of dumping."[854] As we see it, the parties, therefore, are in clear disagreement about the underlying facts themselves, i.e. the extent to which the Korean investigating authorities addressed the issue of replacement in their analysis of the volume of dumped imports. We note that the Panel made no findings in this regard.

5.317. Finally, Japan contends that "[t]he KTC also failed to consider the existence of a competitive relationship between the dumped imports and the domestic like product, in conjunction with the margins of dumping."[855] Japan submits that, in addition to "[t]he diverging volume and market share trends", "[t]he consistent and significant overselling, the diverging price trends, and the differing magnitudes of price changes were all consistent with the lack of meaningful competitive relationship."[856]

5.318. Korea, for its part, submits that Japan does not develop this assertion.[857] Korea avers that the Appellate Body should not engage in an alleged completion of the legal analysis when "the appellant does not develop its claims in any way, fails to link the claim to the allegedly undisputed facts on the record", and "simply makes bare assertions without a proper legal analysis of why a detailed analysis of the competitive relationship between different producers would be required for an analysis of the increase in the volume of imports".[858]

5.319. We note that Japan concedes that the Panel "did not address at all" the point about the Korean investigating authorities' failure to show "any evidence of a competitive relationship" in the context of their consideration of the volume of dumped imports.[859] Thus, the Panel did not explore with the parties the question whether the Korean investigating authorities were required, in the first place, to consider the competitive relationship between dumped imports and domestic like product "in conjunction with the margins of dumping" in its analysis of significant increase in volume of dumped imports under Article 3.2. Furthermore, the "Relevant facts" section does not contain any indication as to whether the Korean investigating authorities analysed the issue raised by Japan *in the context of their consideration of the volume of dumped imports*.[860] Nor is such an analysis clearly

[851] Japan's appellant's submission, para. 147.
[852] Japan's appellant's submission, para. 142.
[853] Korea's appellee's submission, para. 189 (referring to Korea's response to Panel question No. 37).
[854] Japan's appellant's submission, para. 143.
[855] Japan's appellant's submission, para. 139 (referring to Japan's first written submission to the Panel, paras. 132-133; second written submission to the Panel, paras. 106-108).
[856] Japan's appellant's submission, para. 139 (referring to Japan's first written submission to the Panel, paras. 74-83).
[857] Korea's appellee's submission, para. 204.
[858] Korea's appellee's submission, para. 204.
[859] Japan's appellant's submission, para. 147.
[860] We recall that in the context of its price-effects analysis, the KTC considered the competition between dumped imports and domestic like products, which was examined by the Panel in the context of Japan's argument concerning diverging price trends under claim 6, and which we have reviewed above in section 5.3.4.1.2.2.

discernible from our review of the KTC's Final Resolution[861] and the OTI's Final Report[862] that form part of the Panel record.[863]

5.320. Confronted with these circumstances, completion of the legal analysis regarding whether the KTC (i) improperly assumed a competitive relationship between domestic like products and subject imports; and (ii) improperly found a "significant increase" in subject imports without examining the question of replacement is hindered by the absence of relevant factual findings on these issues, sufficient undisputed facts on the Panel record and a sufficient exploration of these issues by the Panel. Thus, engaging in the completion exercise would require us to "review and consider evidence and arguments that … were not sufficiently addressed by the Panel or sufficiently explored and developed before the Panel".[864] In light of the foregoing considerations, we find ourselves unable to complete the legal analysis as to whether the Korean measures are inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement with respect to the Korean investigating authorities' consideration of the volume of the dumped imports.[865]

5.3.5.2 Whether the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement in their consideration of price effects

5.321. Japan asserts that the Korean investigating authorities failed to meet their obligations under Articles 3.1 and 3.2 of the Anti-Dumping Agreement because: (i) the KTC failed to consider the implications of the overselling by the dumped imports; (ii) the KTC "largely ignored" the diverging price trends; (iii) the KTC "ignored the absence of any evidence of price suppression in 2011 and 2012, and drew improper conclusions from the limited evidence in 2013"; and (iv) the KTC failed to ensure the price comparability by failing to demonstrate "any actual and specific competition" between the dumped imports and domestic like products.[866] Japan contends that the Panel's findings under Article 3.5 of the Anti-Dumping Agreement that the Korean investigating authorities failed to ensure price comparability and adequately take into account the overselling by the dumped imports in their examination of *causation* "demonstrate that the [Korean investigating authorities'] determination did not properly assess the 'effect of the dumped imports on prices in the domestic market' as required by Articles 3.1 and 3.2".[867]

5.322. In response, Korea argues that the Appellate Body is not in a position to complete the legal analysis in the absence of any legal or factual findings and undisputed facts on the record regarding Japan's claim under Articles 3.1 and 3.2.[868] Regarding the merits of Japan's claim, Korea maintains that the Korean investigating authorities considered the implications of the price overselling by the dumped imports[869] and diverging price trends.[870] Korea disputes Japan's contention that the Korean investigating authorities' consideration of price suppression was based on limited evidence from 2013[871] and that they did not demonstrate a competitive relationship between the dumped imports and domestic like products.[872] Korea also contends that "the Korean [investigating] authorities properly ensured price comparability between like product and the dumped imports."[873] Regarding Japan's reliance on the Panel's findings concerning Japan's "independent" causation claim, Korea argues that the completion of the legal analysis in this regard is prevented by the fact that the Panel

[861] KTC's Final Resolution (Panel Exhibit KOR-1b (BCI)), pp. 14-17.
[862] OTI's Final Report (Panel Exhibit KOR-2b (BCI)), pp. 46-51.
[863] We recall that in the context of Japan's argument regarding diverging price trends with respect to its "independent" causation claim under Articles 3.1 and 3.5 of the Anti-Dumping Agreement, we have agreed with the Panel's analysis that focused on whether there was a competitive relationship between dumped imports and domestic like products. See section 5.3.4.1.2.2 above.
[864] Appellate Body Report, *EC and certain member States − Large Civil Aircraft (Article 21.5 − US)*, para. 5.749.
[865] Japan's appellant's submission, para. 152.
[866] Japan's appellant's submission, para. 186.
[867] Japan's appellant's submission, para. 202.
[868] Korea's appellee's submission, para. 256. In Korea's view, Japan's request for completing the legal analysis would effectively require the Appellate Body "to play the role of the Panel both in terms of the facts and in terms of the application of the law to the facts". (Ibid., para. 257)
[869] Korea's appellee's submission, paras. 291-297.
[870] Korea's appellee's submission, paras. 298-307.
[871] Korea's appellee's submission, paras. 308-310.
[872] Korea's appellee's submission, paras. 311-319.
[873] Korea's appellee's submission, para. 314.

made certain factual findings in its disposition of the price-effects-related claims under Article 3.5, which the parties dispute and are subject to appeal.[874]

5.323. The second sentence of Article 3.2 of the Anti-Dumping Agreement requires an investigating authority to consider whether the effect of such dumped imports on the prices of the domestic like products is to depress or suppress such prices or to undercut them to a significant degree. Article 3.2, second sentence, does not prescribe specific methodologies as to how an investigating authority is to consider whether there has been a significant price undercutting, price suppression, or price depression. Nor does Article 3.2, second sentence, explicitly state whether an investigating authority must ensure comparability between the prices that are being compared. As noted above, "a failure to ensure price comparability" cannot be considered to be consistent with the requirement under Article 3.1 that "a determination of injury be based on 'positive evidence' and involve an 'objective examination' of, *inter alia*, the effect of subject imports on the prices of domestic like products".[875] Accordingly, to the extent an investigating authority relies on price comparisons in its consideration of price effects of subject imports, price comparability needs to be ensured. Thus, where an investigating authority fails to ensure price comparability in price comparisons between dumped imports and the domestic like product, this undermines its findings of price effects under Article 3.2, to the extent that it relies on such price comparisons.[876]

5.324. With respect to the issue of price comparability, it is undisputed that in the present case "the KTC undertook price comparisons" in finding that the dumped imports had price-suppressing and -depressing effects.[877] We recall that, in the context of Japan's claim 6, the Panel found that "the KTC relied upon the price differentials in [the] comparisons [at issue] in finding that dumped imports had *price suppressing and depressing effects on domestic prices*, which in turn was one of the bases for its ultimate determination under Article 3.5."[878] The Panel set out in a table what Korea referred to as a series of comparisons between the individual resale transaction prices of models of dumped imported valves and the average prices of corresponding models of the domestic like product reported in the OTI's Final Report. This table underlined those transactions in which dumped import prices to certain customers were lower than the average domestic price for the corresponding model produced by the Korean producers.[879] The Panel found that the listed transactions "took place on different dates and involved different quantities".[880] The Panel observed that, in general, the lower the quantity involved in a transaction, the higher the unit price of the dumped imported valve. The Panel took the view that, in light of the possible effect on the comparisons made, an unbiased and reasonable investigating authority could not have properly compared these individual transaction prices with the average price of the corresponding model of the domestic like product without further consideration and explanation of the "relevance or significance" of these differences.[881]

5.325. As indicated above, while the Panel's analysis was carried out in the context of Japan's claim 6, it was nonetheless in line with the requirements set out in Article 3.2, second sentence.[882] Indeed, the Panel's analysis of the issue of price comparability was properly conducted under Article 3.1 and Article 3.2, second sentence, and the Panel's finding that the Korean investigating authorities had to ensure price comparability in the price comparisons they undertook was compatible with the requirements of these provisions. As the Panel's finding indicates, the Korean investigating authorities' transaction-to-average comparison analysis was aimed at assessing whether the prices of dumped imports were lower than the prices of domestic like products. The Korean investigating authorities considered that individual cases of dumped import resale prices for some models that were lower than average domestic prices and high-end domestic prices for corresponding models to certain customers (i.e. individual instances of "underselling") led to price

[874] Korea's appellee's submission, para. 319.
[875] Appellate Body Report, *China – GOES*, para. 200.
[876] See section 5.3.4.1.4 above.
[877] Panel Report, para. 7.267.
[878] Panel Report, para. 7.272. (emphasis added)
[879] Panel Report, para. 7.270 and Table 1 (referring to OTI's Final Report (Panel Exhibit KOR-2b (BCI)), pp. 100-101).
[880] Panel Report, para. 7.271.
[881] Panel Report, para. 7.271.
[882] See section 5.3.4.1.4.2 above.

suppression and price depression of the domestic like product.[883] Price comparability thus became an important issue in the KTC's consideration of price effects since "the KTC relied upon the price differentials in these comparisons in finding that dumped imports had *price suppressing and depressing effects on domestic prices*."[884]

5.326. The Panel found that the transactions "took place on different dates and involved different quantities" and rightly, in our view, considered that an unbiased and reasonable investigating authority could not have properly compared these individual transaction prices with the average price of the corresponding model of the domestic like product without further consideration and explanation of the "relevance or significance" of these differences.[885] The Panel ultimately found that the evidence before it did not suggest that either the KTC or the OTI made any effort to consider differences or their potential consequences *for price suppression and price depression* in the determination of material injury caused by dumped imports, thereby casting doubt on the validity of these price comparisons.[886] In our view, these flaws that the Panel identified concern the objectivity and evidentiary foundation of the KTC's price suppression and price depression findings under Articles 3.1 and 3.2.[887]

5.327. For these reasons, we are able to complete the legal analysis to find that, as the Korean investigating authorities found price-suppressing and -depressing effects of dumped imports based on the transaction-to-average price comparisons without ensuring price comparability, they acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

5.328. Next, with respect to the issue of price overselling, Japan argues that "[i]n finding the price effects of the dumped imports on the domestic like products, the KTC ignored … the significant overselling of the dumped imports."[888]

5.329. Korea responds that the KTC expressly addressed the fact that the average sales price of the dumped imports was higher than that of the like product but found that "this 'overselling' did not undermine the conclusion that the suppression and depression of domestic prices was a result of the dumped imports."[889]

5.330. We recall that the Korean investigating authorities relied on individual instances of "underselling" to address the argument by the interested parties that the consistent overselling by dumped imports based on the average price precluded a finding of price suppression and price depression. In particular, "the KTC referred to the [price-suppressing and -depressing] effects of individual instances of … 'underselling' on 'the price of the like product'."[890] As noted by the Panel in the section entitled "Relevant facts", the KTC stated:

> The Commission finds that the dumped products suppressed price increases of the like product and caused decreases thereof, although the average sales price of the dumped products was higher than that of the like product.
>
> The average sales price of the dumped products was higher due to their price differentiation in accordance with models, option details or customers, but it was found that the sales price of the dumped products was much lower than the average sales price in the case of certain products or customers for which the degree of competition with the domestic industry was fierce, which had *the effect of suppressing increases in the price of the like product or causing decreases thereof*. It was investigated that SMC Korea … consistently expanded its sales organizations and used its dominant position to attract distribution agents or discourage defections of its distribution agents, and thus

[883] Panel Report, para. 7.302 (referring to OTI's Final Report (Panel Exhibit KOR-2b (BCI)), pp. 100-101; Korea's response to Panel's question No. 88(b), para. 19; Record Data on the Dumped Imports' Individual Resale Transaction (Panel Exhibit KOR-57 (BCI))).
[884] Panel Report, para. 7.272. (emphasis added)
[885] Panel Report, para. 7.271.
[886] Panel Report, para. 7.271.
[887] See section 5.3.4.1.4.2 above.
[888] Japan's appellant's submission, para. 187.
[889] Korea's appellee's submission, para. 284.
[890] Panel Report, para. 7.302.

> *the domestic industry had to respond to such strengthened marketing activities of SMC Korea and become forced to decrease the sales price or refrain from increasing prices*.[891]

5.331. The Panel, albeit in the context of Japan's claim 6, considered that "[t]his implie[d] that the KTC found [that] the [price-suppressing and -depressing] effects of these individual instances were on domestic like product prices as a whole, and not only on the prices of certain models of the domestic like product."[892] The Panel thus understood the Korean investigating authorities to have considered that individual cases of dumped import resale prices for some models that were lower than average domestic prices and high-end domestic prices for corresponding models to certain customers (i.e. individual instances of "underselling") led to price suppression and price depression of the domestic like product.[893] As we see it, the KTC relied on the evidence regarding the individual instances of "underselling" in order to respond to the interested parties' arguments concerning the existence of price overselling based on the average prices of all the products. The KTC reached the conclusion that these individual instances of "underselling" had the effect of *suppressing and depressing the prices* of domestic like product despite the overall overselling by the dumped imports. In response to Korea's argument that Panel Exhibit KOR-57 supported the KTC's conclusion, the Panel reviewed the said Exhibit in conjunction with the OTI's Final Report and the KTC's Final Resolution and found that the evidence did not show whether, and if so how, the Korean investigating authorities examined the extent to which prices of the domestic like product were affected by the individual instances of lower dumped import prices.[894]

5.332. Although the Panel made this finding in the context of Japan's claim 6, for the reasons stated above, we have considered that the Panel's analysis was nonetheless in line with the requirements set out in Article 3.1 and Article 3.2, second sentence. Indeed, the Panel's analysis of the issue of price overselling and the individual instances of "underselling" was properly conducted under, and complied with, the requirements of those provisions.[895] Accordingly, we have explained that, although the Panel spoke of price suppression or depression of the domestic like product "as a whole", we do not consider the Panel to have imposed a legal requirement "to demonstrate how and to what extent underselling in certain competitive sales affected the prices of the domestic like product 'as a whole'".[896] Rather, in the context of this case, the Panel examined the KTC's determination and, on that basis, "[understood] the KTC [to have] found [that] the effects of these individual instances were on domestic like product prices as a whole, and not only on the prices of certain models of the domestic like product".[897] However, the Panel found that an explanation and analysis of how and to what extent the prices of the domestic like product were affected was lacking.[898] In our view, the above-mentioned flaws that the Panel identified concern the Korean investigating authorities' failure to conduct an objective examination based on positive evidence in their consideration of price suppression and price depression. As we have explained, in identifying the *price-suppressing and -depressing* effects of the dumped imports, it was therefore incumbent upon the Korean investigating authorities to have provided an explanation and analysis of how and to what extent the prices of the domestic like product were affected in light of the consistent overselling by the dumped imports.[899]

5.333. Korea argues that the Panel made "certain factual findings on which its legal analysis [of the price effects in the context of the Korean investigating authorities' causation determination] was based which both sides contest and dispute".[900] We recall that, in section 5.3.4.1.5 above, we have addressed Korea's appeal that the Panel failed to make an objective assessment of the matter under Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement. In this context, we have rejected several arguments raised by Korea concerning alleged errors by the Panel in its assessment

[891] Panel Report, para. 7.115 (quoting KTC's Final Resolution (Panel Exhibit KOR-1b (BCI)), p. 19). (emphasis added by the Panel)
[892] Panel Report, para. 7.302.
[893] Panel Report, para. 7.302 (referring to OTI's Final Report (Panel Exhibit KOR-2b (BCI)), pp. 100-101; Korea's response to Panel's question No. 88(b), para. 19; Record Data on the Dumped Imports' Individual Resale Transaction (Panel Exhibit KOR-57 (BCI))).
[894] Panel Report, paras. 7.309-7.310.
[895] See section 5.3.4.1.4.2 above.
[896] Korea's other appellant's submission, para. 222.
[897] Panel Report, para. 7.302.
[898] Panel Report, paras. 7.311-7.313.
[899] See section 5.3.4.1.4.2 above.
[900] Korea's appellee's submission, para. 319.

of the facts. For instance, we have rejected Korea's argument that the Panel created and applied "specific and excessively demanding requirements" that must be met in an overselling situation insofar as it relates to the applicable requirements set out in Article 3.2 of the Anti-Dumping Agreement. Similarly, we have rejected Korea's argument regarding the Panel's treatment of Panel Exhibit KOR-57 and agreed with the Panel's reading of that Exhibit.[901] Apart from those arguments, Korea does not identify any disputed factual findings with respect to the Panel's finding that the Korean investigating authorities failed to adequately take into account the consistent overselling by the dumped imports. Rather, as Korea acknowledges, the KTC relied on the relevant price comparisons and individual instances of "underselling" to conclude that the average price overselling by the dumped imports "did not undermine [its] conclusion that the dumped imports suppressed and depressed the domestic price of the like product".[902]

5.334. For these reasons, we are able to complete the legal analysis and find that, in the absence of any explanation and analysis of how and to what extent the prices of the domestic like product were affected in light of the consistent overselling by dumped imports when finding price suppression and price depression, the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

5.335. With respect to diverging price trends, Japan contends that the KTC also "largely ignored" these "dramatically" diverging price trends that strongly suggested the lack of interaction in the market between the price of the subject imports and that of the domestic like products.[903]

5.336. Korea, for its part, submits that the KTC considered the development in prices of both the dumped imports and the domestic like products in a dynamic manner over the entire POI, year-by-year and end-point to end-point, using average import and resale prices as well as a price fluctuation index.[904] On the basis of this "comprehensive analysis", Korea contends that "[the] KTC observed strong indications of price effects by the dumped imports on domestic prices throughout the entire POI, including in 2012 and 2013."[905]

5.337. We recall that, before the Panel, Japan raised the same argument in support of claim 6 and contended that "these diverging price trends show that there was no market interaction between the dumped imports and the domestic like product", thus "*undermining the KTC's price suppression and depression analyses*, which in turn formed the basis of the ultimate determination under Article 3.5".[906] The Panel found that "[t]he different magnitude of the price decreases from 2012 to 2013 does not necessarily undermine the KTC's findings with respect to the competitive relationship between the dumped imports and the domestic like product."[907] According to the Panel, the KTC's explanation that "the prices of the domestic industry were already at unsustainably low levels"[908], which constrained any further price reductions, was reasonable and supported by the facts.[909] For the alleged divergence from 2011 to 2012, the Panel acknowledged that it "could suggest a lack of competition between the dumped imports and the domestic like product".[910] However, the Panel found that "[t]he KTC did not disregard this possibility in its analysis" as it "explained that the diverging trend from 2011 to 2012 was caused by a change in the product mix of the dumped imports."[911] The Panel found this explanation to be "reasonable and supported by the facts".[912]

5.338. As noted above, the Panel's analysis focused on whether there was a competitive relationship between dumped imports and domestic like products despite diverging price trends, and whether the diverging price trends could, in and of themselves, undermine the causal relationship.[913] This,

[901] See section 5.3.4.1.5 above.
[902] Korea's appellee's submission, para. 292.
[903] Japan's appellant's submission, para. 186.
[904] Korea's appellee's submission, para. 299 (referring to Korea's first written submission to the Panel, paras. 77-92 and 97-112).
[905] Korea's appellee's submission, para. 299.
[906] Panel Report, para. 7.273. (emphasis added)
[907] Panel Report, para. 7.295.
[908] Panel Report, para. 7.278 (referring to KTC's Final Resolution (Panel Exhibit KOR-1b (BCI)), p.18).
[909] Panel Report, para. 7.295.
[910] Panel Report, para. 7.295.
[911] Panel Report, para. 7.295.
[912] Panel Report, para. 7.295.
[913] See section 5.3.4.1.2.2 above. See also Panel Report, para. 7.295.

as noted, is evident from the manner in which the Panel drew its conclusions concerning the diverging trends in the average prices of dumped imports and the domestic like product when it explained that: (i) the different magnitude of the price decreases from 2012 to 2013 does not necessarily undermine the KTC's findings with respect to the *competitive relationship* between the dumped imports and the domestic like product[914]; (ii) the opposing price movements from 2011 to 2012 could suggest *a lack of competition* between the dumped imports and the domestic like product and the KTC did not disregard this possibility in its analysis[915]; and (iii) the verified instances in which the dumped imports were sold at prices lower than those of the domestic like product support the view that *there was competition* in the Korean market for valves.[916] We have reviewed above these findings by the Panel and explained that the Panel properly reviewed the Korean investigating authorities' examination of the relationship between the prices of the dumped imports and those of the domestic like products, in order to ascertain the effects of the former on the latter. In so doing, we have found that this corresponds to an examination properly conducted pursuant to Article 3.2, second sentence. Therefore, given that we have found above that the Panel properly reviewed the Korean investigating authorities' consideration of the diverging price trends in light of the requirements set out in Article 3.2, second sentence, and found it reasonable and supported by facts, we reject Japan's allegation that the KTC "largely ignored" the diverging price trends which strongly suggested the lack of interaction in the market between the prices of the subject imports and those of the domestic like products.[917]

5.339. For these reasons, we are able to complete the legal analysis and find that the Korean investigating authorities did not act inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement with respect to their consideration of diverging price trends.

5.340. We now turn to Japan's argument that "the KTC failed to address the counterfactual question of how prices … might have been different in the absence of dumping."[918] Japan asserts that the KTC did not examine certain "market interactions" between the dumped imports and domestic like products.[919] In this way, according to Japan, "the KTC's determination ignored significant facts suggesting that there is no meaningful competitive relationship between the subject imports and domestic like products as a whole."[920]

5.341. Korea disputes Japan's claim that Article 3.2 of the Anti-Dumping Agreement requires an investigating authority "to consider what would have happened to domestic prices 'in the absence of dumping'".[921] Even if there is such an obligation, Korea argues that the Korean investigating authorities adequately addressed the issue "by looking at a reasonable sales price or by examining price developments in light of market conditions such as increasing demand or costs".[922]

5.342. Japan's argument is premised on the notion that Article 3.2 of the Anti-Dumping Agreement requires an investigating authority to consider "the competitive relationship between the dumped imports and the domestic like product in conjunction with the dumping margins at issue".[923] Korea, however, disagrees with Japan's argument that the "core question" in a price-effects analysis under Article 3.2 is to consider what would have happened to domestic prices "in the absence of dumping, i.e. if the dumped imports had been sold at their normal value".[924] Korea considers this argument legally erroneous, because the text of Article 3.2 refers to the price effects of "dumped imports" rather than of "dumping". These arguments thus raise a question regarding Article 3.2 that the Panel never explored with the parties. Indeed, Japan concedes that "[t]he Panel … did not address at all Japan's point[] under Article 3.2 about the failure to … provide an analysis of the counterfactual question of how prices might have been different in the absence of dumping."[925] In our view,

[914] Panel Report, para. 7.295.a.
[915] Panel Report, para. 7.295.a.
[916] Panel Report, para. 7.295.c.
[917] See section 5.3.4.1.2.2 above.
[918] Japan's appellant's submission, para. 185 (referring to Japan's second written submission to the Panel, paras. 17 and 25-32).
[919] Japan's appellant's submission, para. 187.
[920] Japan's appellant's submission, para. 187.
[921] Korea's appellee's submission, para. 267 (quoting Japan's appellant's submission, para. 191).
[922] Korea's appellee's submission, para. 267.
[923] Japan's appellant's submission, para. 185.
[924] Korea's appellee's submission, para. 267 (quoting Japan's appellant submission, para. 191).
[925] Japan's appellant's submission, para. 200.

engaging with this issue would therefore require us to "review and consider evidence and arguments that … were not sufficiently addressed by the Panel or sufficiently explored and developed before the Panel".[926]

5.343. Accordingly, we find ourselves unable to complete the legal analysis as to whether the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.2 in "fail[ing] to address the counterfactual question of how prices … might have been different in the absence of dumping".[927]

5.344. Next, Japan contends that "the KTC also ignored the absence of any evidence of price suppression in 2011 and 2012, and drew improper conclusions from the limited evidence in 2013."[928] According to Japan, "contrary to the KTC findings, the OTI data on 'reasonable selling price' actually undermined any finding of price suppression."[929] In addition, Japan dismisses the "reasonable sales price" analysis claiming that it was "flawed and insufficient".[930] According to Japan, "Korea did not explain how or why it selected a particular benchmark to set the 'reasonable selling price', or why that benchmark should be considered reasonable."[931]

5.345. Korea, for its part, disputes these arguments. Specifically, Korea argues that the KTC "adopted the relevant approach to price suppression by using a 'reasonable sales price' or constructed target price for comparison with the actual price levels, irrespective of whether the prices mirror each other in terms of direction and magnitude".[932] Moreover, Korea claims that "[the] OTI verified that the domestic industries could have raised the sales price of the like product to the level of the reasonable sales prices if there had been no dumping, based on the magnitude of dumping margins and the range of 'reasonable sales prices'."[933]

5.346. We note that, beyond a general reference in the "Relevant facts" section[934], the Panel did not specifically address the issues relating to the OTI's use of the "reasonable sales price", including the OTI's choice of the operating profit ratio that was used to construct the "reasonable sales price".[935] The Panel merely noted that "[i]n its Final Report, the OTI appended two explanatory notes regarding the calculation of the reasonable sales price to the table reporting comparisons between the actual price and the reasonable sales price."[936] It is also evident from the competing positions adopted by the parties that the underlying factual bases are contested. Thus, given the limited scope and nature of the Panel's factual findings and the limited undisputed record evidence in this regard, our attempt to complete the legal analysis involving such competing arguments would require us to "review and consider evidence and arguments that … were not sufficiently addressed by the Panel or sufficiently explored and developed before the Panel".[937]

5.347. Accordingly, we find ourselves unable to complete the legal analysis as to whether the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.2, owing to the alleged flaws and insufficiencies in their "reasonable sales price" analysis.[938]

5.348. Finally, Japan argues that the Korean investigating authorities never considered whether the alleged price suppression and price depression were "significant".[939] However, we fail to detect any specific argumentation in Japan's submissions before us that substantiates how and why the Korean investigating authorities failed to address the significance of the price suppression and price

[926] Appellate Body Report, *EC and certain member States − Large Civil Aircraft (Article 21.5 − US)*, para. 5.749.
[927] Japan's appellant's submission, para. 185 (referring to Japan's second written submission to the Panel, paras. 17 and 25-32).
[928] Japan's appellant's submission, para. 186.
[929] Japan's appellant's submission, para. 186.
[930] Japan's appellant's submission, para. 192.
[931] Japan's appellant's submission, para. 193.
[932] Korea's appellee's submission, paras. 295 and 309.
[933] Korea's appellee's submission, para. 422 (quoting OTI's Final Report (Panel Exhibit KOR-2b (BCI)), p. 85).
[934] See e.g. Panel Report, paras. 7.112 and 7.116-7.117.
[935] Panel Report, para. 7.116 (quoting OTI's Final Report (Panel Exhibit KOR-2b (BCI)), p. 57).
[936] Panel Report, para. 7.116.
[937] Appellate Body Report, *EC and certain member States − Large Civil Aircraft (Article 21.5 − US)*, para. 5.749.
[938] Japan's appellant's submission, para. 192. (fn omitted)
[939] Japan's appellant's submission, para. 186.

depression they identified. Moreover, we note that Korea disputes Japan's argument and claims that the KTC considered the quantitative aspect of the price effects of the dumped imports.[940] In addition, Korea argues that the KTC considered that the drop in domestic prices in 2013 to be particularly significant given that "domestic prices had already been suppressed throughout the entire POI, and because in 2013 consumption grew significantly and manufacturing costs increased".[941] We note that the Panel did not explore the issue of "significance" of the identified price effects with the parties. Indeed, as Japan concedes, "[t]he Panel … did not address at all Japan's point[] under Article 3.2 about the failure to … show whether imports affected the price of subject products to a 'significant' degree."[942] These considerations suggest that the factual basis underlying Japan's argument is disputed and, notably, remained unaddressed by the Panel.

5.349. Accordingly, we find ourselves unable to complete the legal analysis as to whether the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.2 because the KTC never considered whether the alleged price suppression and price depression were "significant".

5.350. In light of the foregoing considerations, we find that we are able to complete the legal analysis in part. For the reasons explained above, we find that the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement: (i) to the extent they found price-suppressing and -depressing effects of dumped imports based on the relevant price comparisons without ensuring price comparability; and (ii) in the absence of any explanation and analysis of how and to what extent the prices of the domestic like product were affected in light of the consistent overselling by dumped imports when finding price suppression and price depression. We also find that the Korean investigating authorities did not act inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement with respect to their consideration of diverging price trends.

5.351. However, for the reasons explained above, we find ourselves unable to complete the legal analysis as to whether the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.2 on the basis of Japan's arguments that: (i) "the KTC failed to address the counterfactual question of how prices … might have been different in the absence of dumping"[943]; (ii) the "reasonable sales price" analysis "was flawed and insufficient, as the KTC failed to examine market interactions between the subject imports and domestic like products"[944]; and (iii) the KTC never considered whether the alleged price suppression and price depression were "significant".[945]

5.3.5.3 Whether the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement in their consideration of the impact of dumped imports on the state of the domestic industry

5.352. We turn to Japan's claim under Articles 3.1 and 3.4 of the Anti-Dumping Agreement regarding the impact of dumped imports on the state of the domestic industry. Japan advances three arguments in support of its claim that the Korean investigating authorities acted inconsistently with these provisions, namely that: (i) the KTC did not establish any logical link between its findings regarding the volume and price effects under Article 3.2 of the Anti-Dumping Agreement and its finding of impact under Article 3.4[946]; (ii) the KTC "more generally" failed to show any explanatory force from dumped imports regarding the trends related to the condition of the domestic industry[947]; and (iii) the KTC failed to explain adequately how imports had negatively impacted the domestic like products as a whole in light of positive trends experienced by the domestic industry.[948]

5.353. Turning to the first of Japan's arguments, Japan contends that the KTC did not establish any "logical link" between its findings regarding the volume and price effects under Article 3.2 and its finding of impact under Article 3.4.[949]

[940] Korea's appellee's submission, para. 305.
[941] Korea's appellee's submission, para. 306.
[942] Japan's appellant's submission, para. 200.
[943] Japan's appellant's submission, para. 185.
[944] Japan's appellant's submission, para. 192. (fns omitted)
[945] Japan's appellant's submission, para. 186.
[946] Japan's appellant's submission, para. 237.
[947] Japan's appellant's submission, para. 245.
[948] Japan's appellant's submission, para. 250.
[949] Japan's appellant's submission, para. 237.

5.354. Korea responds that there is no requirement under Article 3.4 to establish a "logical link" between the volume of the dumped imports and their price effects, on the one hand, and the injury factor developments, on the other hand.[950] Korea adds that the focus of Article 3.4 is on the evaluation of all relevant factors affecting the domestic industry, rather than on establishing a causal link with price suppression or depression or increased volumes of imports.[951]

5.355. We recall that, in the context of claim 6, Japan made an identical argument contending that "the Panel's conclusion that the KTC need not establish a link between volume and price effects under Article 3.2 and impact on the domestic industry under Article 3.4 is … wrong."[952] In addressing Japan's appeal in section 5.3.4.1.2.3 above, we agreed with the Panel that, in order to examine the impact of dumped imports on the domestic industry properly *for purposes of Article 3.4*, an investigating authority is not required to link that examination with its consideration of the volume and the price effects of the dumped imports.[953] Contrary to Japan's argument, the Appellate Body's reliance on the term "the effect of" in Article 3.2 does not suggest that this provision "explicitly foreshadows the next step of considering 'the factors affecting domestic prices in Article 3.4'".[954] Rather, we believe, as did the Panel, that the inquiries under Articles 3.2 and 3.4 can be undertaken independently, and brought together in the ultimate determination of causation under Article 3.5.[955] Therefore, we reject, for the same reasons stated above, the premise of Japan's argument that Article 3.4 necessarily requires an investigating authority to link its examination of the impact of subject imports on the domestic industry with its considerations of volume and price effects under Article 3.2.

5.356. Next, Japan contends that "the KTC['s] Final Resolution more generally failed to show any explanatory force from subject imports regarding the trends related to the condition of the domestic industry."[956] Instead, according to Japan, "the KTC discussion of impact was more suggestive of *other* factors having explanatory force, not subject imports."[957] In support of this point, Japan submits:

a. the decline in total domestic consumption in 2012 had far more power to explain the decline in domestic sales in 2012 than did the decline in subject imports in the same year. These facts did not produce any reasonable basis for the KTC to infer that the subject imports replaced the domestic like products, at least, in 2012; rather, these facts demonstrated that there was no interaction between the subject imports and the domestic like products in the market;

b. the domestic industry's loss of market share in 2013 was caused by the sharp increase of consumption in 2013, rather than by dumped imports, which were a less important explanatory factor;

c. the fact that dumped import prices were higher than domestic prices undermines the explanatory force of those imports for the decrease in the prices of the domestic like product in 2013;

d. competition between the two applicants, as a result of the increase in their respective capacity, has more explanatory force than the dumped imports for the trends in the prices of the domestic industry; and

e. the explanatory force of the dumped imports for the decrease in domestic prices is undermined by the fact that domestic prices decreased by 3.6% in 2012 whereas dumped

[950] Korea's appellee's submission, para. 386.
[951] Korea's appellee's submission, para. 387.
[952] Japan's appellant's submission, para. 293 (referring to Panel Report, paras. 7.330 and 7.347.b).
[953] Panel Report, para. 7.330.
[954] Japan's appellant's submission para. 292.
[955] Panel Report, para. 7.329.
[956] Japan's appellant's submission, para. 245. (fn omitted)
[957] Japan's appellant's submission, para. 245. (emphasis added)

> import prices increased by 7%, and domestic prices decreased by only 1.2% in 2013, when dumped import prices fell by 31.1%.[958]

5.357. Korea, for its part, contends that "Japan seems to consider that [the] KTC should have carried out a fully-fledged non-attribution analysis for its examination under Article 3.4."[959] In any event, Korea submits that "[the] KTC established the requisite 'link', or 'explanatory force', of the dumped imports on the state of the domestic industry."[960]

5.358. Article 3.4 of the Anti-Dumping Agreement is concerned with "the relationship between subject imports and the state of the domestic industry".[961] Thus, Article 3.4 does not merely require an evaluation of each of the injury factors relevant to the state of the domestic industry but contemplates that an investigating authority assess the impact of dumped imports on the basis of such an evaluation.[962]

5.359. Japan suggests that the Korean investigating authorities were required to undertake a full-fledged causation and non-attribution analysis in their examination under Article 3.4. Several of Japan's above arguments, namely (a), (b), and (d), allege that factors other than the dumped imports were responsible for the state of the domestic industry.[963] Indeed, Japan's argument that "[t]he same facts can both undermine the existence of any explanatory force and then also lead to an argument [on non-attribution]"[964] suggests that, in Japan's view, Article 3.4 contemplates an exhaustive analysis of all known factors that may cause injury to the domestic industry, thereby, duplicating the overall causation determination required under Article 3.5. We are unable to subscribe to Japan's understanding of Article 3.4. We have considered above an identical legal question[965] and explained that the demonstration that subject imports are causing injury to the domestic industry "is an analysis specifically mandated by Article 3.5".[966] Indeed, as the Appellate Body stated, under Article 3.4 "an investigating authority is required to *examine* the impact of subject imports on the domestic industry", but "is *not* required to *demonstrate* that subject imports are causing injury to the domestic industry".[967] We are therefore not convinced that the Korean investigating authorities were required to consider these "other factors" enumerated by Japan in their examination under Article 3.4 of the impact of the dumped imports on the state of the domestic industry.[968]

5.360. Turning to the third of Japan's arguments, Japan argues that "the KTC … failed to adequately explain how imports had negatively impacted the domestic like products as a whole in light of positive trends experienced by the domestic industry."[969] Japan contends that the KTC appears to have attached "a high degree of importance to the other relevant factors highlighting negative aspects of the domestic industry, while disregarding or downplaying the many factors suggesting that the Korean industry was not suffering injury".[970] In particular, Japan asserts that "[t]he domestic industry saw increasing domestic sales and substantial new investment."[971]

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[958] Japan's appellant's submission, para. 245. (fns omitted)
[959] Korea's appellee's submission, para. 400.
[960] Korea's appellee's submission, para. 399.
[961] Appellate Body Report, *China – GOES*, para. 149.
[962] Appellate Body Report, *China – GOES*, para. 149. In this regard, the Appellate Body has indicated that the factors and indices that are relevant to an examination under Article 3.4 not only include those expressly listed therein but additional ones if they are relevant to the assessment of the state of the domestic industry. (Appellate Body Report, *Russia – Commercial Vehicles*, para. 5.155)
[963] Panel Report, para. 7.338.
[964] Japan's appellant's submission, para. 249.
[965] See section 5.3.4.1.2.3 above. In the context of claim 6, Japan argued that the Panel "incorrectly" noted "there is no need 'to undertake a fully reasoned causation and non-attribution analysis' as part of Article 3.4." (Japan's appellant's submission, para. 290 (quoting Panel Report, para. 7.332))
[966] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.205 (referring to Appellate Body Report, *China – GOES*, para. 150).
[967] Appellate Body Report, *China – GOES*, para. 150. (emphasis original)
[968] As for arguments (c) and (e), we have addressed Japan's similar arguments concerning price overselling and diverging price trends in sections 5.3.4.1.4 and 5.3.4.1.2.2, respectively.
[969] Japan's appellant's submission, para. 250.
[970] Japan's appellant's submission, para. 251.
[971] Japan's appellant's submission, para. 251.

5.361. In response, Korea submits that "WTO jurisprudence confirms that there is no obligation to conclude that every factor is negative under Article 3.4."[972] Korea asserts that the KTC's injury determination was grounded on the comprehensive review of "all relevant economic factors" and its holistic injury examination cannot be undermined just because a few indices were not necessarily indicative of injury.[973]

5.362. We recall that Article 3.4 requires an investigating authority to examine the impact of subject imports on the state of the domestic industry on the basis of "all relevant economic factors and indices having a bearing on the state of the industry", and provides a list of such factors and indicia that the authority must evaluate.[974] Article 3.4 makes it clear that neither one nor several of the factors listed therein can "necessarily give decisive guidance" as to the impact of the dumped imports on the state of the domestic industry. As noted by the Appellate Body, "there is no exclusive methodology prescribed for an investigating authority to conduct an examination under Article 3.4."[975]

5.363. Japan argues that, notwithstanding the fact that the domestic industry saw increasing domestic sales and substantial new investment, the KTC did not provide any explanation whatsoever regarding the weight attributed to any given factor or of the inferences it drew from those factors that were positive.[976] However, we recall that, in the context of Japan's claim under Articles 3.1 and 3.4 of the Anti-Dumping Agreement, the Panel found that Japan's claim concerning the state of the domestic industry is limited to the allegation that the KTC failed to evaluate two of the specific factors listed in Article 3.4, one of which was the ability to raise capital or investments.[977] The Panel noted that, "[i]n Japan's view, the fact that investment expanded in those two years contradicts the KTC's overall evaluation of the domestic industry's ability to raise capital."[978] In that connection, the Panel noted that, having found that investment increased sharply from 2011 to 2012, "the KTC went on to analyse the reasons for the increase in the first place, and the impact of the fiscal crisis-led contraction in demand on investment."[979] Ultimately, the Panel found that Japan failed to demonstrate that the KTC's evaluation of the investment and funding ability of the domestic industry is not one that a reasonable and objective investigating authority could make in light of the evidence and arguments before it.[980] Japan has not challenged on appeal this finding by the Panel. Thus, we are unable to see the basis on which Japan requests us to complete the legal analysis and find that the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.4 with respect to its argument concerning positive trends in *investment*, which stands addressed by the Panel and remains unappealed.

5.364. We also recall that, in the context of Japan's claim 6 under Articles 3.1 and 3.5 of the Anti-Dumping Agreement, the Panel addressed Japan's argument that the KTC failed to take into account positive trends during the period of trend analysis with respect to sales such that it "disproved" the existence of a causal relationship between the dumped imports and the injury to the domestic industry.[981] The Panel observed that the KTC noted and acknowledged the 14% increase in sales from 2010 to 2013, and the 7.6% increase in sales from 2012 to 2013, in the context of a 52.8% increase in consumption.[982] The Panel further observed that the KTC noted that the domestic industry lost 11.6 percentage points of market share, almost entirely to dumped imports, which indicated material injury.[983] Japan has not appealed these findings made by the Panel. It is therefore unclear on what basis Japan asserts that, notwithstanding these findings, the KTC's assessment of sales was flawed.

[972] Korea's appellee's submission, para. 403. (fn omitted)
[973] Korea's appellee's submission, para. 403.
[974] Appellate Body Report, *China − GOES*, para. 147.
[975] Appellate Body Reports, *China − HP-SSST (Japan) / China − HP-SSST (EU)*, para. 5.204.
[976] Japan's appellant's submission, para. 251 (referring to Japan's first written submission to the Panel, paras. 180-182).
[977] Panel Report, para. 7.175.
[978] Panel Report, para. 7.183.
[979] Panel Report, para. 7.184.
[980] Panel Report, para. 7.186.
[981] Panel Report, paras. 7.324 and 7.341-7.346.
[982] Panel Report, para. 7.345.
[983] Panel Report, para. 7.345.

5.365. That said, Japan's argument in the context of its present claim under Articles 3.1 and 3.4, regarding which it requests us to complete the legal analysis, encompasses broader considerations than those addressed in the above findings by the Panel. Not only does Japan make the argument about the positive trend experienced by domestic industry with respect to domestic sales, but it also asserts that the KTC attached "*a high degree of importance to the other relevant factors* highlighting negative aspects of the domestic industry, while disregarding or downplaying" those factors that showed positive trends.[984] Thus, Japan's contention that, in so doing, the KTC acted inconsistently with Articles 3.1 and 3.4 would require us to review the KTC's examination of impact and the weight it attributed to each of the factors listed in Article 3.4. Indeed, as Japan argues, "[t]he KTC's analysis of the relevant economic factors and indices of the domestic industry as listed in Article 3.4 were mixed", and the KTC disregarded or downplayed "the many factors" that suggested that "the Korean industry was not suffering injury."[985] The Panel, however, did not have the occasion to engage with these arguments in the context of Japan's claim under Articles 3.1 and 3.4. This was so because it found Japan's allegation that the KTC attached a high degree of importance to the relevant factors highlighting negative aspects, while disregarding or downplaying those factors suggesting that the Korean industry was not suffering injury, to fall outside its terms of reference.[986] Although, in the "Relevant facts" section, the Panel set out the Korean investigating authorities' evaluation of all the economic factors listed in Article 3.4, the Panel did not engage and explore the question that Japan now raises, namely, how the KTC's evaluation of all the relevant economic factors fits together to support its overall examination regarding the impact of dumped imports on the state of the domestic industry.[987] These considerations suggest that engaging in the completion exercise would require us to examine the relevance of each of the economic factors listed in Article 3.4 individually and conduct a collective assessment in order to review the consistency of the KTC's impact examination under Articles 3.1 and 3.4 with regard to which the Panel, notably, made no findings. Such an exercise, in our view, would require us to review and consider evidence and arguments that were not sufficiently addressed by the Panel or sufficiently explored and developed before the Panel.

5.366. Finally, Japan contends that, "[i]n the absence of a proper consideration of the dumped imports' effects on the domestic like product as a whole, the impact examination in the present case [is] necessarily inconsistent with Article 3.4".[988] According to Japan, "[t]his problem is particularly serious in this case, since the KTC improperly defined the domestic industry, and actually assessed the impact of imports on only about half of the domestic industry."[989] We recall that Japan has also requested us to complete the legal analysis with respect to its claim under Articles 3.1 and 4.1 of the Anti-Dumping Agreement and find that the Korean investigating authorities acted inconsistently with these provisions in the determination of the "domestic industry" in the anti-dumping investigation at issue. However, for the reasons stated above, we have found that we are unable to complete the legal analysis in view of the disputed nature of certain facts underlying the definition of the domestic industry and the lack of the Panel's exploration of the relevant issues and evidence.

5.367. In light of the foregoing considerations, we find ourselves unable to complete the legal analysis as to whether the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement on the basis of Japan's argument that the KTC failed to adequately explain how imports had negatively impacted the domestic like products as a whole in light of positive trends experienced by the domestic industry.[990]

5.4 Confidential treatment of information

5.368. The Panel found that Japan's claims 8 and 9 concerning the Korean investigating authorities' treatment of confidential information were within its terms of reference, and that Japan demonstrated that the Korean investigating authorities acted inconsistently with Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement. Korea appeals the Panel's findings pursuant to Article 6.2 of the DSU and, consequently, its conclusion that Japan's claims 8 and 9 were within its terms of reference. Should we uphold the Panel's findings under Article 6.2 of the DSU, Korea also appeals the Panel's findings that the Korean investigating authorities acted inconsistently with the obligations

[984] Japan's appellant's submission, para. 251. (emphasis added)
[985] Japan's appellant's submission, para. 251.
[986] Panel Report, paras. 7.172 and 7.175.
[987] We note that Japan submits that "this summary of relevant facts is somewhat less useful than the others." (Japan's appellant's submission, para. 230)
[988] Japan's appellant's submission, para. 241. (fn omitted)
[989] Japan's appellant's submission, para. 241. (fn omitted)
[990] Japan's appellant's submission, para. 250.

under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement. Japan requests the Appellate Body to uphold both the Panel's findings concerning its terms of reference and the findings on the merits of Japan's claims.

5.369. We begin by assessing whether the Panel erred in finding that Japan's claims 8 and 9 concerning the confidential treatment of information were within its terms of reference. If we uphold the Panel's findings under Article 6.2 of the DSU, we will proceed to determine whether the Panel erred in its findings regarding the merits of Japan's claims under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement.

5.4.1 Whether the Panel erred in finding that Japan's claims 8 and 9 concerning the confidential treatment of information were within its terms of reference

5.370. Claims 8 and 9 in Japan's panel request state that the measure at issue is inconsistent with Korea's obligations under:

> [] Article 6.5 of the [Anti-Dumping] Agreement because Korea treated allegedly confidential information provided by the interested parties as confidential without good cause shown;
>
> [] Article 6.5.1 of the [Anti-Dumping] Agreement because Korea: (a) failed to require the applicants to furnish non-confidential summaries of their submissions, questionnaire responses, and amendments thereof; and (b) where such summaries were provided, they were not in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence[.]

5.371. The Panel found that, on its face, the panel request provided a brief but sufficient explanation as to how and why Japan considered the measures at issue to be violating the specific WTO obligations in question, namely those in Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement. According to the Panel, this language was precise enough to both define the basis for the Panel's terms of reference and inform other WTO Members, including the respondent, of the nature of the dispute.[991]

5.372. The Panel found that its conclusion was confirmed by taking into account the scope of the allegations concerning the alleged inconsistencies in the confidential treatment of information advanced in Japan's submissions, namely that: (i) the Korean investigating authorities granted confidential treatment to certain information provided by the applicants without requiring a showing of good cause and without conducting an objective assessment to justify the confidentiality; and (ii) with respect to certain documents, the Korean investigating authorities failed to require that submitting parties provide a non-confidential summary of the information that was treated as confidential or to show why such a summary could not be provided.[992] Furthermore, the Panel noted that, in its first written submission to the Panel, Japan identified 38 specific elements of information that are the basis of its claims under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement. The Panel indicated that these specific elements of information, which were allegedly granted confidential treatment without good cause shown, may be seen as part of the arguments advanced by Japan in support of its claims. Consequently, the Panel considered that Japan was not required to include these specific elements in the panel request.[993]

5.373. Accordingly, the Panel found that Japan's claims concerning the confidential treatment of information under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement were within its terms of reference.[994]

5.374. On appeal, Korea argues that the Panel erred in finding that Japan's panel request, with respect to the claims under Articles 6.5 and 6.5.1, comported with the obligation under Article 6.2 of the DSU to "provide a brief summary of the legal basis of the complaint sufficient to present the

[991] Panel Report, para. 7.415.
[992] Panel Report, para. 7.416.
[993] Panel Report, para. 7.417. See also ibid., para. 7.428.
[994] Panel Report, para. 7.418.

problem clearly".[995] Korea submits that the panel request "merely paraphrases the relevant legal obligations under Articles 6.5 and 6.5.1 without providing any additional information explaining the *how* and *why* of its claims".[996] Korea argues that, with respect to the claim under Article 6.5, in light of the wording of Japan's panel request, it is not possible to identify what allegedly confidential information is concerned by the claim, or, at a minimum, the subject matter of that allegedly confidential information.[997] Korea maintains that, by resorting to Japan's subsequent submission, the Panel failed to adhere to the principle that the panel request must be examined on its face as it existed at the time of the filing, and that defects therein cannot be cured in subsequent submissions during the panel proceedings.[998] Korea also argues that, with respect to Article 6.5.1, Japan's panel request similarly fails to explain the "how or why" of Japan's claim, as nothing in it links the claim to the particular circumstances of the investigation at issue. Korea adds that the Panel also erred by relying on the examination of Japan's subsequent submissions.[999]

5.375. Japan responds that the panel request expressly identifies Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement as the specific provisions at issue for these two claims. Furthermore, the panel request identifies the obligation under Article 6.5 to grant confidential treatment to information that is by nature confidential or provided on a confidential basis "upon good cause shown", and the obligation under Article 6.5.1 to require the provision of non-confidential summaries "in sufficient detail".[1000] Japan contends that the language it used in its panel request presents the problem clearly by connecting the measure at issue and the alleged inconsistencies, in light of the nature and scope of the particular obligations. Japan submits that "[t]he essence of these two claims is that the KTC conducted its investigation by just assuming that certain information was confidential without any specific inquiry, and accepted the absence of any non-confidential summaries, as evidenced through the KTC's Final Resolution and the OTI's Final Report."[1001] Japan also indicates that Korea's arguments confuse the claim with the arguments in support of the claim.[1002]

5.376. We indicated in section 5.1.1 above that a panel is to determine whether a panel request complies with the requirements of Article 6.2 of the DSU by examining the panel request on its face, taking into consideration the circumstances of the case, including the nature of the measure and the nature of the provisions concerned. In order to provide the legal basis of the complaint sufficient to present the problem clearly, a panel request must plainly connect the challenged measure with the obligation alleged to have been breached. In this regard, a complainant must, at a minimum, identify the provisions in the covered agreement alleged to have been breached.[1003]

5.377. Like the Panel, we observe that Japan has, in its claims 8 and 9 in the panel request, identified Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement as the provisions of the covered agreement alleged to have been breached.[1004] Thus, Japan meets the minimum requirement under Article 6.2 of the DSU to identify the relevant provisions alleged to have been breached. As indicated above, in some circumstances, particularly where the provisions concerned establish multiple obligations, it will not be sufficient merely to list the provisions in question in a panel request. In considering the nature of the provisions, therefore, we will seek to determine whether such circumstances arise in this dispute.

5.378. With regard to the nature of the measure, we observe that the narrative included in Japan's claims 8 and 9 indicate that they respectively concern Korea's treatment of certain information as

[995] Korea's other appellant's submission, para. 304. In particular, Korea argues that nothing in the Panel's findings suggests that the Panel examined this important question. Indeed, the Panel did not take into account the nature of the measure at issue and the manner in which it was described in the panel request and did not examine the nature and scope of the provisions of the covered agreements alleged to have been breached. (Ibid.)

[996] Korea's other appellant's submission, para. 305. (emphasis original)

[997] Korea's other appellant's submission, para. 307.

[998] Korea's other appellant's submission, para. 310 (referring to Appellate Body Report, *US − Carbon Steel*, para. 127).

[999] Korea's other appellant's submission, para. 311.

[1000] Japan's appellee's submission, para. 161.

[1001] Japan's appellee's submission, para. 162 (referring to Japan's second written submission to the Panel, paras. 209-211 and 214-234).

[1002] Japan's appellee's submission, para. 165 (referring to Korea's other appellant's submission, paras. 307-309).

[1003] See para. 5.6 above.

[1004] See Panel Report, paras. 7.414-7.415.

confidential under Article 6.5 of the Anti-Dumping Agreement, and Korea's treatment of summaries of confidential information under Article 6.5.1 of the Anti-Dumping Agreement. It is therefore a specific portion of the measure at issue that is concerned by Japan's claims 8 and 9.

5.379. With regard to the nature of the provisions concerned, under Article 6.5, authorities must treat information submitted by parties to an investigation as confidential if it is "by nature" confidential or if it is "provided on a confidential basis", and "upon good cause shown".[1005] In addition, Article 6.5 provides illustrative examples of information that falls into the category of "by nature" confidential.[1006]

5.380. Article 6.5 of the Anti-Dumping Agreement thus establishes a clear and well-delineated obligation, such that referencing this provision in a panel request, and connecting it to the specific portion of the measure at issue, suffices to comply with the requirements of Article 6.2 of the DSU. Thus, we agree with the Panel that, by indicating that Japan considers Korea to have breached Article 6.5 because Korea treated allegedly confidential information provided by the interested parties as confidential without good cause shown, claim 8 in Japan's panel request has provided a brief summary of the legal basis sufficient to present the problem clearly, including by plainly connecting the challenged measure with the obligation alleged to have been breached.

5.381. With respect to Japan's claim pursuant to Article 6.5.1 of the Anti-Dumping Agreement, we recall that Japan's claim 9, which is described in paragraph 5.370 above, refers specifically to the first two sentences of Article 6.5.1.[1007] In essence, these two sentences oblige the investigating authority to require non-confidential summaries of confidential information in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence.

5.382. The portion of Article 6.5.1 specifically referenced in Japan's claim 9 establishes a clear and well-delineated obligation, such that referencing these sentences suffices to provide a clear indication of the legal basis of Japan's complaint under this claim. Specifically, the narrative of Japan's claim makes clear that it takes issue with the alleged failure of the Korean investigating authorities: (i) to require the applicants to furnish non-confidential summaries of their submissions, questionnaire responses, and amendments thereof; and (ii) where such summaries were provided, to ensure that they were in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In our view, therefore, Japan's claim sufficiently connects the measures at issue with the alleged violation of Article 6.5.1.

5.383. Korea argues that "[a]s a general matter, large volumes of confidential information are received and assessed by investigating authorities in an anti-dumping investigation, and the underlying investigation to this dispute was no exception."[1008] However, in light of the wording of the panel request, "there is no way to identify what allegedly confidential information is concerned by the claim or, at a minimum, the subject matter of that allegedly confidential information."[1009] However, we recall that Article 6.2 demands only "a *brief* summary" of the legal basis of the

[1005] We recall that Article 6.5 of the Anti-Dumping Agreement provides:
> Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.

[1006] Appellate Body Report, *EC − Fasteners (China)*, para. 536. The Appellate Body indicated, for instance, that "[o]ne type of such information is commercially sensitive information not typically disclosed in the normal course of business, and which would likely be regularly treated as confidential in anti-dumping investigations" and that "[t]his could be the case, for example, for certain profit or cost data or proprietary customer information." (Ibid., para. 536 and fn 775 thereto)

[1007] We recall that Article 6.5.1 of the Anti-Dumping Agreement provides:
> The authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.

[1008] Korea's other appellant's submission, para. 307.

[1009] Korea's other appellant's submission, para. 307.

complaint.[1010] To require Japan to detail all allegedly confidential information concerned would appear to impose a burden that would go beyond what is required under Article 6.2. For these reasons, we share the Panel's view that specific elements of information that allegedly were granted confidential treatment without good cause shown may be seen as part of the arguments advanced by Japan in support of its claim, which need not be included in the panel request.[1011] Thus, in our view, the Panel did not inappropriately rely on Japan's subsequent submissions[1012], but rather did so to confirm that the claims listed in Japan's panel request were sufficient to present the problem clearly.

5.384. In sum, Japan's claims 8 and 9 concerning the confidential treatment of information identify Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement, respectively, as the provisions alleged to have been breached. Japan's claims also indicate that they relate, respectively, to the specific portion of the measure at issue concerning Korea's treatment of certain information as confidential under Article 6.5 of the Anti-Dumping Agreement, and Korea's treatment of non-confidential summaries of confidential information under Article 6.5.1 of the Anti-Dumping Agreement. Article 6.5 establishes a clear and well-delineated obligation for investigating authorities to treat information submitted by parties to an investigation as confidential if it is "by nature" confidential or "provided on a confidential basis", and "upon good cause shown". In addition, Japan's claim 9 refers to the first two sentences of Article 6.5.1, which set forth a clear and well-delineated obligation for the investigating authority to require non-confidential summaries in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. Therefore, Japan's claims 8 and 9 each "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly" within the meaning of Article 6.2 of the DSU.

5.385. For the foregoing reasons, we find that the Panel did not err in finding that Japan's claims 8 and 9, concerning the confidential treatment of information, were within its terms of reference. Consequently, we uphold the Panel's findings in paragraphs 7.418 and 8.2.e of the Panel Report.

5.4.2 Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement

5.386. Korea appeals the Panel's findings under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement. With respect to Article 6.5, Korea argues that the Panel committed legal error in its interpretation and application of this provision. In addition, Korea contends that the Panel erred in its application of Article 6.5.1 of the Anti-Dumping Agreement.

5.4.2.1 Article 6.5 of the Anti-Dumping Agreement

5.4.2.1.1 The Panel's findings

5.387. Before the Panel, Japan argued that Korea acted inconsistently with Article 6.5 of the Anti-Dumping Agreement because the KTC granted confidential treatment to certain information provided by the applicants without requiring a showing of good cause and without conducting an objective assessment to justify the confidential treatment.[1013]

5.388. The Panel indicated that "confidential information" within the meaning of Article 6.5 is information that is: "(a) by nature confidential; or (b) provided on a confidential basis by parties to an investigation".[1014] Moreover, pursuant to this provision, "upon good cause shown", an investigating authority must treat such information as confidential and *not* disclose it without the permission of the submitter. The Panel pointed out that "[s]howing good cause is thus a 'condition precedent for according confidential treatment to information submitted to an authority'."[1015] The Panel added that "[t]he requirement to show good cause applies to all information for which

[1010] Emphasis added.
[1011] Panel Report, para. 7.417.
[1012] Korea's other appellant's submission, para. 311.
[1013] Panel Report, para. 7.391.
[1014] Panel Report, para. 7.422.
[1015] Panel Report, para. 7.423 (quoting Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.38).

confidential treatment is sought, whether it is by nature confidential or submitted on a confidential basis."[1016]

5.389. In the case at hand, the Panel considered that the main issue under Article 6.5 was whether the KTC granted confidential treatment to certain information provided by the applicants without requiring a showing of good cause and without an objective assessment of that showing to justify the confidential treatment.[1017] The Panel specified that it would focus its analysis on the 38 elements of information that Japan alleged were treated as confidential without the KTC having required and assessed whether there was good cause for such treatment.[1018]

5.390. The Panel indicated that a series of facts was undisputed by the parties. First, Article 15 of Korea's Enforcement Rule of the Customs Act lists five categories of information that are entitled to confidential treatment in anti-dumping investigations.[1019] Second, in the anti-dumping investigation at issue, the applicants filed "Disclosed", or public, versions of at least three of their written submissions.[1020] Certain information was redacted from these documents by being either removed entirely or replaced with an "X" or asterisks. The Panel added that, with respect to these submissions, in the course of the investigation, the responding companies had access only to the redacted versions.[1021]

5.391. Moreover, the Panel noted that there is no explicit mention of "good cause" in any of the three public versions of the written submissions or any link therein between the redacted information and the categories laid out in Article 15 of the Enforcement Rule of the Customs Act.[1022] Likewise, there is no specific indication in the relevant documents on the record that the KTC or the OTI assessed whether good cause had been shown by the applicants.[1023] Consequently, the Panel considered it clear that the Korean investigating authorities granted confidential treatment to certain information provided by the applicants "without any evidence that a showing of good cause that would justify the confidential treatment had been required from the applicants".[1024]

5.392. Korea argued before the Panel that the 38 items of information identified by Japan fall into the list set out in Article 15 of the Enforcement Rule of the Customs Act describing types of information to be treated as confidential.[1025] Korea asserted that, as a consequence, there was good cause to treat this information as confidential. In this regard, Korea argued that the KTC "objectively assessed … whether the information was of the types for which Korean laws afford confidential protection" and "confirmed the 'good cause'" on the basis of this examination.[1026]

5.393. However, the Panel considered that there is no evidence on the record to support Korea's argument that the KTC objectively assessed whether there was "good cause" for treating certain information as confidential. As highlighted by the Panel, there was nothing on the record indicating that the applicants had specified or the Korean investigating authorities had taken into account whether the information in question fell into any of the categories set out in the relevant Korean

[1016] Panel Report, para. 7.423.
[1017] Panel Report, para. 7.427.
[1018] Panel Report, para. 7.428 (referring to Japan's first written submission before the Panel, paras. 266-269 and annex III).
[1019] Under Article 15 of the Enforcement Rule of the Customs Act, the five categories of information that are entitled to confidential treatment in anti-dumping investigations are: (a) costs of production; (b) accounting materials which have not been made public; (c) name, address, and trade volumes of trade partners; (d) matters concerning the provider of confidential information; and (e) other materials adequately deemed as confidential. (Panel Report, para. 7.430 (referring to Article 15 of the Enforcement Rule of the Customs Act of Korea (Panel Exhibit KOR-34b)))
[1020] The three submissions with respect to which the applicants filed "Disclosed", or public, versions are: (i) the investigation application dated 23 December 2013; (ii) the summary of opinion from attorneys dated 23 October 2014; and (iii) the rebuttal opinion of applicants dated 13 November 2014. (Panel Report, para. 7.431)
[1021] Panel Report, para. 7.431.
[1022] Panel Report, para. 7.432 (referring to Korea's response to Panel question No. 113, para. 104).
[1023] Panel Report, para. 7.432.
[1024] Panel Report, para. 7.434. Indeed, according to the Panel, "there is no evidence on record that the applicants made any indication as to the existence of good cause for confidential treatment, nor is there any evidence that the Korean Investigating Authorities requested that such good cause be shown." (Ibid.)
[1025] Panel Report, para. 7.438.
[1026] Panel Report, para. 7.435 (quoting Korea's response to Panel question No. 69).

legislation. The Panel indicated that, in these circumstances, it could not conclude that the Korean investigating authorities "actually engaged in a consideration of whether the submitters of the information had shown good cause for confidential treatment of the information in question".[1027] The Panel added that "the existence in the legislation of defined categories of information that will normally be treated as confidential does not relieve the investigating authorities of their obligation to determine that good cause has been shown to justify the confidential treatment requested by the submitting party."[1028]

5.394. For the foregoing reasons, the Panel found that, with respect to the 38 items of information identified by Japan, the submitters did not show good cause for the confidential treatment of that information. On that basis, the Panel concluded that, with respect to the information at issue, the Korean investigating authorities did not act consistently with Article 6.5 of the Anti-Dumping Agreement.[1029]

5.4.2.1.2 Whether the Panel erred in its interpretation or application of Article 6.5 of the Anti-Dumping Agreement

5.395. Korea maintains that the Panel committed two errors of law under Article 6.5 of the Anti-Dumping Agreement. First, the Panel erred "when considering that investigating authorities must make statements in the record demonstrating that 'good cause' was assessed and found to exist for the confidential treatment of certain pieces or categories of information".[1030] In Korea's view, investigating authorities are not required to make an express "statement" as to whether good cause is shown. Instead, under Article 6.5, "an authority must satisfy itself (i.e. 'ensure') that good cause is shown before treating the information in question as confidential."[1031] Second, Korea argues that, as a result of its erroneous interpretation of Article 6.5, the Panel also erred in *applying* the law to the facts of this case. In particular, the Panel erred in finding that "[the] KTC failed to show that good cause was shown for certain pieces of evidence as there was no evidence on the record 'linking the information for which confidential treatment was granted to the categories of confidential treatment identified in Korean law'."[1032] Korea maintains that, based on a proper application of Article 6.5, the KTC was not obliged to make specific statements about each of the requests for confidentiality other than to "satisfy itself" that good cause was shown before treating the information in question as confidential.[1033]

5.396. Japan responds that the Panel properly found that, in the underlying investigation, the KTC failed to establish that "good cause" was shown for treating certain information as confidential, contrary to the requirements of Article 6.5 of the Anti-Dumping Agreement. According to Japan, Article 6.5 conditions the granting of confidential treatment "upon good cause shown", and such condition is not met merely "if good cause exists".[1034] Japan thus disagrees with Korea's argument that "every interested party 'implicitly asserts' the required 'good cause' by deleting allegedly confidential information in the public version of its submissions."[1035] For Japan, Korea dismisses the importance of the explicit textual requirement that good cause must be "shown" and cannot merely be presumed to exist. Indeed, "[a]bsent some showing of 'good cause', a panel has no way to review what the authority has done and whether it complies with Article 6.5."[1036]

[1027] Panel Report, para. 7.440.
[1028] Panel Report, para. 7.438.
[1029] Panel Report, para. 7.441.
[1030] Korea's other appellant's submission, para. 326.
[1031] Korea's other appellant's submission, para. 327.
[1032] Korea's other appellant's submission, para. 315 (quoting Panel Report, para. 7.436).
[1033] Korea's other appellant's submission, para. 330 (referring to Korea's response to Panel question No. 65).
[1034] Japan's appellee's submission, para. 169.
[1035] Japan's appellee's submission, para. 170 (referring to Korea's other appellant's submission, paras. 330-331).
[1036] Japan's appellee's submission, para. 171. (emphasis omitted)

5.397. As we see it, Korea's position is that an investigating authority could comply with Article 6.5 simply by "satisfy[ing] itself (i.e. 'ensur[ing]')"[1037] that good cause is shown, even in a situation where there is *no indication* on the record of the underlying investigation establishing that such authority conducted an objective assessment as to whether good cause was shown. In addressing Korea's argumentation, we begin by recalling the legal standard under Article 6.5 of the Anti-Dumping Agreement.

5.398. Past interpretations of Article 6.5 by the Appellate Body can be summarized as follows. The requirement to show "good cause" for confidential treatment applies to both information that is "by nature" confidential and that which is provided to the authority "on a confidential basis".[1038] The "'good cause' alleged must constitute a reason sufficient to justify the withholding of information from both the public and from the other parties interested in the investigation".[1039] Moreover, the "'[g]ood cause' must be assessed and determined objectively by the investigating authority, and cannot be determined merely based on the subjective concerns of the submitting party."[1040] More specifically, "a party seeking confidential treatment for information must make its 'good cause' showing to the investigating authority upon submission of the information. The authority must objectively assess the 'good cause' alleged for confidential treatment, and scrutinize the party's showing in order to determine whether the submitting party has sufficiently substantiated its request."[1041] In any event, "[t]he obligation remains with the investigating authority to examine objectively the justification given for the need for confidential treatment."[1042] Thus, an authority would be acting inconsistently with its obligation under Article 6.5 "[i]f information is treated as confidential … without such a 'good cause' showing having been made".[1043] Importantly, "a panel tasked with reviewing whether an investigating authority has objectively assessed the 'good cause' alleged by a party must examine this issue on the basis of the investigating authority's published report and its related supporting documents, and in the light of the nature of the information at issue and the reasons given by the submitting party for its request for confidential treatment."[1044]

5.399. Thus, while interested parties must make a "good cause" showing that certain information should be treated as confidential, it is ultimately for the investigating authority to conduct an "objective assessment" of this issue to determine whether the request for confidential treatment has been sufficiently substantiated such that confidential treatment should be granted. Article 6.5 does *not* prescribe the *particular steps* that investigating authorities should take in order to assess and determine whether "good cause" has been "shown". However, in the context of WTO dispute settlement, a panel may be asked to examine a claim under Article 6.5 as to whether an investigating authority properly examined and determined that "good cause" had been shown in granting confidential treatment to certain information. This examination by a panel should be based on the

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[1037] Korea's other appellant's submission, para. 327. Similarly, Korea argues:

> In light of the fact that Article 6.5 only requires investigating authorities to satisfy themselves that good cause is shown before treating the information in question as confidential, [the] KTC was not obliged to make specific statements about each of the requests for confidentiality other than to satisfy itself that good cause was shown before treating the information in question as confidential.

(Ibid., para. 315)

[1038] Appellate Body Report, *EC − Fasteners (China)*, para. 537. With regard to the difference between the two types of information, the Appellate Body indicated in *EC − Fasteners (China)* that the question whether information is "by nature" confidential depends on the content of the information. Confidentiality of such information "will often be readily apparent", as the illustrative examples provided in Article 6.5 show. (Ibid., para. 536) Information that is "provided on a confidential basis" is not necessarily confidential by reason of its content, but rather, confidentiality arises from the circumstances in which it is provided to the authorities. According to the Appellate Body, these two categories may, in practice, overlap. (Ibid.)

[1039] Appellate Body Report, *EC − Fasteners (China)*, para. 537. The Appellate Body elaborated that, "[p]ut another way, 'good cause' must demonstrate the risk of a potential consequence, the avoidance of which is important enough to warrant the non-disclosure of the information." (Ibid.)

[1040] Appellate Body Report, *EC − Fasteners (China)*, para. 537.

[1041] Appellate Body Report, *EC − Fasteners (China)*, para. 539. In making its assessment, "the investigating authority must seek to balance the submitting party's interest in protecting its confidential information with the prejudicial effect that the non-disclosure of the information may have on the transparency and due process interests of other parties involved in the investigation to present their cases and defend their interests." (Ibid. (fn omitted))

[1042] Appellate Body Report, *EC − Fasteners (China)*, para. 539.

[1043] Appellate Body Report, *EC − Fasteners (China)*, para. 539.

[1044] Appellate Body Reports, *China − HP-SSST (Japan) / China − HP-SSST (EU)*, para. 5.97. (fn omitted)

investigating authority's "published report and its related supporting documents" in which the assessment of "good cause" must be discernible.[1045]

5.400. Korea maintains that the Panel erred in the interpretation of Article 6.5 "when considering that investigating authorities must make statements in the record demonstrating that 'good cause' was assessed and found to exist for the confidential treatment of certain pieces or categories of information".[1046] In Korea's view, investigating authorities are simply not required to make an express "statement" as to whether good cause is shown. Instead, under Article 6.5, "an authority must satisfy itself (i.e. 'ensure') that good cause is shown before treating the information in question as confidential."[1047]

5.401. We turn to examine the Panel's articulation of the legal standard under Article 6.5 as it relates to Korea's argument. The Panel stated that "[s]howing good cause is … a 'condition precedent for according confidential treatment to information submitted to an authority'."[1048] The Panel added that "'good cause' means a reason that is sufficient to justify withholding information from both the public and the other parties to the investigation, and that a showing of 'good cause' involves 'a demonstration of a risk of a potential consequence, the avoidance of which is important enough to warrant the non-disclosure of the information'."[1049] In addition, the Panel indicated that "[t]here is no explicit requirement in Article 6.5 that a showing of good cause be made in respect of each individual item of information."[1050] Thus, "good cause may be shown in respect of general categories of information."[1051] At the same time, the Panel highlighted that, "if an investigating authority treats as confidential information in respect of which no good cause has been shown, that investigating authority acts inconsistently with its obligation under Article 6.5."[1052]

5.402. As we see it, in articulating the legal standard under Article 6.5, the Panel did *not* pronounce on the specific manner in which investigating authorities should specify that "good cause" was shown when granting confidential treatment to certain information. Under Article 6.5, an investigating authority is required to assess objectively whether the request for confidential treatment has been sufficiently substantiated such that "good cause" has been shown. The fact that the investigating authority has conducted this objective assessment must be discernible from its published report or related supporting documents. In our view, the Panel's articulation comports with the legal standard under Article 6.5, as described above. Consequently, we do not consider that the Panel committed legal error in its interpretation of Article 6.5 of the Anti-Dumping Agreement.

5.403. Korea further argues that the Panel erred in finding that "[the] KTC failed to show that good cause was shown for certain pieces of evidence as there was no evidence on the record 'linking the information for which confidential treatment was granted to the categories of confidential treatment identified in Korean law'."[1053] Korea maintains that, based on a proper application of Article 6.5, the KTC was not obliged to make specific statements about each of the requests for confidentiality other than to satisfy itself that good cause was shown before treating the information in question as confidential.[1054]

5.404. To the extent that Korea is suggesting that an investigating authority would comply with Article 6.5 in a situation where there is *no indication* on the record establishing that such authority conducted an objective assessment as to whether good cause was shown, we disagree. Under Article 6.5, the fact that an investigating authority objectively assessed and determined that "good cause" was "shown" must be *discernible* from its published report or related supporting documents.

[1045] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.97.
[1046] Korea's other appellant's submission, para. 326.
[1047] Korea's other appellant's submission, para. 327.
[1048] Panel Report, para. 7.423 (quoting Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.38).
[1049] Panel Report, para. 7.423 (quoting Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.37; referring to Appellate Body Report, *EC – Fasteners (China)*, para. 537).
[1050] Panel Report, para. 7.424.
[1051] Panel Report, para. 7.424.
[1052] Panel Report, para. 7.424.
[1053] Korea's other appellant's submission, para. 315 (quoting Panel Report, para. 7.436).
[1054] Korea's other appellant's submission, para. 330.

Without such indication, we fail to see how a panel would be expected to review a claim under Article 6.5 of the Anti-Dumping Agreement.

5.405. Moreover, Korea asserts that the applicants submitted non-confidential summaries, which were prepared by deleting from their submissions the information with respect to which they sought confidential treatment. According to Korea, in submitting these non-confidential summaries, the provider of the information "implicitly assert[ed] that such deleted information falls within the categories of 'confidential information' specifically set forth in the relevant laws in Korea (in particular, the Enforcement Decree and Enforcement Rule of the Customs Act of Korea), or recognized as such in Korea's anti-dumping practice".[1055] Korea further submits that, in the underlying investigation, when the KTC received such non-confidential summaries from the applicants, it regarded such summaries as a request by the applicants that the deleted information be treated as confidential, and "it objectively assessed whether there was indeed 'good cause' by confirming whether the deleted information fell within a category of confidential information enumerated in the relevant Korean laws."[1056]

5.406. Japan considers that, contrary to Korea's assertions, the Panel rightly found that there is no evidence on the record indicating that a showing of good cause was required by the authorities, or made by the applicants, prior to the KTC's decision to grant confidential treatment.[1057] Moreover, Japan asserts that, while a Member's legislation may set out specific categories of information for which confidential treatment will normally be granted, this is not sufficient to comply with Article 6.5. Indeed, for Japan, the existence of such legislation "does not relieve the investigating authority of its obligation under Article 6.5 to determine that 'good cause' has been 'shown' to justify the confidential treatment requested by the submitting party".[1058] Japan argues that there is no indication on the record that, in granting confidential treatment, either the applicants had specified or the Korean investigating authorities had taken into account whether the information in question fell into any of the enumerated categories under Korean law.[1059]

5.407. As we understand it, Korea's claim that the Panel erred in finding an inconsistency with Article 6.5 is based on two related arguments regarding the conduct of the interested parties in the underlying investigation *and* the role of the KTC. We address each of these arguments in turn.

5.408. With respect to the showing of good cause by interested parties, Korea's position is that, in providing non-confidential summaries by way of deleting the relevant information from their submissions[1060], the providers of the information "implicitly" asserted that such deleted information fell within the categories of "confidential information" set forth in the relevant Korean laws. As a consequence of that "implicit" assertion, Korea argues, "good cause" was "shown" for granting confidential treatment to that information.

5.409. As asserted by Korea, under its relevant legislation, certain categories of information are entitled to confidential treatment in anti-dumping investigations. In this regard, the Panel specified that, "under the relevant Korean legislation (Article 15 of the Enforcement Rule of the Customs Act), the following information is entitled to confidential treatment in anti-dumping investigations, because its disclosure may infringe the interests of the person supplying the information or another interested party: (a) costs of production; (b) accounting materials which have not been made public;

[1055] Korea's other appellant's submission, para. 331. (fn omitted)

[1056] Korea's other appellant's submission, para. 332 (referring to Korea's first written submission to the Panel, para. 337). Korea adds that, "in applying the relevant provisions of the Korean law on confidential treatment of information, [the] KTC also considered that the requested confidential information [was] 'by nature' commercially-sensitive information … which would likely be regularly treated as confidential in anti-dumping investigations." (Ibid., para. 333)

[1057] Japan's appellee's submission, para. 170 (referring to Panel Report, para. 7.434).

[1058] Japan's appellee's submission, para. 172 (referring to Panel Report, para. 7.438).

[1059] Japan's appellee's submission, para. 172.

[1060] The applicants filed "Disclosed", or public, versions of at least three of their written submissions (the investigation application dated 23 December 2013, the summary of opinion from attorneys dated 23 October 2014, and the rebuttal opinion of applicants dated 13 November 2014) from which certain information was redacted. With respect to these submissions, in the course of the investigation, the responding companies had access only to the redacted versions. (Panel Report, para. 7.431) Korea argued before the Panel that the version of the applicants' submissions from which confidential information was deleted constitutes the non-confidential summary required by Article 6.5.1. (Panel Report, para. 7.442 (referring to Korea's first written submission to the Panel, paras. 341-343; response to Panel question No. 65(a)))

(c) name, address, and trade volumes of trade partners; (d) matters concerning the provider of confidential information; and (e) other materials adequately deemed as confidential."[1061] The Panel further indicated that "[t]he legislation also provides that information that is by nature deemed confidential or that is submitted by the interested party on a confidential basis, showing good cause, shall not be disclosed by the Korean Investigating Authorities without an explicit consent of the provider."[1062]

5.410. However, while the Panel did not see a "reason *a priori* why a Member's legislation may not set out specific categories of information for which confidential treatment will normally be granted"[1063], it was ultimately not convinced that, in the present case, the existence of such a list sufficed to establish "good cause" for the confidential treatment of the information at issue. Indeed, the Panel highlighted that "there is no indication on the record that, in granting confidential treatment, either the applicants specified, or the Korean Investigating Authorities took into account, whether the information in question fell into any of those categories."[1064] Similarly, the Panel found that "[t]here is also nothing specific in any of the[] three written submissions [from which certain information was redacted] linking the redacted information to any of the categories laid out in Article 15 of the Enforcement Rule of the Customs Act."[1065] Moreover, the Panel went on to add that "some of the categories described in the [Korean] legislation are so general (for example: accounting materials which have not been made public; matters concerning the provider of confidential information; or other materials adequately deemed as confidential) that the mere invocation of a specific category might in itself be insufficient to substantiate the alleged good cause for confidential treatment."[1066]

5.411. On the basis of the above reasons, the Panel rejected Korea's argument that the applicants had made a showing of "good cause" in the underlying investigation by "implicitly" indicating that the redacted information fell within the categories of "confidential information" set forth in the relevant Korean laws. In this regard, we recall that "a party seeking confidential treatment for information must make its 'good cause' showing to the investigating authority upon submission of the information."[1067] We doubt that an "implicit" indication by way of redacting certain information from a submission would suffice for establishing such a showing of good cause. In our view, the mere redaction of information does not establish, in and of itself, that such information falls within certain legal categories for confidential information, let alone that there is good cause for treating certain information as confidential. Thus, we share the Panel's view that, although Korea's relevant legislation sets out certain categories of information entitled to confidential treatment, a total absence of any indication in the underlying investigation as to how the information redacted from the submissions relates to the general categories of information set out in the law appears insufficient to demonstrate the showing of good cause by the interested parties.

5.412. Turning to Korea's argument regarding the role played by the KTC, Korea's position is that, when the KTC received such non-confidential summaries, it objectively assessed whether there was indeed "good cause" by confirming whether the deleted information fell within a category of confidential information set out in the relevant Korean laws.[1068] Korea further contends that, "[i]n applying the relevant provisions of the Korean law on confidential treatment of information, [the] KTC also considered that the requested confidential information [was] by nature 'commercially-sensitive information (such as profit or cost data or proprietary customer information) that is not typically disclosed in the normal course of business and which would likely be regularly treated as confidential in anti-dumping investigations'."[1069]

[1061] Panel Report, para. 7.430 (referring to Article 15 of the Enforcement Rule of the Customs Act (Panel Exhibit KOR-34b)).
[1062] Panel Report, para. 7.430.
[1063] Panel Report, para. 7.438.
[1064] Panel Report, para. 7.438.
[1065] Panel Report, para. 7.432 (referring to Korea's response to Panel question No. 113, para. 104).
[1066] Panel Report, para. 7.438. (fn omitted)
[1067] Appellate Body Report, *EC – Fasteners (China)*, para. 539.
[1068] Korea's other appellant's submission, para. 332 (referring to Korea's second written submission to the Panel, para. 337).
[1069] Korea's other appellant's submission, para. 333 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 536).

5.413. Before the Panel, Korea also presented this line of argumentation.[1070] However, the Panel was not convinced, given that it found no supporting evidence on the record.[1071] In particular, the Panel pointed out that, "[w]hile such a procedure [by the KTC] may be sufficient to satisfy the requirements of Article 6.5, in the absence of anything in the submissions themselves, or evidence otherwise on the record, linking the information for which confidential treatment was granted to the categories of confidential information identified in Korean law, [it could not] conclude that the Korean Investigating Authorities actually engaged in the asserted procedure."[1072] For the foregoing reasons, the Panel found that, with respect to the 38 items of information identified by Japan, the submitters of the information did not show good cause for the confidential treatment of that information. Consequently, the Panel concluded that, with respect to the information at issue, the Korean investigating authorities did not act consistently with Article 6.5 of the Anti-Dumping Agreement.[1073]

5.414. In our view, the Panel's analysis is consistent with Article 6.5, as interpreted by the Appellate Body in past disputes. Indeed, the Panel maintained that "the existence in the legislation of defined categories of information that will normally be treated as confidential does not relieve the investigating authorities of their obligation to determine that good cause has been shown to justify the confidential treatment requested by the submitting party."[1074] This is consistent with the Appellate Body's statement that "[t]he obligation remains with the investigating authority to examine objectively the justification given for the need for confidential treatment"[1075], and that, to comply with this obligation, "[t]he authority must objectively assess the 'good cause' alleged … and scrutinize the party's showing" in order to determine whether the party has substantiated its request for confidential treatment.[1076] On appeal, Korea offers no arguments challenging the Panel's factual findings indicating that there is nothing on the record of the underlying investigation establishing that the Korean investigating authorities objectively assessed whether good cause had been "shown" before granting the confidential treatment. Given those findings by the Panel, we are unable to agree with Korea's argument.[1077]

5.415. Korea's position is ultimately premised on the erroneous understanding that an investigating authority would comply with Article 6.5 merely by "satisfy[ing] itself that good cause was shown", even in a situation where there is *no indication* in an investigating authority's published report or its related supporting documents that the authority conducted an objective assessment as to whether good cause was shown. We consider that the Panel correctly rejected this position. The Panel observed that "there is no evidence on the record linking the information for which confidential treatment was granted to the categories of information warranting confidential treatment identified in Korean law."[1078] The Panel emphasized that, in this situation, it could not "conclude that the Korean Investigating Authorities actually engaged in a consideration of whether the submitters of the information had shown good cause for confidential treatment of the information in question".[1079] In our view, the Panel's decision to base its conclusion with respect to Japan's claim under Article 6.5 on the information found on the Korean investigating authorities' published report and related supporting documents is consistent with the legal standard under Article 6.5.

5.416. In sum, in articulating the legal standard under Article 6.5, the Panel did *not* pronounce on the specific manner in which investigating authorities should specify that "good cause" was shown when granting confidential treatment to certain information. Under Article 6.5, an investigating authority is required to assess objectively whether the request for confidential treatment has been sufficiently substantiated such that "good cause" has been shown. The fact that the investigating authority has conducted this objective assessment must be *discernible* from its published report or

[1070] See Panel Report, para. 7.435 (quoting Korea's response to Panel question No. 69).
[1071] Panel Report, para. 7.436.
[1072] Panel Report, para. 7.436.
[1073] Panel Report, para. 7.441.
[1074] Panel Report, para. 7.438.
[1075] Appellate Body Report, *EC – Fasteners (China)*, para. 539.
[1076] Appellate Body Report, *EC – Fasteners (China)*, para. 539.
[1077] Korea's other appellant's submission, para. 332 (referring to Korea's first written submission to the Panel, para. 337).
[1078] Panel Report, para. 7.440. The Panel further noted that there was no evidence to suggest that "the Korean Investigating Authorities themselves undertook to link the information for which confidential treatment was sought to the categories defined in Korean legislation and thereby determine whether good cause for confidential treatment existed." (Ibid.)
[1079] Panel Report, para. 7.440.

related supporting documents. The Panel's articulation comports with the legal standard under Article 6.5. Consequently, we find that the Panel did not err in its interpretation of Article 6.5 of the Anti-Dumping Agreement.

5.417. Furthermore, with respect to the investigation at issue, the Panel stated that it could not "conclude that the Korean Investigating Authorities actually engaged in a consideration of whether the submitters of the information had shown good cause for confidential treatment of the information in question".[1080] Korea argues that, in providing non-confidential summaries by way of deleting the relevant information from their submissions, the providers of the information "implicitly" asserted that such deleted information fell within the categories of "confidential information" set forth in the relevant Korean laws. In Korea's view, as a consequence of that "implicit" assertion, "good cause" was "shown" for granting confidential treatment to that information. As noted, the Panel was not convinced by this argument because there is no evidence on the record "linking the information for which confidential treatment was granted to the categories of information warranting confidential treatment identified in Korean law".[1081] Neither is there evidence suggesting that "the Korean Investigating Authorities themselves undertook to link the information for which confidential treatment was sought to the categories defined in Korean legislation and thereby determine whether good cause for confidential treatment existed."[1082] Given these Panel findings, we disagree with Korea's assertion that, "when [the] KTC received information that was considered confidential by the interested parties, it objectively assessed whether there was indeed 'good cause' by confirming whether the deleted information fell within a category of confidential information enumerated in the relevant Korean laws."[1083] Consequently, we find that the Panel did not err in its application of Article 6.5 of the Anti-Dumping Agreement.

5.418. For the foregoing reasons, we uphold the Panel's finding, in paragraphs 7.441, 7.451, and 8.4.b of the Panel Report, that Japan demonstrated that the Korean investigating authorities acted inconsistently with Article 6.5 of the Anti-Dumping Agreement with respect to their treatment of information provided by the applicants as confidential without requiring that good cause be shown.

5.4.2.2 Article 6.5.1 of the Anti-Dumping Agreement

5.4.2.2.1 The Panel's findings

5.419. Before the Panel, Japan asserted that, with respect to certain documents, the KTC failed to require that submitting parties provide a non-confidential summary of the information that was treated as confidential or to show why such a summary could not be provided, as required under Article 6.5.1 of the Anti-Dumping Agreement.[1084]

5.420. The Panel indicated that the issue before it under Article 6.5.1 was whether, with respect to certain information, the KTC failed to require that the submitting parties provide a non-confidential summary of information for which confidential treatment was sought.[1085] In this regard, Korea argued before the Panel that the version of the applicants' submissions from which confidential information was deleted constituted the non-confidential summary required by Article 6.5.1.[1086]

5.421. The Panel began by noting that the obligation in Article 6.5.1 falls on the investigating authorities. Thus, the Panel emphasized that it is incumbent on the investigating authorities to

[1080] Panel Report, para. 7.440.
[1081] Panel Report, para. 7.440.
[1082] Panel Report, para. 7.440.
[1083] Korea's other appellant's submission, para. 332 (referring to Korea's first written submission to the Panel, para. 337).
[1084] Panel Report, para. 7.391.
[1085] Panel Report, para. 7.427. The Panel further specified that, because the applicants did not argue that the confidential information was not susceptible of summary, the question before it was only whether the KTC failed to require that the applicants provide a non-confidential summary of the information for which confidential treatment was sought, and not whether the KTC should have required a showing of why such information was not susceptible of summary. (Ibid., para. 7.442)
[1086] Panel Report, para. 7.442.

ensure that, when information is treated as confidential, a proper non-confidential summary is provided by the party submitting the confidential information.[1087]

5.422. With respect to the underlying investigation, the Panel noted that the "Disclosed" versions of the three communications submitted by the applicants and identified by Japan (the investigation application dated 23 December 2013, the summary of opinion from attorneys dated 23 October 2014, and the rebuttal opinion of applicants dated 13 November 2014) have entire sections from which information was removed, without any narrative to summarize the specific information deleted from the text.[1088] The Panel noted that the information redacted from the submissions includes a significant amount of important data, such as information relating to the production and sales of the domestic like product and various economic indicators regarding the state of the domestic industry.[1089]

5.423. The Panel then addressed several arguments advanced by Korea. First, Korea argued that Article 6.5.1 does not require a non-confidential summary to be provided for every piece of data included in a submission. The Panel considered that, while there need not be a non-confidential summary of, for instance, each individual data point reported in a table or chart, a non-confidential summary of the information must nonetheless be provided. Second, the Panel disagreed with Korea's argument that Japan did not claim due process violations or the lack of a sufficient opportunity for the interested parties to defend their interests, finding instead that establishing a violation of Article 6.5.1 does not require Japan to substantiate such claims. Finally, the Panel rejected Korea's assertion that the KTC provided descriptive narratives of the information at issue subsequent to the filing of the submissions, thereby ensuring a proper understanding of the substance of the information. In the Panel's view, the subsequent provision of a non-confidential summary by the investigating authority does not absolve it of having failed to comply with Article 6.5.1 in the first instance.[1090]

5.424. The Panel did not exclude *a priori* that, in some circumstances, a redacted version of a document from which the submitting party has deleted certain information may, in and of itself, constitute the necessary non-confidential summary of the information treated as confidential. However, the Panel noted that, in the present case, "the documents in question contain entire sections from which the data has been redacted"[1091], without including any narrative that attempts to summarize the redacted information. In the Panel's view, "[i]n the complete absence of data, and with no narrative summary with respect to the deleted information, the 'Disclosed' versions of the three communications identified by Japan cannot be said to contain a summary in sufficient detail to 'permit a reasonable understanding of the substance of the information submitted in confidence'."[1092]

5.425. On this basis, the Panel concluded that, "[b]y failing to require that the submitting parties provide a sufficient non-confidential summary of the information in question, the Korean Investigating Authorities acted inconsistently with Article 6.5.1 of the Anti-Dumping Agreement."[1093]

5.4.2.2.2 Whether the Panel erred in its application of Article 6.5.1 of the Anti-Dumping Agreement

5.426. Korea submits that the Panel erred in its application of Article 6.5.1 by finding that the KTC failed to require the applicants to furnish non-confidential summaries of the information submitted in confidence. According to Korea, the non-confidential summaries submitted by the applicants were in sufficient detail to permit a reasonable understanding of the substance of the confidential information.[1094] Korea maintains that the KTC's longstanding practice is to procure a non-confidential

[1087] Panel Report, para. 7.444 (referring to Panel Report, *EC – Fasteners (China)*, para. 7.515). The Panel also observed that, "[w]hen information has been treated as confidential inconsistently with Article 6.5, the issue of whether a proper non-confidential summary was provided becomes irrelevant." (Ibid., para. 7.443)

[1088] Panel Report, paras. 7.445 and 7.449.

[1089] Panel Report, para. 7.445.

[1090] Panel Report, paras. 7.446-7.447 (referring to Korea's first written submission to the Panel, paras. 346-348).

[1091] Panel Report, para. 7.449.

[1092] Panel Report, para. 7.449.

[1093] Panel Report, para. 7.450.

[1094] Korea's other appellant's submission, para. 349.

summary of the confidential information from the interested parties by way of requiring the "public versions" of the submissions. According to Korea, in the "public versions" of the submissions from the Korean producers that were "proactively disclosed" by the KTC[1095], "certain non-confidential descriptive narratives are found with respect to all confidential information, and these narratives permitted a reasonable understanding of the substance of the information and thus enabled interested parties to defend their interests."[1096]

5.427. Japan responds that, contrary to Korea's assertion, the non-confidential summaries submitted by interested parties did not contain sufficient detail to permit a reasonable understanding of the substance of the confidential information. According to Japan, the "public versions" of the documents at issue contained entire sections from which the key information had been redacted and there was no narrative that attempted to summarize the redacted information.[1097] Therefore, in Japan's view, the Panel correctly found that the KTC failed to require non-confidential summaries in "sufficient detail" to convey the substance of the information.[1098]

5.428. Article 6.5.1 of the Anti-Dumping Agreement governs two related situations. First, this provision sets out that "[t]he authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof." With respect to the content of those summaries, Article 6.5.1 elaborates that they "shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence". Second, Article 6.5.1 further stipulates that "[i]n exceptional circumstances, such parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided."

5.429. In the present dispute, the Panel indicated that the claim at hand concerns only the first of those situations, that is, whether the investigating authorities required the submission of non-confidential summaries that were in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. Indeed, the Panel noted that, "[b]ecause the applicants did not argue that the confidential information was not susceptible of summary, the question before [it was] only whether the KTC failed to require that the applicants provide a non-confidential summary of the information for which confidential treatment was sought, and not whether the KTC should have required a showing of why such information was not susceptible of summary."[1099] On appeal, Korea does not dispute the Panel's understanding of the scope of the claim under Article 6.5.1.[1100]

5.430. Thus, the central issue underlying Korea's claim on appeal is whether the Panel committed legal error under Article 6.5.1 in finding that the Korean investigating authorities failed to require that the parties submitting confidential information provide a "sufficient" non-confidential summary of the information at issue. Indeed, on appeal, Korea's main argument is that the "KTC did not fail to require the applicants to provide sufficient non-confidential summaries of the confidential information" given that "[t]he non-confidential summaries were in sufficient detail to permit a reasonable understanding of the substance of the confidential information."[1101]

5.431. We note that, as found by the Panel, "the applicants filed 'Disclosed', or public, versions of at least three of their written submissions (the investigation application dated 23 December 2013,

[1095] Korea's other appellant's submission, para. 353.

[1096] Korea's other appellant's submission, para. 352.

[1097] Japan's appellee's submission, para. 174. Japan specifies that, in some cases, tables were provided but all data contained therein was deleted; in other cases, percentage changes were shown but actual figures were deleted. (Ibid. (referring to Panel Report, para. 7.449))

[1098] Japan's appellee's submission, para. 174 (quoting Panel Report, para. 7.449).

[1099] Panel Report, para. 7.442.

[1100] In its other appellant's submission, Korea states that "[t]here can certainly be situations when there is no meaningful way of summarizing confidential data and, thus, the only option is to redact such information in full (e.g. by indicating 'XXX')". (Korea's other appellant's submission, para. 350) While this statement might suggest that Korea invokes "exceptional circumstances" pursuant to Article 6.5, Korea nonetheless clarified at the oral hearing that its position is that the KTC provided non-confidential summaries of the confidential information at issue by way of requiring "public versions" of the applicants' submissions. Thus, Korea agrees that the claim at hand should be evaluated in light of the first situation covered by Article 6.5.1 and therefore does *not* involve examining whether there were any "exceptional circumstances" in the underlying investigation such that the information at issue was not susceptible of summary.

[1101] Korea's other appellant's submission, para. 349.

the summary of opinion from attorneys dated 23 October 2014, and the rebuttal opinion of applicants dated 13 November 2014) from which certain information was redacted either by totally removing it or by replacing it with 'X' or asterisks."[1102]

5.432. Korea argued before the Panel that "the version of the applicants' submissions from which confidential information was deleted *constitutes the non-confidential summary* required by Article 6.5.1."[1103] In this regard, the Panel stated that it did not "exclude *a priori* that in some circumstances a redacted version of a document from which the submitting party has deleted certain information may in itself constitute the necessary non-confidential summary of information treated as confidential".[1104] The Panel added that "[w]hether such a document satisfies the requirements in Article 6.5.1, and specifically whether it is in sufficient detail to 'permit a reasonable understanding of the substance of the information submitted in confidence', is something that would have to be determined on a case-by-case basis."[1105] We agree with these statements by the Panel.

5.433. On appeal, Korea maintains that the three documents cited by Japan contain "non-confidential descriptive narratives … with respect to all confidential information", which "permitted a reasonable understanding of the substance of the information and thus enabled interested parties to defend their interests".[1106] The Panel rejected this view. In particular, the Panel noted that "the 'Disclosed' versions of the three communications identified by Japan have entire sections from which information was removed."[1107] The Panel added that "[t]he information redacted from the submissions includes a significant amount of important data."[1108] By way of example, the Panel noted that, "in some cases tables are provided from which all data was deleted; in other cases, percentage changes are shown in the tables, but the actual figures were deleted. There are also sections of text from which data was redacted."[1109] The Panel also pointed out that "[t]here is no narrative in the 'Disclosed' version to summarize the specific information deleted from the text."[1110] The Panel noted that the information redacted from the submissions refers to, *inter alia*, the following:

> (a) volumes of domestic production of the like product, including percentages of the domestic production represented by the complainants; (b) volumes of domestic consumption; (c) market shares in the Korean domestic market; (d) import price of the product under investigation; (e) production capacity and utilization by the domestic industry; (f) domestic sales; (g) inventories[,] volumes[,] and ratio for the domestic industry; (h) profitability for the domestic industry; (i) production costs for the domestic industry; (j) investments in equipment and research and development by the domestic industry; (k) employment and wages in the domestic industry; (l) productivity in the domestic industry; (m) cash flow for the domestic industry; (n) prices of raw materials; (o) quantity and value of imports of the product under investigation; and (p) production capacity and utilization by the Japanese industry.[1111]

5.434. In light of the above considerations, the Panel found that, "[i]n the complete *absence of data*, and with *no narrative summary* with respect to the deleted information, the 'Disclosed' versions of the three communications identified by Japan cannot be said to contain a summary in sufficient detail to 'permit a reasonable understanding of the substance of the information submitted in confidence'."[1112]

5.435. In the above passages from the Panel Report, the Panel made findings of fact with respect to the content of the documents that were treated as the "non-confidential summaries" in the underlying investigation. In particular, the Panel pointed out that "the 'Disclosed' versions of the

[1102] Panel Report, para. 7.431.
[1103] Panel Report, para. 7.442 (referring to Korea's first written submission to the Panel, paras. 341-343; response to Panel question No. 65(a)). (emphasis added)
[1104] Panel Report, para. 7.448.
[1105] Panel Report, para. 7.448 (referring to Korea's response to Panel question No. 68).
[1106] Korea's other appellant's submission, para. 352.
[1107] Panel Report, para. 7.445.
[1108] Panel Report, para. 7.445.
[1109] Panel Report, para. 7.449. (fns omitted)
[1110] Panel Report, para. 7.445.
[1111] Panel Report, para. 7.445.
[1112] Panel Report, para. 7.449. (emphasis added)

three communications identified by Japan have entire sections from which information was removed"[1113], which cover "a significant amount of important data".[1114] The Panel also highlighted that "[t]here is no narrative in the 'Disclosed' version to summarize the specific information deleted from the text."[1115] Korea does not challenge the Panel's appreciation of the facts under Article 11 of the DSU. Instead, Korea repeats certain arguments that the Panel had already rejected without explaining why the Panel's analysis constitutes a *misapplication* of Article 6.5.1. We recall that Article 6.5.1 mandates the investigating authority to require a non-confidential summary that contains "sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence".[1116] In light of the applicable legal standard and the reasoning provided by the Panel, we fail to see how the "non-confidential summaries" at issue could satisfy the legal standard of being "in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence". In these circumstances, we disagree with Korea's argument that "[the] KTC did not fail to require the applicants to provide sufficient non-confidential summaries of the confidential information."[1117]

5.436. Korea further argues on appeal that "non-confidential summaries are not required under Article 6.5.1 for every single figure and piece of data included in the parties' submissions, regardless of the relevant context."[1118] This argument was also addressed by the Panel.[1119] The Panel stated that while "all confidential information must be summarized … this does not mean that there must be a non-confidential summary of, for instance, each individual data point reported in a table or chart."[1120] As we see it, the Panel did not fault Korea under Article 6.5.1 for failing to disclose individual data points. Instead, as noted above, the Panel's conclusion was based on the fact that the "non-confidential summaries" did not meet the legal standard under Article 6.5.1 because there was a "complete absence of data" and "no narrative summary with respect to the deleted information".[1121] We are therefore not convinced by Korea's argument.

5.437. Korea additionally submits that "Article 6.5.1 does not provide any instruction on the method and extent of preparing non-confidential summaries. Thus, investigating authorities are entitled [to] certain deference to a reasonable degree in accepting or rejecting non-confidential summaries."[1122] In our view, regardless of the degree of deference that an investigating authority may enjoy under Article 6.5.1, it must comply with the obligation to require summaries that are "in sufficient detail to permit a reasonable understanding of the information submitted in confidence". Our above analysis shows that the Panel correctly found that the "non-confidential summaries" at issue failed to meet this legal standard. Therefore, we fail to see anything in this argument by Korea that would disturb the Panel's conclusion.

5.438. Korea also contends that there was neither a violation of due process rights of the interested parties nor a failure to provide interested parties with an opportunity to defend their interests. In Korea's view, "[i]t is noteworthy that there were no such claims put forward by Japan under Article 6.2 or 6.4 of the Anti-Dumping Agreement."[1123] This argument by Korea was also rejected by the Panel.[1124] For the Panel, "if an investigating authority fails to ensure that a non-confidential

[1113] Panel Report, para. 7.445.
[1114] Panel Report, para. 7.445.
[1115] Panel Report, para. 7.445.
[1116] Appellate Body Report, *EC – Fasteners (China)*, para. 542. Article 6.5.1 also contemplates that in "exceptional circumstances" confidential information may not be "susceptible of summary". The Appellate Body observed in *EC – Fasteners (China)* that, "[i]n such exceptional circumstances, a party may indicate that it is not able to furnish a non-confidential summary of the information submitted in confidence, but it is nevertheless required to provide a 'statement of the reasons why summarization is not possible'." (Ibid., para. 543)
[1117] Korea's other appellant's submission, para. 349.
[1118] Korea's other appellant's submission, para. 352.
[1119] Before the Panel, Korea argued that "Article 6.5.1 does not require that a non-confidential summary must be provided for every piece of data included in a submission." (Panel Report, para. 7.446 (referring to Korea's first written submission to the Panel, para. 346))
[1120] Panel Report, para. 7.447.
[1121] Panel Report, para. 7.449.
[1122] Korea's other appellant's submission, para. 352.
[1123] Korea's other appellant's submission, para. 353.
[1124] Korea asserted that "Japan [was] not claiming that the due process rights of interested parties were violated or that interested parties did not have a sufficient opportunity to defend their interests." (Panel Report, para. 7.446 (referring to Korea's first written submission to the Panel, para. 347))

summary is submitted, there is no requirement under Article 6.5.1 for a complainant before the WTO to demonstrate that the due process rights of interested parties were violated or that interested parties did not have a sufficient opportunity to defend their interests, in order to establish a violation."[1125]

5.439. We consider the Panel's reasoning to be in line with the role of due process concerns when assessing claims under Article 6.5.1. Indeed, in describing the legal standard under Article 6.5.1, the Appellate Body stated in *EC − Fasteners (China)* that, "[w]henever information is treated as confidential, transparency and due process concerns *will necessarily arise* because such treatment entails the withholding of information from other parties to an investigation."[1126] Thus, as we see it, the Appellate Body has rejected the view that a panel's inquiry into whether Article 6.5.1 has been breached includes a separate analysis of whether the parties' due process rights have been violated. The Panel was therefore correct in rejecting Korea's argument about the relevance of conducting a *separate* assessment as to whether the due process rights of the interested parties had been violated in order to establish a claim under Article 6.5.1.

5.440. Finally, Korea contends that "throughout the underlying investigation, [the] KTC analyzed and proactively disclosed the non-confidential summaries of the confidential information submitted by the interested parties."[1127] Before the Panel, Korea had similarly argued that "the KTC provided descriptive narratives with respect to all of the information that Japan identified in its communications subsequent to the filing of the submissions, thereby ensuring a proper understanding of the substance of the information."[1128] As in previous instances, the Panel disagreed with Korea. According to the Panel, "even assuming that the Korean Investigating Authorities subsequently provided descriptive narratives of the information treated as confidential, this would not resolve the issue of whether they required the submission of a non-confidential summary from the submitter of the information for which confidential treatment was sought. The subsequent provision of a non-confidential summary by the investigating authority does not absolve it of having failed to comply with Article 6.5.1 in the first instance."[1129]

5.441. In our view, the Panel's reasoning for rejecting Korea's argument is supported by the text of Article of 6.5.1 and relevant Appellate Body jurisprudence. This provision imposes an obligation on investigating authorities with respect to the conduct *expected of parties* seeking to obtain confidential treatment for certain information, namely "[t]he authorities shall require" interested parties "to furnish non-confidential summaries" of the relevant information. Thus, under Article 6.5.1, the authorities bear the obligation to require non-confidential summaries *from the parties*, and there appears to be no basis for the proposition that the authorities' obligation could be fulfilled through summaries provided by the authorities themselves. Consequently, we see no error in the Panel's statement that the *subsequent* issuance of descriptive narratives of the information treated as confidential *by the KTC* "would *not* resolve the issue of whether they required the submission of a non-confidential summary from the submitter of the information for which confidential treatment was sought".[1130]

5.442. In sum, Article 6.5.1 mandates investigating authorities to require non-confidential summaries from interested parties providing confidential information. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In the present dispute, the Panel found that, "[i]n the complete *absence of data*, and with *no narrative summary* with respect to the deleted information, the 'Disclosed' versions of the three communications identified by Japan cannot be said to contain a summary in sufficient detail to 'permit a reasonable understanding of the substance of the information submitted in confidence'."[1131] Korea does not challenge the Panel's appreciation of the facts under Article 11 of the DSU leading to the above finding. Instead, Korea repeats certain arguments that the Panel had already rejected without explaining why the Panel's analysis constitutes a *misapplication* of Article 6.5.1. In light of the applicable legal standard and the reasoning provided by the Panel, we

[1125] Panel Report, para. 7.447.
[1126] Appellate Body Report, *EC − Fasteners (China)*, para. 541. (emphasis added)
[1127] Korea's other appellant's submission, para. 353.
[1128] Panel Report, para. 7.446 (referring to Korea's first written submission to the Panel, paras. 346-348).
[1129] Panel Report, para. 7.447.
[1130] Panel Report, para. 7.447. (emphasis added)
[1131] Panel Report, para. 7.449. (emphasis added)

fail to see how the versions of the submissions from which confidential information had been redacted could satisfy the legal standard of being non-confidential summaries that are "in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence". In these circumstances, we disagree with Korea's argument that "[the] KTC did not fail to require the applicants to provide sufficient non-confidential summaries of the confidential information."[1132]

5.443. For the foregoing reasons, we uphold the Panel's finding, in paragraphs 7.450, 7.451, and 8.4.c of the Panel Report, that Japan demonstrated that the Korean investigating authorities acted inconsistently with Article 6.5.1 of the Anti-Dumping Agreement by failing to require that the submitting parties provide a sufficient non-confidential summary of the information for which confidential treatment was sought.

5.5 Essential facts

5.444. The Panel found that Japan's claim 10 as listed in its panel request, which concerns the disclosure of essential facts, did not meet the requirements of Article 6.2 of the DSU and, consequently, was not within its terms of reference.[1133]

5.445. Japan appeals this finding and requests the Appellate Body to find that this claim is within the Panel's terms of reference. In addition, Japan requests the Appellate Body to complete the legal analysis and find that the Korean investigating authorities acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to inform the interested parties of the 14 essential facts relating to price effects, the volume of dumped imports, the state of the domestic industry, and causation.[1134]

5.446. Korea, for its part, requests the Appellate Body to uphold the Panel's finding under Article 6.2 of the DSU. Should the Appellate Body reverse the Panel's finding, Korea argues that the Appellate Body cannot complete the legal analysis.[1135]

5.447. We begin by examining whether the Panel erred under Article 6.2 of the DSU in finding that Japan's claim 10, concerning the disclosure of essential facts, was not within its terms of reference. If we reverse the Panel's findings under Article 6.2 of the DSU and find that Japan's claim concerning the disclosure of essential facts was within the Panel's terms of reference, we will proceed to examine whether the Appellate Body can complete the legal analysis with respect to Japan's claim that the Korean investigating authorities acted inconsistently with Article 6.9 of the Anti-Dumping Agreement.

5.5.1 Whether the Panel erred in finding that Japan's claim 10 concerning the disclosure of essential facts was not within its terms of reference

5.448. In its panel request, Japan claimed that the Korean measures are inconsistent with Korea's obligations under:

> Article 6.9 of the [Anti-Dumping] Agreement because Korea failed to inform the interested parties of the essential facts under consideration which formed the basis for the decision to impose definitive anti-dumping measures[.]

5.449. The Panel found that Japan's panel request merely paraphrased the language of Article 6.9 and did not identify the essential facts allegedly not disclosed or set out any elements that would allow the respondent or other Members to have any understanding of the scope of the claim. To the Panel, a mere paraphrase of the language of Article 6.9 is insufficient to explain how or why Japan considers the obligation was breached.[1136] In the Panel's view, some additional narrative regarding the kinds of essential facts allegedly not disclosed should have been included in the panel request so as to present the problem clearly.[1137] The Panel found support for its conclusion by taking into

[1132] Korea's other appellant's submission, para. 349.
[1133] Panel Report, para. 7.517.
[1134] Japan's appellant's submission, paras. 326 and 347.
[1135] Korea's appellee's submission, para. 464.
[1136] Panel Report, para. 7.514.
[1137] Panel Report, para. 7.515.

account the "broad and diverse scope of the allegations" contained in Japan's submissions.[1138] The Panel thus concluded that Japan's claim under Article 6.9 of the Anti-Dumping Agreement concerning the disclosure of essential facts was not properly within the Panel's terms of reference, and the Panel declined to consider it further or resolve it.[1139]

5.450. On appeal, Japan argues that claim 10 of its panel request refers specifically to the failure to disclose essential facts and expressly identifies Article 6.9 as the provision at issue.[1140] However, the Panel failed to consider fully and carefully the "nature and scope" of this obligation, and failed to consider the claim in light of the nature of the specific measure being challenged.[1141] Japan submits that the obligation to disclose essential facts is narrow and well defined on its face. Thus, the nature of the obligation in these circumstances is "sufficient to present the problem clearly".[1142] Japan further argues that the Panel failed to consider the nature of the measure, in particular the fact that its claim refers specifically to Korea's failure to "inform the interested parties of the essential facts under consideration".[1143] Japan finally submits that the Panel improperly relied on the phrase "how or why" to require the complainant to provide arguments in support of the claim[1144], and incorrectly relied on its later arguments to support its finding that claim 10 of the panel request does not comply with the requirements of Article 6.2.[1145]

5.451. Korea replies that the Panel correctly found that Japan's panel request does not explain how or why Japan considers that the Korean investigating authorities failed to inform interested parties of the essential facts that formed the basis for the decision to impose anti-dumping measures.[1146] To Korea, it is clear that the lack of clarity in Japan's panel request prejudiced the preparation of Korea's defence and violated Korea's essential due process rights in this proceeding.[1147] Korea argues that the Panel did not fail to consider the nature of the obligation[1148] or the nature of the measure. Instead, the Panel considered that an anti-dumping measure could violate Article 6.9 in many different ways and thus that it was important for Japan to provide the how and why of the specific allegations of violation.[1149] Korea further contends that the Panel was aware of the distinction between claims and arguments[1150], and did not improperly rely on later arguments because the Panel first made its determination on the basis of the panel request, on its face, before turning to the later submissions for confirmation.[1151]

5.452. We have indicated in section 5.1.1 above that, in assessing whether a panel request comports with the requirements of Article 6.2 of the DSU, a panel must examine a panel request on its face, taking into consideration the circumstances of each case. We have also explained that, in order to provide the legal basis of the complaint sufficient to present the problem clearly, a panel request must plainly connect the challenged measure with the obligation alleged to have been breached. In this regard, a complainant must, as a minimum requirement, list the provisions of the covered agreement alleged to have been breached. However, there may be situations in which identification of these provisions, in and of itself, may fall short of meeting the legal standard under Article 6.2 of the DSU, for example, where the provision at issue establishes multiple obligations.[1152]

5.453. In the present instance, the Panel nonetheless considered that "[a] mere paraphrase of the language of Article 6.9 does not explain *how* or *why* Japan considers the measures at issue to be inconsistent with" this provision.[1153] Beyond this conclusion, the Panel did not provide any further analysis on the circumstances of this case, such as the nature of the measure or that of the provision

[1138] Panel Report, para. 7.516.
[1139] Panel Report, para. 7.517.
[1140] Japan's appellant's submission, para. 314.
[1141] Japan's appellant's submission, para. 315.
[1142] Japan's appellant's submission, para. 316.
[1143] Japan's appellant's submission, para. 320.
[1144] Japan's appellant's submission, para. 324.
[1145] Japan's appellant's submission, paras. 325-326.
[1146] Korea's appellee's submission, para. 474.
[1147] Korea's appellee's submission, para. 475.
[1148] Korea's appellee's submission, paras. 478-479.
[1149] Korea's appellee's submission, para. 482.
[1150] Korea's appellee's submission, paras. 485-486.
[1151] Korea's appellee's submission, para. 492.
[1152] See para. 5.6 above.
[1153] Panel Report, para. 7.514. (emphasis original)

at issue. However, whether Japan's claim 10, despite its brevity, fulfils the requirements of Article 6.2 of the DSU should be assessed, taking into consideration these circumstances.

5.454. With regard to the nature of the measure, we observe that Japan's claim 10 specifically refers to the Korean investigating authorities' failure "to inform the interested parties of the essential facts under consideration which formed the basis for the decision to impose definitive anti-dumping measures". Claim 10, therefore, expressly relates to the alleged omission to disclose essential facts by the Korean investigating authorities in the anti-dumping investigation at issue.

5.455. With regard to the nature of the provisions concerned, Article 6.9 of the Anti-Dumping Agreement provides that:

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

5.456. Article 6.9 thus concerns the disclosure of "essential facts" before a final determination is made, namely those facts that are significant in the process of reaching a decision whether to apply definitive measures.[1154] Therefore, the obligation contained in Article 6.9 is distinct and well delineated. It essentially requires the investigating authority to disclose the essential facts to all interested parties in a timely manner, that is, before the final determination is made and in sufficient time for the parties to defend their interests. Thus, by identifying the specific aspect of the measure at issue under this claim with the degree of precision highlighted above, and by referring to Article 6.9 of the Anti-Dumping Agreement, Japan's claim 10 has plainly connected the challenged measure with the provision alleged to have been breached such that the panel request meets the requirements of Article 6.2 of the DSU.

5.457. We recall, however, that in finding that the panel request was not sufficiently precise to comply with the requirements of Article 6.2 of the DSU, the Panel relied on the following allegations in Japan's written submissions that the KTC failed to disclose the essential facts under consideration with respect to:

a. price effects, specifically: the alleged practices of aggressive marketing, the construction of the "reasonable sales price", the interchangeability of the dumped imports and the domestic industry's like product, including with respect to the importance of "system sales" in this regard;

b. the volume of dumped imports, specifically: the actual volumes and market shares of the dumped imports, the volume of the dumped imports relative to domestic production, and the end-point to end-point comparison of the volume of the dumped imports;

c. the condition of the domestic industry, specifically: capacity utilization, market share, and the profitability of the domestic industry; and

d. causation, specifically: facts relating to any causal relationship and facts relating to other known factors having an impact on the state of the domestic industry such as third countries' imports and the export performance of the domestic industry.[1155]

5.458. In our view, these allegations indicate which essential facts, or which categories of essential facts, Japan contended that the Korean investigating authorities failed to disclose. The Panel therefore appears to have understood that, to comply with the requirements of Article 6.2 of the DSU, when bringing a claim under Article 6.9 of the Anti-Dumping Agreement, a complainant is required to indicate in its panel request *which* essential facts, or categories thereof, have not been disclosed by the investigating authority.

[1154] Appellate Body Report, *Russia – Commercial Vehicles*, para. 5.177. The Appellate Body has further indicated that "[s]uch facts are those that are salient for a decision to apply definitive measures as well as those that are salient for a contrary outcome." (Ibid.)

[1155] Panel Report, para. 7.516.

5.459. As indicated above, however, the identification of Article 6.9 in the panel request, together with the identification of the specific aspect of the measure at issue, was sufficient to provide a brief summary of the legal basis of the complaint for purposes of Article 6.2 of the DSU. Requiring the panel request to include the kind of additional detail suggested by the Panel − such as the specific essential facts allegedly not disclosed − would entail the elaboration of the arguments underlying Japan's claim, which would, in our view, exceed the requirements to which the complainant is held under Article 6.2 of the DSU.

5.460. Moreover, we also disagree with Korea's argument that Japan "failed to satisfy even the basic obligation of providing any narrative that presented the problem clearly".[1156] In Korea's view, although Japan was not required to "set forth the factual and legal *reasons and evidence* supporting its claim", Japan must "explain the 'how or why' of its legal claims" such that its panel request could "provide[] a narrative to present the problem clearly".[1157] However, we fail to see the difference between the "factual and legal reasons" supporting the claim, which Korea agrees are not required in the panel request, and the explanation of the "how or why" that Korea maintains should have been included in the panel request. In our view, by plainly connecting the measure at issue with the obligations alleged to have been breached, Japan's panel request provides a brief summary of the legal basis as required by Article 6.2 of the DSU.

5.461. In sum, Japan's claim 10 concerning the disclosure of essential facts in its panel request identifies Article 6.9 of the Anti-Dumping Agreement as the provision alleged to have been breached by Korea. Claim 10 also specifically refers to the Korean investigating authorities' failure "to inform the interested parties of the essential facts under consideration which formed the basis for the decision to impose definitive anti-dumping measures". In addition, Article 6.9 sets forth a distinct and well-delineated obligation requiring the investigating authority to disclose the essential facts to all interested parties in a timely manner, that is, before the final determination is made and in sufficient time for the parties to defend their interests. Thus, Japan's claim 10 "provide[s] a brief summary of the legal basis of the complaint sufficient to present the problem clearly" within the meaning of Article 6.2 of the DSU.

5.462. For the foregoing reasons, we find that the Panel erred in finding that Japan's claim 10 concerning the disclosure of essential facts was not within its terms of reference. Consequently, we reverse the Panel's finding, in paragraphs 7.517 and 8.1.f of the Panel Report, and find that Japan's claim 10 is within the Panel's terms of reference.

5.5.2 Whether the Appellate Body can complete the legal analysis under Article 6.9 of the Anti-Dumping Agreement

5.463. Having reversed the Panel's finding that Japan's claim under Article 6.9 of the Anti-Dumping Agreement is outside the Panel's terms of reference, we turn to Japan's request for completion of the legal analysis under this provision.

5.464. Japan requests us to complete the legal analysis and find that Korea acted inconsistently with Article 6.9 of the Anti-Dumping Agreement due to the KTC's failure to disclose the "essential facts" before its "final determination".[1158] Japan maintains that the KTC violated Article 6.9 because of the inadequate manner in which it disclosed certain information to the Japanese respondents. For Japan, "[s]ome of the failures were not to disclose any information at all, even though the KTC would ultimately rely on that undisclosed information to make key findings. Some other failures were to provide no adequate public summary of certain information, which essentially left the parties with no disclosure."[1159] Japan maintains that, "[f]or both categories the KTC deprived the Japanese respondents of the opportunity to defend their interests."[1160]

[1156] Korea's appellee's submission, para. 488.
[1157] Korea's appellee's submission, para. 487. (emphasis original)
[1158] Japan's appellant's submission, para. 347.
[1159] Japan's appellant's submission, para. 334.
[1160] Japan's appellant's submission, para. 334.

5.465. In Japan's view, the KTC failed to disclose adequately the "essential facts" in the following "key disclosure documents": the OTI's Preliminary Report[1161], the KTC's Preliminary Resolution[1162], and the OTI's Interim Report[1163]. According to Japan, the Korean investigating authorities failed to disclose the following "essential facts", which are grouped into four main themes:

> - [With respect to price effects]: (1) the alleged "aggressive marketing", (2) the construction of the "reasonable sales price", (3) the treatment of "system sales", and (4) the interchangeability of the dumped imports and the domestic industry's like product;
>
> - [With respect to volume of dumped imports]: (5) the actual volumes of [the] dumped imports, (6) the market shares of the dumped imports, (7) the volume of the dumped imports relative to domestic production, and (8) the end-point to end-point comparison of the volume of the dumped imports;
>
> - [With respect to the state of the domestic industry]: (9) capacity utilization of the domestic industry, (10) market share of the domestic industry, and (11) the profitability of the domestic industry; and[]
>
> - [With respect to causation]: (12) facts relating to any causal relationship, (13) facts relating to other known factors having an impact on the state of the domestic industry such as third countries' imports, and (14) similar facts about the export performance of the domestic industry.[1164]

5.466. Japan argues that, on the basis of the "relevant facts" set out by the Panel, "there is no dispute about the contents of the key disclosure documents: the OTI's Preliminary Report dated 26 June 2014, the KTC's Preliminary Resolution also dated 26 June 2014, and the OTI's Interim Report dated 23 October 2014."[1165] In Japan's view, "[t]he only dispute is the legal issue of whether the KTC Final Resolution constitutes a 'final determination' of injury for purposes of Article 6.9"[1166], or whether it constitutes a disclosure document.

5.467. Korea responds that there is no basis for the Appellate Body to complete the legal analysis, given that it can do so only in a situation where there are sufficient factual findings by the Panel or undisputed facts on the Panel record.[1167] Korea recalls that, in the section of the Panel Report entitled "Relevant facts", the Panel summarized a number of factual findings made by the Korean investigating authorities at different stages of the underlying investigation. However, "[t]his section does not contain any legal or factual findings by the Panel on which are the 'essential facts' and which were the relevant documents to be examined for purposes of Article 6.9."[1168]

5.468. Korea disagrees with Japan's statement that "the status of the KTC Final Resolution is 'a legal issue, not a factual issue'."[1169] Korea considers that the final disclosure took place in the OTI's Final Report and the KTC's Final Resolution, and that the final decision to adopt measures was taken only later by the MOSF. In Korea's view, while the question whether these final documents by the OTI and the KTC disclosed the "essential facts" within the meaning of Article 6.9 may well be a legal issue, the issue whether these documents were the relevant documents to consider for purposes of Article 6.9 is a factual matter on which the Panel did not express a view and is disputed between the parties.[1170] For these reasons, Korea argues that the Appellate Body should reject Japan's request for the completion of the legal analysis.

[1161] OTI's Preliminary Report (Panel Exhibit JPN-2b).
[1162] KTC's Preliminary Resolution (Panel Exhibit JPN-1b).
[1163] OTI's Interim Report (Panel Exhibit JPN-3b).
[1164] Japan's appellant's submission, para. 334. (fns omitted)
[1165] Japan's appellant's submission, para. 328. (fns omitted)
[1166] Japan's appellant's submission, para. 329.
[1167] Korea's appellee's submission, para. 496 (referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 342).
[1168] Korea's appellee's submission, para. 497. Korea adds that the Panel did not make any finding on which document under domestic law is the appropriate one for purposes of this examination. (Ibid.)
[1169] Korea's appellee's submission, para. 498 (quoting Japan's appellant's submission, para. 329).
[1170] Korea's appellee's submission, para. 498.

5.469. Article 6.9 of the Anti-Dumping Agreement reads:

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

5.470. The Appellate Body noted in *China – GOES* that Article 6.9 sets out "the requirement to disclose, before a final determination is made, the essential facts under consideration *which form the basis for* the decision whether or not to apply definitive measures".[1171] Disclosing the essential facts under consideration "is paramount for ensuring the ability of the parties concerned to defend their interests".[1172] The Appellate Body also observed that, unlike Article 12.2.2 of the Anti-Dumping Agreement, which governs the disclosure of matters of fact and law and reasons at the conclusion of anti-dumping and countervailing duty investigations, Article 6.9 "concern[s] the disclosure of 'facts' in the course of such investigations 'before a final determination is made'."[1173] As to what type of facts are "essential" under Article 6.9, the Appellate Body has stated that "essential facts" refer to those facts under consideration that "are significant in the process of reaching a decision as to whether or not to apply definitive measures".[1174]

5.471. With respect to the temporal aspect of the obligation under Article 6.9, the investigating authorities must disclose the essential facts under consideration "before a final determination is made" and "in sufficient time for the parties to defend their interests". Moreover, the Appellate Body held in *China – HP-SSST (Japan) / China – HP-SSST (EU)* that an investigating authority must disclose the essential facts "in a coherent way" that permits an interested party to understand the factual basis for each of the intermediate findings and conclusions reached by the authority, such that it is able properly to defend its interests.[1175]

5.472. In light of these considerations, compliance with Article 6.9 should be assessed on the basis of an investigating authority's conduct "before a final determination is made". Thus, in the present case, the application of the legal standard requires determining, first, *which is* the "final determination" in the underlying investigation and, second, whether *prior to* such "final determination" the Korean investigating authorities properly disclosed the "essential facts" under consideration in accordance with Article 6.9.

5.473. In order to situate Japan's claim under Article 6.9, we begin by providing relevant background regarding the timeline of the underlying investigation in the present dispute. The investigation at issue was initiated by the KTC based on an application filed by TPC and KCC on 23 December 2013.[1176] On 26 June 2014, the OTI issued a Preliminary Report on dumping and injury to the domestic industry of valves for pneumatic transmission from Japan.[1177] On the same date, the KTC issued a Preliminary Resolution on dumping and injury to the domestic industry of valves for pneumatic transmission from Japan.[1178] On 23 October 2014, the OTI issued an Interim Report on dumping and injury of valves for pneumatic transmission from Japan.[1179] On 20 January 2015,

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[1171] Appellate Body Report, *China – GOES*, para. 240. (emphasis original)

[1172] Appellate Body Report, *China – GOES*, para. 240.

[1173] Appellate Body Report, *China – GOES*, para. 240. See also Appellate Body Report, *Russia – Commercial Vehicles*, para. 5.177.

[1174] Appellate Body Report, *China – GOES*, para. 240. The Appellate Body has similarly indicated that Article 6.9 "cover[s] 'facts under consideration', that is, those facts on the record that may be taken into account by an authority in reaching a decision as to whether or not to apply definitive anti-dumping … duties". (Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.129 (quoting Appellate Body Report, *China – GOES*, para. 240))

[1175] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.130. See also Appellate Body Report, *China – GOES*, para. 240.

[1176] Panel Report, para. 2.2 (referring to KTC's Final Resolution (Panel Exhibit KOR-1b (BCI)), p. 2; OTI's Final Report (Panel Exhibit KOR-2b (BCI)), p. 1).

[1177] See Panel Report, fn 15 to para. 2.3 (referring to OTI's Preliminary Report (Panel Exhibit JPN-2b)).

[1178] Panel Report, para. 2.3 (referring to KTC's Preliminary Resolution (Panel Exhibit JPN-1b)). In its Preliminary Resolution, the KTC determined that there was sufficient evidence to presume the existence of dumping and of material injury to the domestic industry caused by the dumped imports. The KTC did not recommend the imposition of provisional anti-dumping duties. In turn, the MOSF did not impose provisional anti-dumping duties. (Ibid.)

[1179] Panel Report, para. 2.3 (referring to OTI's Interim Report (Panel Exhibit JPN-3b)).

based on the OTI's Final Report of the same date, the KTC issued the Final Resolution determining that the Korean domestic industry producing the like product was materially injured by reason of the dumping of pneumatic valves from Japan and recommending the imposition of anti-dumping duties.[1180] The Panel observed that "[t]he full non-confidential texts of OTI's Final Report and the KTC's Final Resolution were notified to domestic producers, importers, and consumers on 17 March 2015."[1181]

5.474. On 12 June 2015, the MOSF issued a Public Notice of Proposal Draft Rules on the Imposition of Anti-Dumping Duties on Valves for Pneumatic Transmissions Originating from Japan.[1182] The Panel noted that "Japanese respondents subsequently filed an Opinion before MOSF on the Proposal."[1183] On 5 August 2015, the KTC filed an opinion with the MOSF addressing the arguments advanced by the Japanese respondents.[1184] Finally, "[r]elying on the KTC's Final Resolution, on 19 August 2015 the MOSF adopted Decree No. 498, entitled 'Regulation Concerning the Imposition of Antidumping Duty on Valves for Pneumatic Transmissions Originating from Japan', which imposes anti-dumping duties for five years on the imports of pneumatic valves from Japan at the rates recommended in the KTC's Final Resolution."[1185]

5.475. We recall that the Appellate Body may complete the legal analysis with a view to facilitating the prompt settlement and effective resolution of the dispute when the factual findings by the panel[1186] and/or uncontested facts on the panel record[1187] provide a sufficient factual basis for doing so.[1188] The Appellate Body has therefore been unable to complete the legal analysis where there have been insufficient factual findings in the panel report and a lack of undisputed facts on the panel record. Other reasons that have prevented the Appellate Body from completing the legal analysis include the absence of a full exploration of the issues before the panel[1189] and related considerations pertaining to the parties' due process rights.[1190]

5.476. In the present case, the participants disagree on which documents issued by the Korean investigating authorities constitute the "final determination" and which are the "disclosure" documents. On the one hand, Japan asserts that the "KTC's Final Resolution dated 20 January 2015 constituted the 'final determination' for purposes of Article 6.9, as it encompassed the conclusion of the investigation of dumping and injury."[1191] Regarding the "disclosure" of essential facts, Japan argues that this was made in the following three documents issued prior to the KTC's Final Resolution: (i) OTI's Preliminary Report dated 26 June 2014; (ii) KTC's Preliminary Resolution

[1180] Panel Report, para. 2.4 (referring to KTC's Final Resolution (Panel Exhibit KOR-1b), p. 1).

[1181] Panel Report, para. 7.466 (referring to Notification of Final Determination on Dumping and Injury to Domestic Industry of Valves for Pneumatic Transmissions from Japan (Panel Exhibit JPN-29b)).

[1182] Panel Report, para. 7.467 (referring to MOSF, Public Notice 2015-105).

[1183] Panel Report, para. 7.467 (referring to the Respondents' Opinion on the Pre-Announcement of Legislation of the Rule (Draft) on Imposition of Anti-Dumping Duties on Valves for Pneumatic Transmissions from Japan (Panel Exhibit KOR-37b)). The Panel also observed that the Japanese respondents requested the MOSF not to impose anti-dumping duties, and that they advanced substantive objections to the KTC's findings with respect to various issues, such as: (a) the substitutability of the products at issue; (b) the scope of the domestic industry; (c) the consideration of the increase in dumped imports; (d) the effect of the dumped products on the price of the like product; (e) the consideration of other indicators pertaining to the domestic industry; and (f) the assessment of other factors affecting the domestic industry. (Ibid.)

[1184] Panel Report, para. 7.467 (referring to Opinion after Reviewing the Respondents' Opinion on the Public Notice of the (Proposal Pratt) Rules on Imposition of Anti-Dumping Duties (Panel Exhibit KOR-38b)).

[1185] Panel Report, para. 7.467 (referring to MOSF's Decree No. 498 (Panel Exhibit JPN-6b); MOSF's Public Announcement (Panel Exhibit KOR-3b) (BCI)).

[1186] See e.g. Appellate Body Reports, *US − Gasoline*, p. 19, DSR 1996:I, pp. 18-19; *Canada − Periodicals*, p. 24, DSR 1997:I, p. 469; *Australia − Salmon*, paras. 117-119.

[1187] See e.g. Appellate Body Reports, *US − Lamb*, paras. 150 and 172; *US − Shrimp*, paras. 123-124, 132, and 140; *US − Section 211 Appropriations Act*, paras. 343-345; *EC and certain member States − Large Civil Aircraft*, paras. 1174-1177; *US − Large Civil Aircraft (2nd complaint)*, para. 1262.

[1188] See also Appellate Body Reports, *Colombia − Textiles*, para. 5.30; *US − Anti-Dumping Methodologies (China)*, para. 5.146; *Russia − Pigs (EU)*, para. 5.141; *EC and certain member States − Large Civil Aircraft*, para. 1178; *EC and certain member States − Large Civil Aircraft (Article 21.5 − US)*, para. 5.745.

[1189] See e.g. Appellate Body Reports, *EC − Asbestos*, paras. 81-82; *EC and certain member States − Large Civil Aircraft (Article 21.5 − US)*, para. 5.749; *EC − Seal Products*, para. 5.69; *Russia − Commercial Vehicles*, para. 5.141.

[1190] See e.g. Appellate Body Reports, *EC − Export Subsidies on Sugar*, para. 339; *EC − Seal Products*, para. 5.69.

[1191] Japan's appellant's submission, para. 335.

dated 26 June 2014; and (iii) OTI's Interim Report dated 23 October 2014.[1192] On the other hand, Korea maintains that "the 'final determination' within the meaning of Article 6.9 in the present case was the Final Decision of MOSF"[1193] to impose definitive duties issued on 19 August 2015.[1194] Moreover, Korea submits that the documents in which the "disclosure" of essential facts was made are (i) KTC's Final Resolution and (ii) OTI's Final Report, both of which were issued prior to the MOSF's Final Decision to impose definitive duties.[1195] Consequently, the participants have a disagreement as to *when* in the investigation the Korean investigating authorities reached the "final determination" within the meaning of Article 6.9. As a result, the participants also disagree on which documents issued during the underlying investigation should be examined for purposes of assessing the "disclosure" of essential facts.

5.477. We recall that the Panel found that Japan's panel request did not meet the requirements of Article 6.2 of the DSU with respect to Japan's claim under Article 6.9 of the Anti-Dumping Agreement and, consequently, that the claim was not within the Panel's terms of reference. As a result, the Panel "neither consider[ed] … further nor resolve[d]" this claim.[1196] Thus, the Panel did *not* make any findings indicating which documents constitute the "final determination" or which are the relevant "disclosure" documents for purposes of assessing compliance with Article 6.9, even though these issues were contended by the parties in the course of the Panel proceedings.[1197] In the "Relevant facts" section of its Report pertaining to this claim, the Panel limited itself to describing the institutional structure and procedures for conducting anti-dumping investigations in Korea[1198], providing a timeline of events in the underlying investigation[1199], and summarizing relevant facts regarding the four categories of facts that, in Japan's view, were not properly disclosed: (i) price effects; (ii) volume; (iii) the state of the domestic industry; and (iv) causation.[1200] In providing these summaries, the Panel referred to multiple documents from the underlying investigation without determining *which* of them, or whether all of them, constituted the "disclosure" documents for purposes of Japan's claim under Article 6.9.[1201]

5.478. The question whether the disclosure of "essential facts" was made through the documents alleged by Japan or those asserted by Korea encompasses a series of *factual* issues, with respect to which the Panel made *no* findings, and certain legal issues that were left unexplored by the Panel. For instance, the Panel made no findings on whether, under Korean law, the underlying anti-dumping investigation was concluded on substance when the MOSF decided to impose definitive measures or, alternatively, whether the anti-dumping investigation at issue was concluded on substance when the KTC issued its Final Resolution. Findings regarding these issues are necessary in order to assess which of the documents referred to by the participants constitute the "final determination" within

[1192] Japan's appellant's submission, para. 334 (referring to KTC's Preliminary Resolution (Panel Exhibit JPN-1b); OTI's Preliminary Report (Panel Exhibit JPN-2b); OTI's Interim Report (Panel Exhibit JPN-3b)).

[1193] Korea's appellee's submission, para. 508 (referring to MOSF's Public Announcement (Panel Exhibit KOR-3b (BCI))).

[1194] In response to questioning at the oral hearing, Korea asserted that the Final Decision of the MOSF is embodied in the MOSF's Public Announcement of the decision to impose anti-dumping duties on the pneumatic transmissions valves from Japan, which is part of the Panel record as Panel Exhibit KOR-3b. Korea further stated at the oral hearing that Decree No. 498, which is part of the Panel record as Panel Exhibit JPN-6b and is entitled "Regulation Concerning the Imposition of Antidumping Duty on Valves for Pneumatic Transmissions Originating from Japan", implements the MOSF's Final Decision by imposing anti-dumping duties for five years on the imports of pneumatic valves from Japan. We note that, as found by the Panel, MOSF's Public Announcement and MOSF's Decree No. 498 were both issued on 19 August 2015. (Panel Report, para. 2.5 and fn 19 thereto)

[1195] Korea's appellee's submission, para. 502. Korea refers to the KTC's Final Resolution and the OTI's Final Report as "the last and complete piece of the disclosure documents for the purpose of Article 6.9". (Ibid.) Korea also asserts that, "[i]n the course of the investigation, and in sufficient time for interested parties to defend their interests, [the] KTC released several documents of relevance to Japan's claim." (Ibid. (referring to Korea's first written submission to the Panel, paras. 358-404; second written submission to the Panel, paras. 163-177))

[1196] Panel Report, para. 7.517.

[1197] See Panel Report, paras. 7.453-7.454 and 7.456.

[1198] Panel Report, paras. 7.463-7.465.

[1199] Panel Report, paras. 7.466-7.467.

[1200] Panel Report, paras. 7.469-7.510.

[1201] In addressing the four categories of facts that, in Japan's view, were not properly disclosed, the documents cited by the Panel include: (i) KTC's Final Resolution (Panel Exhibit KOR-1b (BCI)); (ii) OTI's Final Report (Panel Exhibit KOR-2b (BCI)); (iii) OTI's Interim Report (Panel Exhibit JPN-3b); and (iv) OTI's Preliminary Report (Panel Exhibit JPN-2b). (Panel Report, paras. 7.469-7.510)

the meaning of Article 6.9, prior to which the required disclosure of essential facts should have occurred. Moreover, the Panel made no findings as to whether, in the investigation at issue, the KTC's Final Resolution and the OTI's Final Report constitute the last and complete piece of the disclosure documents that formed the basis for the Final Decision by the MOSF, or, alternatively, whether the disclosure of essential facts was made *earlier* in the proceedings through the OTI's Preliminary Report dated 26 June 2014, the KTC's Preliminary Resolution dated 26 June 2014, and the OTI's Interim Report dated 23 October 2014. Findings regarding these issues are necessary in order to determine which of the documents referred to by the participants may be regarded as the disclosure documents, whose content must be scrutinized for assessing the Korean investigating authorities' compliance with Article 6.9.

5.479. The participants present conflicting views with respect to the issues described above. Therefore, there is considerable uncertainty regarding which documents should be examined for purposes of determining whether the Korean investigating authorities properly disclosed the "essential facts" under consideration, as required by Article 6.9 of the Anti-Dumping Agreement. Agreeing with Japan that the "final determination" within the meaning of Article 6.9 is the KTC's Final Resolution would mean that the assessment under Article 6.9 should be conducted on the basis of the documents issued *before* the KTC's Final Resolution, which include: (i) the OTI's Preliminary Report; (ii) the KTC's Preliminary Resolution; and (iii) the OTI's Interim Report. By contrast, agreeing with Korea that the "final determination" under Article 6.9 is the MOSF's decision from 19 August 2015 that resulted in the adoption of Decree No. 498 would mean that compliance with Article 6.9 should be primarily determined on the basis of: (i) the KTC's Final Resolution; and (ii) the OTI's Final Report.

5.480. In light of the above considerations, it is clear that there are no Panel findings, undisputed facts on the record, or a sufficient exploration by the Panel of certain key issues[1202], for the purpose of determining *when* the "final determination" within the meaning of Article 6.9 was reached in the investigation at issue and *which* are the "disclosure" documents for purposes of Article 6.9. Therefore, we are unable to ascertain which document constitutes the "final determination" in the investigation at issue, such that the relevant documents issued by the Korean investigating authorities *prior to* the issuance of that final determination could be examined to assess whether they properly disclosed the essential facts "before a final determination is made" and "in sufficient time for the parties to defend their interests". Resolution of these issues is needed to determine whether Korea acted inconsistently with Article 6.9 by failing to disclose the "essential facts" with respect to price effects, the volume of the dumped imports, the state of the domestic industry, and causation.[1203]

5.481. We conclude that, because key issues were left unexplored by the Panel and there is a lack of sufficient factual findings by the Panel and uncontested facts on the record, there is considerable uncertainty regarding *when* the "final determination" was reached in the investigation at issue and *which* are the "disclosure" documents for purposes of Article 6.9. There is therefore no basis for us to determine whether Korea acted inconsistently with Article 6.9 by failing to disclose the "essential facts" under consideration. Consequently, we find ourselves unable to complete the legal analysis with regard to Japan's claim that Korea acted inconsistently with Article 6.9 of the Anti-Dumping Agreement.

6 FINDINGS AND CONCLUSIONS

6.1. For the reasons set out in this Report, the Appellate Body makes the following findings and conclusions:

6.1 Overall considerations regarding the legal standard under Article 6.2 of the DSU

6.2. The requirements under Article 6.2 of the DSU are central to the establishment of the jurisdiction of a panel. A panel request governs a panel's terms of reference and delimits the scope of the panel's jurisdiction. In addition, by establishing and defining the jurisdiction of the panel, the panel request also fulfils a due process objective by providing the respondent and third parties with notice regarding the nature of the complainant's case and enabling them to respond accordingly. Whether a panel request complies with the requirements of Article 6.2 of the DSU must be

[1202] See para. 5.475 above.
[1203] Japan's appellant's submission, para. 334.

determined on the face of the panel request, on a case-by-case basis. Defects in the request for the establishment of a panel cannot be cured in the subsequent submissions of the parties during the panel proceedings. However, in considering the sufficiency of a panel request, submissions and statements made during the course of the panel proceedings, in particular the first written submission of the complaining party, may be consulted in order to confirm the meaning of the words used in the panel request.

6.3. In order to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly" pursuant to Article 6.2 of the DSU, a panel request must plainly connect the measure(s) with the provision(s) of the covered agreements claimed to have been infringed. The identification of the treaty provision claimed to have been violated by the respondent is "always necessary" and a "minimum prerequisite", but may not be sufficient to meet the above requirement of Article 6.2 depending on the particular circumstances of a case. Such circumstances include the nature of the measure at issue and the manner in which it is described in the panel request, as well as the nature of the provisions of the covered agreements alleged to have been breached.

6.2 Domestic industry

6.2.1 Whether the Panel erred in finding that Japan's claim 7 concerning the definition of the domestic industry was not within its terms of reference

6.4. Japan's panel request refers to both Articles 3.1 and 4.1 of the Anti-Dumping Agreement and thus identifies the provisions of the covered agreements alleged to have been breached. Japan's claim also makes clear that it relates specifically to the portion of the measure at issue concerning the definition of the domestic industry and its alleged inconsistency with Korea's obligation under Articles 3.1 and 4.1. In turn, Articles 3.1 and 4.1 together establish a distinct, well-delineated obligation regarding the definition of the domestic industry. Thus, Japan's claim 7 "provide[s] a brief summary of the legal basis of the complaint sufficient to present the problem clearly" within the meaning of Article 6.2 of the DSU. For the foregoing reasons, we find that the Panel erred in finding that claim 7 in Japan's panel request was not within its terms of reference.

a. Consequently, we reverse the Panel's finding, in paragraphs 7.67 and 8.1.a of the Panel Report, and find that Japan's claim 7 is within the Panel's terms of reference.

6.2.2 Whether the Appellate Body can complete the legal analysis

6.5. In defining the domestic industry as a "major proportion" of the total domestic production, an investigating authority is required to assess both quantitative and qualitative aspects, and ensure that it does not act in a manner that gives rise to a material risk of distortion. As discussed in section 5.2.2 above, we are unable to complete the legal analysis with regard to the above aspects of the "major proportion" requirement. First, in the absence of relevant factual findings by the Panel or undisputed facts on the Panel record, we are unable to assess whether the KTC considered the available evidence objectively in calculating the proportion of the total domestic production accounted for by the applicants. In addition, we do not have sufficient factual findings by the Panel or undisputed facts on the Panel record to assess whether the two applicants included in the definition of the domestic industry were sufficiently representative of the total domestic production, or whether the Korean investigating authorities' process of defining the domestic industry introduced a material risk of distortion.

a. Consequently, we find ourselves unable to complete the legal analysis regarding Japan's claim that the Korean investigating authorities' definition of the domestic industry is inconsistent with Articles 3.1 and 4.1 of the Anti-Dumping Agreement.

6.3 Determination of injury

6.3.1 Whether the Panel erred in finding that Japan's claim 1 concerning the volume of dumped imports was not within its terms of reference

6.6. Japan's claim 1 identifies both Articles 3.1 and 3.2 of the Anti-Dumping Agreement as the provisions alleged to have been breached, and indicates that it relates to "Korea's analysis of a significant increase of the imports under investigation". This claim thus identifies the provisions of

the covered agreements alleged to have been breached. It further makes clear that it concerns the specific portion of the measure at issue relating to the Korean investigating authorities' consideration of the volume of the dumped imports and its alleged inconsistency with Articles 3.1 and 3.2 of the Anti-Dumping Agreement. With regard to volume, Article 3.1 and the first sentence of Article 3.2 together establish a distinct and well-delineated obligation that the investigating authorities make an objective examination of whether there has been a significant increase in dumped imports on the basis of positive evidence. Thus, Japan's claim 1 "provide[s] a brief summary of the legal basis of the complaint sufficient to present the problem clearly" within the meaning of Article 6.2 of the DSU. For the foregoing reasons, we find that the Panel erred in finding that Japan's claim 1, concerning the volume of the dumped imports, was not within its terms of reference.

a. Consequently, we reverse the Panel's finding, in paragraphs 7.94 and 8.1.b of the Panel Report, and find that Japan's claim 1 is within the Panel's terms of reference.

6.3.2 Whether the Panel erred in finding that Japan's claim 2 concerning the price effects was not within its terms of reference

6.7. Japan's claim 2 identifies both Articles 3.1 and 3.2 of the Anti-Dumping Agreement as the provisions alleged to have been breached. In addition, Japan's panel request indicates that this claim concerns the specific portion of the measure at issue that relates to the Korean investigating authorities' consideration of the price effects of the dumped imports, more precisely significant price suppression and price depression, and its alleged inconsistency with Articles 3.1 and 3.2. With regard to price effects, the second sentence of Article 3.2, in conjunction with Article 3.1, sets out an obligation that is distinct and well defined, with, at its core, the requirement to consider, on the basis of an objective examination of positive evidence, whether the effect of the dumped imports on domestic prices consists of the economic phenomena contained therein, including significant price suppression and price depression. Therefore, Japan's claim 2 "provide[s] a brief summary of the legal basis of the complaint sufficient to present the problem clearly" within the meaning of Article 6.2 of the DSU. For the foregoing reasons, we find that the Panel erred in finding that Japan's claim 2, concerning the price effects of the dumped imports, was not within its terms of reference.

a. Consequently, we reverse the Panel's finding, in paragraphs 7.131 and 8.1.c of the Panel Report, and find that Japan's claim 2 is within the Panel's terms of reference.

6.3.3 Whether the Panel erred in finding that part of Japan's claim 3 concerning the impact of the dumped imports on the domestic industry was not within its terms of reference

6.8. Japan's claim 3 identifies the portion of the measure at issue that relates to the Korean investigating authorities' "analysis of the impact of the imports under investigation on the domestic industry" and thus identifies with sufficient precision the specific aspect of the measure at issue. Claim 3 also identifies Articles 3.1 and 3.4 of the Anti-Dumping Agreement as the provisions alleged to have been breached. Article 3.4, together with Article 3.1, establishes a distinct obligation that essentially requires the investigating authorities to examine objectively the impact of the dumped imports on the domestic industry on the basis of positive evidence concerning all relevant economic factors and indices having a bearing on the state of the domestic industry. Japan's claim 3 thus "provide[s] a brief summary of the legal basis of the complaint sufficient to present the problem clearly" within the meaning of Article 6.2 of the DSU. The three allegations that the Panel found to be outside its terms of reference, like Japan's other arguments under claim 3, serve to explain the manner in which the Korean investigating authorities would have breached the distinct obligation established by Articles 3.1 and 3.4, such that Japan was not required to include this level of detail in its panel request. For the foregoing reasons, we find that the Panel erred in finding that these three allegations were not within its terms of reference.

a. We therefore reverse the Panel's finding, in paragraph 7.175 of the Panel Report, that "all other allegations of inconsistency with Article 3.4 argued by Japan are not properly within the Panel's terms of reference", and in paragraph 8.1.d of the Panel Report, that "Japan's claim under Articles 3.1 and 3.4 of the Anti-Dumping Agreement concerning the impact of the dumped import on the state of the domestic industry" was not within the Panel's terms of reference, and find the three allegations described above to be within the Panel's terms of reference.

6.3.4 Whether the Panel erred in finding that Japan's claim 4 was within its terms of reference

6.9. Japan's claim 4 identifies Articles 3.1 and 3.5 of the Anti-Dumping Agreement as the provisions alleged to have been breached, and relates specifically to the Korean investigating authorities' alleged failure to demonstrate that the imports under investigation were causing injury to the domestic industry. While Article 3.5, together with Article 3.1, establishes obligations that are multilayered, Japan has indicated which aspect of the obligations set forth in Articles 3.1 and 3.5 is alleged to have been breached. Japan's claim 4, on its face, is about the alleged failure to demonstrate the causal relationship on the basis of an "objective examination" of "all relevant … evidence before the authorities" as required under Article 3.5, in particular its second sentence, as well as under Article 3.1. Thus, Japan's claim 4 "provide[s] a brief summary of the legal basis of the complaint sufficient to present the problem clearly" within the meaning of Article 6.2 of the DSU. For these reasons, we find that the Panel did not err in finding that Japan's claim 4 was within its terms of reference.

a. Consequently, we uphold the Panel's finding in paragraphs 7.235 and 8.2.c of the Panel Report.

6.3.5 Whether the Panel erred in finding that part of Japan's claim 5 was within its terms of reference

6.10. Japan's claim 5 identifies Articles 3.1 and 3.5 of the Anti-Dumping Agreement as the provisions alleged to have been breached, and relates to a specific aspect of the causation determination, namely the Korean investigating authorities' examination of the non-attribution factors. While Articles 3.1 and 3.5 establish obligations that are multilayered, Japan has identified which aspect of the provisions its claim concerns, namely the requirement not to attribute to the dumped imports the injuries caused by any known factors other than the dumped imports. Thus, Japan's claim 5 "provide[s] a brief summary of the legal basis of its complaint sufficient to present the problem clearly" within the meaning of Article 6.2 of the DSU. For the foregoing reasons, we find that the Panel did not err in finding that part of Japan's claim 5, with regard to Korea's alleged failure to consider adequately all known factors other than the dumped imports causing injury, was within its terms of reference.

a. Consequently, we uphold the Panel's finding, in paragraphs 7.241 and 8.2.d of the Panel Report, that Japan's claim under Articles 3.1 and 3.5 of the Anti-Dumping Agreement, insofar as it relates to the alleged failure of the Korean investigating authorities to examine certain known factors adequately and their examination of those factors in isolation, is properly within the Panel's terms of reference.

6.3.6 Whether the Panel erred in finding that Japan's claim 6 was within its terms of reference

6.11. Japan's claim 6 identifies Articles 3.1 and 3.5 of the Anti-Dumping Agreement as the provisions alleged to have been breached, and concerns a specific aspect of the Korean measure, namely the determination of causation by the Korean investigating authorities within the meaning of Article 3.5. While Articles 3.1 and 3.5 establish obligations that are multilayered, Japan has identified in the narrative of its claim the particular aspect of the provisions its claim relates to. By indicating that "Korea's demonstration of causation lacks any foundation in its analyses of the volume of the imports under investigation, the effects of the imports under investigation on prices, and/or the impact of the imports under investigation on the domestic industry at issue", Japan's claim 6 indicates that it takes issue with the demonstration of the causal relationship between the dumped imports and the domestic industry as provided in the first sentence of Article 3.5 of the Anti-Dumping Agreement. Thus, the Panel rightly took the view that the narrative in Japan's panel request is sufficiently precise to present the problem clearly. In addition, whether a claim is related to, contingent on, or independent from another claim does not detract from the requirement under Article 6.2 of the DSU to consider the panel request on its face to determine whether it provides the legal basis of the complaint sufficient to present the problem clearly. For these reasons, we find that the Panel did not err in finding that Japan's claim 6 was within its terms of reference.

a. Consequently, we uphold the Panel's finding in paragraphs 7.226 and 8.2.b of the Panel Report.

6.3.7 Magnitude of the margin of dumping

6.12. Articles 3.1 and 3.4 require an investigating authority to evaluate the magnitude of the margin of dumping, and to assess its relevance and the weight to be attributed to it in the injury assessment. However, we do not consider that these provisions require any one of the listed factors, such as the magnitude of the margin of dumping, to be evaluated in a particular manner or given a particular relevance or weight, in examining the impact of the dumped imports on the domestic industry. Therefore, we find that the Panel did not err in its interpretation of Articles 3.1 and 3.4 of the Anti-Dumping Agreement with respect to the evaluation of the magnitude of the margin of dumping. In addition, we find that Japan has failed to substantiate that: (i) the Korean investigating authorities did not evaluate the magnitude of the margin of dumping as required under Articles 3.1 and 3.4; and (ii) the Korean investigating authorities were required to conduct a counterfactual analysis in light of the facts of the case.

a. Consequently, we uphold the Panel's finding, in paragraphs 7.189-7.192 and 8.3.a of the Panel Report, that Japan failed to establish that the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement with respect to their evaluation of the magnitude of the margin of dumping.

6.3.8 Causation

6.3.8.1 Whether the Panel erred in its interpretation or application of Article 3.5 in addressing Japan's claim 6

6.13. With respect to a claim under Article 3.5, a panel is tasked with reviewing an investigating authority's ultimate demonstration that "dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury" to the domestic industry. In so doing, a panel is called upon to review whether the investigating authority properly linked the outcomes of its analyses conducted pursuant to Articles 3.2 and 3.4, taking into account the evidence and factors required under Article 3.5, in coming to a definitive determination regarding the causal relationship between dumped imports and injury to the domestic industry. A panel's review does not, however, call for revisiting the question whether each of the interlinked components of this determination itself meets the applicable requirements set out in Article 3.2 or Article 3.4. Examining such consistency in the context of a claim under Article 3.5 would effectively require a panel to incorporate and apply obligations and disciplines set out in other paragraphs of Article 3, which are not contained in the text of Article 3.5. We agree with Korea that the phrase "through the effects of dumping, as set forth in paragraphs 2 and 4" in Article 3.5 "is not a call [for a panel] to re-do the examination[s]" under Articles 3.2 and 3.4 of the Anti-Dumping Agreement.

6.14. In the present dispute, under claim 6, Japan alleged that the KTC's causation determination was undermined by its flawed analyses of the volume of the dumped imports, the price effects, and the impact of the dumped imports on the state of the domestic industry, "irrespective and independent" of whether the Panel found the KTC's analyses of volume, price effects, and impact to be inconsistent with Articles 3.2 and 3.4 of the Anti-Dumping Agreement.

6.15. In addressing claim 6, the Panel first considered Japan's arguments with respect to the volume of dumped imports. The Panel noted that "Japan's allegation that certain flaws in the KTC's analysis of the volume of dumped imports 'independently' undermine[d] its causation determination" was based on the fact that: (i) the volume of dumped imports decreased during two years of the three-year period of trend analysis; and (ii) the volume of dumped imports increased only modestly in absolute terms and decreased in terms of market share in 2013 compared with 2010. The Panel rejected these arguments and found that Japan failed to demonstrate that the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement. In so doing, the Panel reviewed the Korean investigating authorities' analysis pursuant to the requirements set out in Article 3.2, first sentence, as opposed to those under Article 3.5. Thus, in reviewing the causation claim at issue, the Panel effectively incorporated the requirements in Article 3.2, first sentence, rather than properly applying the requirements set out in Article 3.5 in its

assessment of the causation claim at issue. We therefore consider the Panel to have erred in its application of Article 3.5.

6.16. With respect to price effects in the context of claim 6, before the Panel, Japan advanced three grounds in support of its claim that the KTC's analysis of the price effects of the dumped imports "independently" undermined its causation determination, namely that: (i) there was divergence between the trends in dumped import and domestic like product prices; (ii) dumped imports consistently and significantly oversold the domestic like product; and (iii) there was no competitive relationship between the dumped imports and the domestic like product, such that their prices were not comparable. The Panel found that the KTC acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement by "failing to ensure price comparability, in terms of the dates and sales quantities involved, when it compared the individual transaction prices of certain models of dumped imports with the average prices of corresponding models of the domestic like product". Concerning overselling, the Panel found that the Korean investigating authorities failed to explain adequately their consideration of the price-suppressing and -depressing effects of dumped imports in their determination of causation, in light of the undisputed fact that the prices of the dumped imports were higher than those of the domestic like product throughout the period of trend analysis, and therefore acted inconsistently with Articles 3.1 and 3.5. As for diverging price trends, the Panel found that the different magnitudes of the price decreases from 2012 to 2013 and the opposing price movements from 2011 to 2012 did not, in and of themselves, demonstrate that the KTC's determination of a causal relationship was inconsistent with Articles 3.1 and 3.5.

6.17. To the extent that an investigating authority relies on price comparisons in its consideration of the price effects of dumped imports, price comparability needs to be ensured. Thus, where an investigating authority fails to ensure price comparability in price comparisons between dumped imports and the domestic like products, this undermines its findings of price effects under Article 3.2, to the extent that it relies on such price comparisons. We agree with the Panel that the KTC was required to ensure price comparability in its price comparisons inasmuch as it relied on the price differentials in these comparisons to find that dumped imports had price-suppressing and -depressing effects on domestic prices. Likewise, we agree with the Panel that, given the consistent overselling by the dumped imports and the fact that the average prices of the models of dumped imports involved in the individual instances of "underselling" were higher than the average prices of the corresponding domestic models, an explanation and analysis of how and to what extent the prices of the domestic like product are affected was necessary. That said, our review of the Panel's findings indicates that, for each of these arguments, the analyses carried out by the Panel were pertinent to a claim under Article 3.2 and were in line with the requirements of that provision, rather than to a claim under Article 3.5. In so doing, the Panel effectively incorporated the requirements of Article 3.2, rather than properly applying the requirements set out in Article 3.5, even though it was reviewing a claim under the latter provision. With respect to a claim under Article 3.5, a panel's review does not call for revisiting the question whether each of the interlinked components of the causation determination itself meets the applicable requirements set out under their respective provisions, such as the determination of price effects under Article 3.2. We therefore consider the Panel to have erred in its application of Article 3.5.

6.18. Finally, with respect to the examination of the impact of dumped imports in the context of claim 6, before the Panel, Japan relied on its argument that, because the KTC did not establish any logical connection between the effects of the dumped imports under Article 3.2 and the condition of the domestic industry for the purpose of its impact analysis under Article 3.4, its causation determination was undermined. The Panel found that "'the logical progression of inquiry' does not mean that the examination of impact under Article 3.4 must be linked to the consideration under Article 3.2." We agree with the Panel that, in order to examine the impact of dumped imports on the domestic industry properly *for purposes of Article 3.4*, an investigating authority is not required to link that examination with its consideration of the volume and the price effects of the dumped imports. Similarly, we agree with the Panel's finding that "there is no need 'to undertake a fully reasoned causation and non-attribution analysis' as part of Article 3.4." However, the Panel's examination of the alleged flaws in the Korean investigating authorities' impact analysis primarily relates to the issue of whether the KTC's impact examination was in line with the requirements set out in Article 3.4, as opposed to Article 3.5. In so doing, the Panel effectively incorporated the requirements of Article 3.4 rather than properly applying the requirements set out in Article 3.5, even though it was reviewing a claim under the latter provision. Article 3.5 does not foresee a panel revisiting the question whether an investigating authority's impact analysis is consistent with Article 3.4. We therefore consider the Panel to have erred in its application of Article 3.5.

a. Consequently, we reverse the Panel's finding, in paragraph 8.4.a of the Panel Report, that Japan has demonstrated that the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement in their causation analysis as a result of flaws in their analysis of the effect of the dumped imports on prices in the domestic market.

6.3.8.2 Whether the Panel erred in its interpretation or application of Article 3.5 in addressing Japan's claim 4

6.19. In addressing Japan's volume-related arguments in the context of claim 6, the Panel reviewed the requirements under Article 3.2, first sentence, as opposed to those under Article 3.5. Thus, the Panel effectively incorporated the requirements in Article 3.2, first sentence, concerning the volume of dumped imports in its assessment of Japan's claim under Article 3.5, rather than applying properly the requirements set out in Article 3.5. Given that the Panel relied on the same considerations in rejecting Japan's arguments concerning the lack of correlation in volume trends in the context of the causation claim at issue (claim 4), we find the Panel's finding in this regard to be in error.

6.20. The Panel's analysis of the diverging trends in the context of Japan's claim 6 focused on whether there was a lack of competitive relationship between dumped imports and domestic like products, and whether the diverging price trends could, in and of themselves, undermine the causal relationship under Article 3.5. The Panel reviewed the Korean investigating authorities' examination of the relationship between the prices of the dumped imports and those of the domestic like products, in order to ascertain the effects of the former on the latter, which corresponds to an examination properly conducted pursuant to Article 3.2, second sentence. Therefore, the Panel's conclusion that the diverging price trends, do not, in and of themselves, demonstrate that the KTC's determination of a causal relationship is inconsistent with Articles 3.1 and 3.5 was a mere consequence of its analysis as to whether the KTC's price-effects analyses were objective and reasoned, and compatible with the requirements set out in Article 3.2, second sentence. For these reasons, the Panel's analysis of the issue of diverging price trends was based on the applicable requirements under Article 3.2, rather than those concerning causation under Article 3.5, even though it was addressing a claim under the latter provision. Given that the Panel, in the context of the causation claim at issue (claim 4), relied on the same considerations in rejecting Japan's arguments concerning the lack of correlation in price trends due to the diverging price trends, we find the Panel's finding in this regard to be in error.

6.21. With respect to profit trends, neither the Panel nor the KTC ignored the alleged lack of correlation between the domestic-industry profit, dumped import prices, and the volume and market share of the dumped imports. For these reasons, we reject Japan's argument that the KTC's discussion on this issue was deficient, and that the Panel should have recognized this alleged deficiency. We do not see any error in the Panel's finding that Japan has failed to establish that the insufficient correlation between dumped imports and trends in domestic-industry profits demonstrates that a reasonable and unbiased investigating authority could not have properly found the required causal relationship between the dumped imports and injury to the domestic industry in light of the facts and arguments that were before the KTC.

a. Consequently, we uphold the Panel's finding, in paragraph 8.3.b of the Panel Report, that Japan has not demonstrated that the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement with respect to their conclusion that the dumped imports, through the effects of dumping, were causing injury to the domestic industry, insofar as Japan's argument regarding insufficient correlation between dumped imports and trends in domestic-industry profits is concerned.

6.3.9 Whether the Appellate Body can complete the legal analysis under Articles 3.1, 3.2, and 3.4 of the Anti-Dumping Agreement

6.3.9.1 Whether the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement in their consideration of the volume of dumped imports

6.22. Japan makes certain arguments in support of its present claim under Articles 3.1 and 3.2 that are identical to those addressed by the Panel in the context of claim 6. Japan argues that the KTC

acted inconsistently with Articles 3.1 and 3.2 by "improperly" finding a "significant increase" in subject imports, even though the volume of such imports "actually fell in two out of three of the comparison periods and ended the overall period up only slightly on an absolute basis and actually down on a relative basis". Thus, like its argument in the context of claim 6, Japan focuses on the alleged failure by the KTC to take into account the decrease of import volumes in absolute terms during the first two years of the POI, and the decrease of import volumes in relative terms, in finding that there was a "significant increase" in the volume of imports. The Panel's analysis of Japan's identical arguments in the context of claim 6 properly reviewed the requirements set out in Article 3.2, first sentence.

6.23. However, Japan's arguments in the context of its present claim under Articles 3.1 and 3.2 concerning the volume of dumped imports, regarding which it requests us to complete the legal analysis, encompass broader considerations than those contained in the findings by the Panel, namely that: (i) the KTC improperly assumed a competitive relationship between domestic like products and subject imports; and (ii) the KTC improperly found a "significant increase" in subject imports without examining whether the increased imports actually replaced domestic like products through market competition. The Panel did not sufficiently explore these issues with the participants. Moreover, the underlying factual bases pertaining to these issues are contested between the participants. Confronted with these circumstances, completion of the legal analysis with respect to these issues is hindered by the absence of relevant factual findings, sufficient undisputed facts on the panel record, and a sufficient exploration by the Panel. Thus, engaging in the completion exercise would require us to review and consider evidence and arguments that were not sufficiently addressed by the Panel or sufficiently explored and developed before the Panel.

a. Consequently, we find ourselves unable to complete the legal analysis as to whether the Korean measures are inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement with respect to the Korean investigating authorities' consideration of the volume of dumped imports.

6.3.9.2 Whether the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement in their consideration of price effects

6.24. Japan requests us to complete the legal analysis and find that the Korean investigating authorities failed to meet their obligations under Articles 3.1 and 3.2 of the Anti-Dumping Agreement because: (i) the KTC failed to ensure the price comparability; (ii) the KTC failed to consider the implications of overselling by the dumped imports; and (iii) the KTC largely ignored the diverging price trends. Japan also contends that the KTC erred in its findings because it failed to address the counterfactual question of how prices might have been different in the absence of dumping and the KTC never considered whether the alleged price suppression and price depression were significant. Finally, Japan contends that the "reasonable sales price" analysis conducted by the KTC was "flawed and insufficient".

6.25. With respect to price comparability and price overselling, Japan raised identical arguments in the context of claim 6. The Panel's analyses and findings, although made in the context of claim 6, were nonetheless in line with and properly conducted under the requirements set out in Article 3.2, second sentence. The flaws that the Panel identified concerned the objectivity and evidentiary foundation of the KTC's price suppression and price depression findings under Articles 3.1 and 3.2. Therefore, as the Korean investigating authorities found price-suppressing and -depressing effects of dumped imports based on (i) the transaction-to-average price comparisons without ensuring price comparability and (ii) failed to provide an explanation and analysis of how and to what extent the prices of the domestic like product were affected in light of the consistent overselling by dumped imports, we find them to have acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement. With respect to diverging price trends, Japan raised an identical argument in the context of claim 6. The Panel's findings, although made in the context of claim 6, properly reviewed the Korean investigating authorities' examination of the relationship between the prices of the dumped imports and those of the domestic like products, in order to ascertain the effects of the former on the latter. This corresponds to an examination properly conducted pursuant to Article 3.2, second sentence. The Panel properly reviewed the Korean investigating authorities' consideration of the diverging price trends in light of the requirements set out in Article 3.2, second sentence, and found it reasonable and supported by facts. We therefore reject Japan's allegation that the KTC "largely ignored" the diverging price trends. Accordingly, we find that the Korean investigating authorities

did not act inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement with respect to their consideration of diverging price trends.

6.26. With respect to Japan's arguments concerning (i) the KTC's failure to address the counterfactual question of how prices might have been different in the absence of dumping, (ii) the KTC's failure to address whether the alleged price suppression and price depression were significant, and (iii) whether the "reasonable sales price" analysis conducted by the KTC was "flawed and insufficient", the Panel never explored these arguments with the parties. Moreover, the parties disagree with respect to the factual bases underlying these arguments. Therefore, given the limited scope and nature of the Panel's factual findings and the limited undisputed record evidence in this regard, our attempt to complete the legal analysis involving such competing arguments would require us to review and consider evidence and arguments that were not sufficiently addressed by the Panel or sufficiently explored and developed before the Panel.

a. For the foregoing reasons, we find that we are able to complete the legal analysis in part. For the reasons explained above, we find that the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement: (i) to the extent that they found price-suppressing and -depressing effects of dumped imports based on the relevant price comparisons without ensuring price comparability; and (ii) in the absence of any explanation and analysis of how and to what extent the prices of the domestic like product were affected in light of the consistent overselling by the dumped imports when finding price suppression and price depression. We also find that the Korean investigating authorities did not act inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement with respect to their consideration of diverging price trends.

b. However, for the reasons explained above, we find ourselves unable to complete the legal analysis as to whether the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.2 on the basis of Japan's arguments that: (i) the KTC failed to address the counterfactual question of how prices might have been different in the absence of dumping; (ii) the "reasonable sales price" analysis was flawed and insufficient, as the KTC failed to examine market interactions between the subject imports and domestic like products; and (iii) the KTC never considered whether the alleged price suppression and price depression were "significant".

6.3.9.3 Whether the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement in their consideration of the impact of dumped imports on the state of the domestic industry

6.27. Japan argues that the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement because the KTC did not establish any logical link between its findings regarding the volume and price effects under Article 3.2 of the Anti-Dumping Agreement and its finding of impact under Article 3.4. We recall that in reviewing the Panel's finding in the context of claim 6, where Japan raised an identical argument, we have agreed with the Panel that, in order to examine the impact of dumped imports on the domestic industry properly *for purposes of Article 3.4*, an investigating authority is not required to link that examination with its consideration of the volume and the price effects of the dumped imports. We have also rejected above Japan's understanding that Article 3.4 contemplates an exhaustive analysis of all known factors that may cause injury to the domestic industry. However, Japan's arguments in the context of its present claim under Articles 3.1 and 3.4, regarding which it requests us to complete the legal analysis, encompass broader considerations. Not only does Japan make an argument about the positive trend experienced by the domestic industry with respect to domestic sales, but Japan also asserts that the KTC attached a high degree of importance to the other relevant factors highlighting negative aspects of the domestic industry, while disregarding or downplaying those factors that showed positive trends. Thus, Japan's contention that, in so doing, the KTC acted inconsistently with Articles 3.1 and 3.4 would require us to review the KTC's examination of impact and the weight it attributed to each of the factors listed in Article 3.4 regarding which the Panel, notably, made no findings. Such an exercise would require us to review and consider evidence and arguments that were not sufficiently addressed by the Panel or sufficiently explored and developed before the Panel.

a. Consequently, we find ourselves unable to complete the legal analysis as to whether the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement on the basis of Japan's argument that the KTC failed to explain

adequately how imports had negatively impacted the domestic like products as a whole in light of positive trends experienced by the domestic industry.

6.4 Confidential treatment of information

6.4.1 Whether the Panel erred in finding that Japan's claims 8 and 9 concerning the confidential treatment of information were within its terms of reference

6.28. Japan's claims 8 and 9 concerning the confidential treatment of information identify Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement, respectively, as the provisions alleged to have been breached. Japan's claims also indicate that they relate, respectively, to the specific portion of the measure concerning Korea's treatment of certain information as confidential under Article 6.5 of the Anti-Dumping Agreement and Korea's treatment of non-confidential summaries of confidential information under Article 6.5.1 of the Anti-Dumping Agreement. Article 6.5 establishes a clear and well-delineated obligation for investigating authorities to treat information submitted by parties to an investigation as confidential if it is "by nature" confidential or "provided on a confidential basis", and "upon good cause shown". In addition, Japan's claim 9 refers to the first two sentences of Article 6.5.1, which set forth a clear and well-delineated obligation for the investigating authority to require non-confidential summaries in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. Therefore, Japan's claims 8 and 9 each "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly" within the meaning of Article 6.2 of the DSU. For the foregoing reasons, we find that the Panel did not err in finding that Japan's claims 8 and 9, concerning the confidential treatment of information, were within its terms of reference.

a. Consequently, we uphold the Panel's findings in paragraphs 7.418 and 8.2.e of the Panel Report.

6.4.2 Whether the Panel erred in its interpretation or application of Article 6.5 of the Anti-Dumping Agreement

6.29. In articulating the legal standard under Article 6.5, the Panel did *not* pronounce on the specific manner in which investigating authorities should specify that "good cause" was shown when granting confidential treatment to certain information. Under Article 6.5, an investigating authority is required to assess objectively whether the request for confidential treatment has been sufficiently substantiated such that "good cause" has been shown. The fact that the investigating authority has conducted this objective assessment must be *discernible* from its published report or related supporting documents. The Panel's analysis comports with the legal standard under Article 6.5. Consequently, we find that the Panel did not err in its interpretation of Article 6.5.

6.30. Furthermore, with respect to the investigation at issue, the Panel stated that it could not "conclude that the Korean Investigating Authorities actually engaged in a consideration of whether the submitters of the information had shown good cause for confidential treatment of the information in question". Korea argues that, in providing non-confidential summaries by way of deleting the relevant information from their submissions, the providers of the information "implicitly" asserted that such deleted information fell within the categories of "confidential information" set forth in the relevant Korean laws. In Korea's view, as a consequence of that "implicit" assertion, "good cause" was "shown" for granting confidential treatment to that information. As noted, the Panel was not convinced by this argument because there is *no evidence on the record* "linking the information for which confidential treatment was granted to the categories of information warranting confidential treatment identified in Korean law". Neither is there evidence suggesting that "the Korean Investigating Authorities themselves undertook to link the information for which confidential treatment was sought to the categories defined in Korean legislation and thereby determine whether good cause for confidential treatment existed." Given these Panel findings, we disagree with Korea's assertion that, "when [the] KTC received information that was considered confidential by the interested parties, it objectively assessed whether there was indeed 'good cause' by confirming whether the deleted information fell within a category of confidential information enumerated in the relevant Korean laws." Consequently, we find that the Panel did not err in its application of Article 6.5.

a. Consequently, we uphold the Panel's finding, in paragraphs 7.441, 7.451, and 8.4.b of the Panel Report, that Japan demonstrated that the Korean investigating authorities acted inconsistently with Article 6.5 of the Anti-Dumping Agreement with respect to their treatment of information provided by the applicants as confidential without requiring that good cause be shown.

6.4.3 Whether the Panel erred in its application of Article 6.5.1 of the Anti-Dumping Agreement

6.31. Article 6.5.1 mandates investigating authorities to require non-confidential summaries from interested parties providing confidential information. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In the present dispute, the Panel found that, "[i]n the complete *absence of data*, and with *no narrative summary* with respect to the deleted information, the 'Disclosed' versions of the three communications identified by Japan cannot be said to contain a summary in sufficient detail to 'permit a reasonable understanding of the substance of the information submitted in confidence'." Korea does not challenge the Panel's appreciation of the facts under Article 11 of the DSU leading to the above finding. Instead, Korea repeats certain arguments that the Panel had already rejected without explaining why the Panel's analysis constitutes a *misapplication* of Article 6.5.1. In light of the applicable legal standard and the reasoning provided by the Panel, we fail to see how the versions of the submissions from which confidential information had been redacted could satisfy the legal standard of being non-confidential summaries that are "in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence". In these circumstances, we disagree with Korea's argument that "[the] KTC did not fail to require the applicants to provide sufficient non-confidential summaries of the confidential information."

a. Consequently, we uphold the Panel's finding, in paragraphs 7.450, 7.451, and 8.4.c of the Panel Report, that Japan demonstrated that the Korean investigating authorities acted inconsistently with Article 6.5.1 of the Anti-Dumping Agreement by failing to require that the submitting parties provide a sufficient non-confidential summary of the information for which confidential treatment was sought.

6.5 Essential facts

6.5.1 Whether the Panel erred in finding that Japan's claim 10 concerning the disclosure of essential facts was not within its terms of reference

6.32. Japan's claim 10 concerning the disclosure of essential facts identifies Article 6.9 of the Anti-Dumping Agreement as the provision alleged to have been breached by Korea. Claim 10 also specifically refers to the Korean investigating authorities' failure "to inform the interested parties of the essential facts under consideration which formed the basis for the decision to impose definitive anti-dumping measures". In addition, Article 6.9 sets forth a distinct and well-delineated obligation requiring the investigating authority to disclose the essential facts to all interested parties in a timely manner, that is, before the final determination is made and in sufficient time for the parties to defend their interests. Thus, Japan's claim 10 "provide[s] a brief summary of the legal basis of the complaint sufficient to present the problem clearly" within the meaning of Article 6.2 of the DSU. For the foregoing reasons, we find that the Panel erred in finding that Japan's claim 10 concerning the disclosure of essential facts was not within its terms of reference.

a. Consequently, we reverse the Panel's finding in paragraphs 7.517 and 8.1.f of the Panel Report, and find that Japan's claim 10 is within the Panel's terms of reference.

6.5.2 Whether the Appellate Body can complete the legal analysis under Article 6.9 of the Anti-Dumping Agreement

6.33. Because key issues were left unexplored by the Panel and there is a lack of sufficient factual findings by the Panel and uncontested facts on the record, there is considerable uncertainty regarding *when* the "final determination" was reached in the investigation at issue and *which* are the "disclosure" documents for purposes of Article 6.9 of the Anti-Dumping Agreement. There is therefore no basis for us to determine whether Korea acted inconsistently with Article 6.9 by failing to disclose the "essential facts" under consideration.

a. Consequently, we find ourselves unable to complete the legal analysis with regard to Japan's claim that Korea acted inconsistently with Article 6.9 of the Anti-Dumping Agreement.

6.6 Recommendation

6.34. The Appellate Body recommends that the DSB request Korea to bring its measures found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the Anti-Dumping Agreement, into conformity with its obligations under that Agreement.

Signed in the original in Geneva this 24th day of July 2019 by:

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Ujal Singh Bhatia
Presiding Member

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Thomas R. Graham
Member

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Shree B. C. Servansing
Member

_____

WORLD TRADE ORGANIZATION

WT/DS504/AB/R/Add.1

10 September 2019

(19-5219)

KOREA – ANTI-DUMPING DUTIES ON PNEUMATIC VALVES FROM JAPAN

AB-2018-3

Report of the Appellate Body

Addendum

This Addendum contains Annexes A to D to the Report of the Appellate Body circulated as document WT/DS504/AB/R.

The Notices of Appeal and Other Appeal and the executive summaries of written submissions contained in this Addendum are attached as they were received from the participants and third participants. The content has not been revised or edited by the Appellate Body, except that paragraph and footnote numbers that did not start at 1 in the original may have been renumbered to do so, and the text may have been formatted in order to adhere to WTO style. The executive summaries do not serve as substitutes for the submissions of the participants and third participants in the Appellate Body's examination of the appeal.

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LIST OF ANNEXES

ANNEX A

NOTICES OF APPEAL AND OTHER APPEAL

ANNEX B

ARGUMENTS OF THE PARTICIPANTS

ANNEX C

ARGUMENTS OF THE THIRD PARTICIPANTS

ANNEX D

PROCEDURAL RULINGS

ANNEX A

NOTICES OF APPEAL AND OTHER APPEAL

ANNEX A-1

JAPAN'S NOTICE OF APPEAL*

Pursuant to Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Rule 20 of the Working Procedures for Appellate Review ("Working Procedures"), Japan hereby notifies the Dispute Settlement Body of its decision to appeal certain issues of law covered in the Panel Report in *Korea – Anti-Dumping Duties on Pneumatic Valves from Japan* (WT/DS504/R) ("Panel Report"), and certain legal interpretations developed by the Panel in this dispute.

Pursuant to Rules 21(1) of the Working Procedures, Japan is simultaneously filing this Notice of Appeal and its Appellant Submission with the Appellate Body.

For the reasons to be elaborated in its submissions and oral statements to the Appellate Body, Japan appeals the following errors in the issues of law in the Panel Report and legal interpretations developed by the Panel, and requests the Appellate Body to reverse and modify the related findings, conclusions and recommendations of the Panel,[1] and where indicated to complete the analysis.

1. With respect to Japan's claim[2] that Korea defined the domestic industry producing the like product contrary to the requirements of Articles 3.1 and 4.1 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement"), Japan requests the Appellate Body:

   a. to reverse the Panel's erroneous findings and conclusion that in applying Article 6.2 of the DSU it found all of this claim to be outside the Panel's terms of reference, Panel Report, paras. 7.60 – 7.66, and it refused to address this claim, Panel Report, para. 7.67;

   b. then to conclude that Japan's claim is consistent with Article 6.2 of the DSU and that Japan's claim is within the terms of reference of this dispute; and

   c. then to complete the analysis, and find that the definition by the Korea Trade Commission ("KTC") of the domestic industry as including only the two petitioning firms among the nine domestic producers of like products did not properly represent the total domestic production as a whole and then did not meet the "major proportion" requirement as required by Articles 3.1 and 4.1 of the Anti-Dumping Agreement.

2. With respect to Japan's claim[3] that Korea found a significant increase in the volume of imports contrary to the requirements of Article 3.1 and the first sentence of Article 3.2 of the Anti-Dumping Agreement, Japan requests the Appellate Body:

   a. to reverse the Panel's erroneous findings and conclusion that in applying Article 6.2 of the DSU it found all of this claim to be outside the Panel's terms of reference, Panel Report, paras. 7.89 – 7.93, and it refused to address this claim, Panel Report, para. 7.94;

   b. then to conclude that Japan's Panel Request was consistent with Article 6.2 of the DSU and that Japan's claim is within the terms of reference of this dispute;

   c. then to complete the analysis, and find that Korea violated Articles 3.1 and the first sentence of Article 3.2 of the Anti-Dumping Agreement, by improperly finding a "significant increase" in subject imports considered in isolation, while: (i) disregarding the

* This notification, dated 28 May 2018, was circulated to Members as document WT/DS504/5.

[1] Pursuant to Rule 20(2)(d)(iii)of the Working Procedures, this Notice of Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to the ability of Japan to refer to other paragraphs of the Panel Report in the context of its appeal.

[2] Panel Request, page 2, para. 7.

[3] Panel Request, page 1, para. 1.

lack of continuous increase of subject imports in either absolute or relative terms in each year of the comparison period; (ii) improperly assuming a competitive relationship between domestic products and subject imports without an objective examination based on positive evidence; and (iii) improperly finding displacement of domestic sales by subject imports without examining whether the increased imports replaced domestic like products through market competition; and

d. as part of completing the analysis, to reverse the Panel's mistaken interpretation of how to consider the volume of imports as set forth in its discussion of this issue in its causation findings, including paras. 7.254-7.257.

3. With respect to Japan's claim[4] that Korea found the effects of imports on domestic prices to be significant contrary to the requirements of Article 3.1 and the second sentence of Article 3.2 of the Anti-Dumping Agreement, Japan requests the Appellate Body:

a. to reverse the Panel's erroneous findings and conclusion that in applying Article 6.2 of the DSU it found all of this claim to be outside the Panel's terms of reference, Panel Report, paras. 7.123 − 7.130, and it refused to address this claim, Panel Report, para. 7.131;

b. then to conclude that Japan's Panel Request is consistent with Article 6.2 of the DSU and that Japan's claim is within the terms of reference of this dispute; and

c. then to complete the analysis, and find that Korea violated Articles 3.1 and the second sentence of Article 3.2 of the Anti-Dumping Agreement, by incorrectly determining the effect of imports on the domestic prices to be significant as required by the same Articles, both as price depression and price suppression, while: (i) ignoring the facts of consistent and significant overselling of subject imports; (ii) disregarding the dramatically diverging price trends; (iii) focusing on a single year of 2013, and ignoring the absence of any evidence of price suppression in 2011 and 2012; and (iv) incorrectly finding price comparability between subject imports and domestic like products without demonstrating any competition between them.

4. With respect to Japan's claim[5] that Korea analyzed the impact of imports on the domestic industry contrary to the requirements of Articles 3.1 and 3.4 of the Anti-Dumping Agreement, Japan requests the Appellate Body:

a. to reverse the Panel's erroneous findings and conclusion that in applying Article 6.2 of the DSU it found significant parts of this claim to be outside the Panel's terms of reference, Panel Report, paras. 7.165 − 7.174, and it refused to address several important aspects this claim, Panel Report, paras. 7.172, 7.175;

b. then to conclude that Japan's Panel Request is consistent with Article 6.2 of the DSU and that Japan's claim is within the terms of reference of this dispute;

c. then to complete the analysis, and find that Korea violated Articles 3.1 and 3.4 of the Anti-Dumping Agreement because the KTC's examination of the impact of the dumped imports on the state of the domestic industry was inadequate in the following aspects: (i) failure to link its analysis of volume and price effects with the alleged consequent impact from the dumped imports; (ii) failure to demonstrate any "explanatory force" of the dumped imports on the state of the domestic industry; and (iii) failure to properly take into account positive trends; and

d. as part of completing the analysis, to reverse the Panel's mistaken interpretations and conclusions that the authority: (i) need not establish a logical link in its analysis of impact, as set forth at paras. 7.328-7.330; (ii) need not address the explanatory force of imports when analyzing the impact of imports, as set forth at para. 7.339; and (iii) could dismiss with insufficient consideration positive trends during the period, as set forth at

[4] Panel Request, page 1, para. 2.
[5] Panel Request, page 1, para. 3.

paras. 7.342-7.346, in the Panel's discussion of these issues as part of its findings about causation.

5. With respect to Japan's claim[6] that Korea analyzed the impact of imports on the domestic industry contrary to the requirements of Articles 3.1 and 3.4 of the Anti-Dumping Agreement, Japan requests the Appellate Body:

a. to note the Panel correctly agreed to consider one aspect of this claim regarding two specific factors, Panel Report, para. 7.169 − 7.170, including the magnitude of the margin of dumping, but to find the Panel erred as a matter of law by accepting as sufficient the mention of the margin of dumping without more, Panel Report, paras. 7.189 - 7.191, and thus acted contrary to the requirements of Articles 3.1 and 3.4 of the Anti-Dumping Agreement; and

b. then to reverse the Panel's finding, Panel Report, paras. 7.187 − 7.192, that Japan has not demonstrated that Korea did not assess the relevance of the magnitude of the margin of dumping and the weight to be attributed to it in the injury analysis, and find that Korea violated Articles 3.1 and 3.4 of the Anti-Dumping Agreement by not properly assessing the margin of dumping.

6. With respect to Japan's claim[7] that Korea found causation without a proper foundation of intermediate findings regarding the volume, price effects, and impact of imports contrary to the requirements of Articles 3.1 and 3.5 of the Anti-Dumping Agreement, Japan requests the Appellate Body:

a. to note Panel correctly found what it called Japan's first causation claim to be within its terms of reference, Panel Report, paras. 7.218 - 7.226; and

b. to, regarding the Panel's following errors as a matter of law in several key respects regarding this claim:

i. reverse the Panel's error in misapplying the legal standard when assessing the volume of subject imports, and improperly viewing its analysis for purpose of Article 3.5 as constrained by its narrow interpretation of the first sentence of Article 3.2, Panel Report, paras. 7.254 − 7.258; and find that Korea's focus on the volume of imports in 2013 in isolation from the broader period of investigation as context fundamentally undermined its causation finding;

ii. reverse the Panel's error in misapplying the legal standard when it considered its findings about diverging price trends in isolation from its other findings about price comparability and price overselling, Panel Report, paras. 7.278, 7.295-7.296; and find that Korea's assessment of the diverging prices and other evidence does not support its finding of causation;

iii. reverse the Panel's error in misapplying the legal standard when it considered the KTC's allegations of "fierce competition" for a small fraction of the domestic like product as a whole, and in isolation from the other evidence about alleged price effects, Panel Report, para. 7.294; and find that Korea's assessment of the alleged fierce competition does not support its finding of causation; and

iv. reverse the Panel's error in misapplying the legal standard when it found that the findings under Article 3.2 about volume and price effects are independent of the findings under Article 3.4 about the impact of imports on the domestic industry, Panel Report, paras. 7.329, 7.330, and 7.332; and find that Korea's consideration of volume, price effects, and impact in isolation fundamentally undermined its causation finding.

c. Japan also requests the Appellate Body to reverse the Panel's error by acting contrary to the standard of review of Article 11 of the DSU when it considered Korea's arguments but

[6] Panel Request, page 1, para. 3.
[7] Panel Request, page 2, para. 6.

failed to consider Japan's rebuttal arguments to various Korean assertions about the reasonable sales price, Panel Report, para. 7.278.

7. With respect to Japan's claim[8] that Korea found causation without an objective examination of the alleged causal relationship, and without objective examination of the lack of correlations among various factors, contrary to the requirements of Articles 3.1 and 3.5 of the Anti-Dumping Agreement, Japan requests the Appellate Body:

a. to note that the Panel correctly found what it called Japan's second causation claim to be within its terms of reference, Panel Report, paras. 7.231 - 7.235; and

b. to find the Panel erred as a matter of law and to reverse the Panel's error of ignoring the lack of correlation in the key volume, price, and profit trends that contradicted the "causal relationship" as required by Articles 3.1 and 3.5, Panel Report, paras. 7.353, 7.356, 7.360; and find that Korea erroneously ignored the lack of correlations that fundamentally undermined any conclusion that an objective examination showed the required "causal relationship".

8. With respect to Japan's claim[9] that Korea failed to inform the interested parties of the essential facts contrary to the requirements of Article 6.9 of the Anti-Dumping Agreement, Japan requests the Appellate Body:

a. to reverse the Panel's erroneous findings and conclusion that in applying Article 6.2 of the DSU it found all of this claim to be outside the Panel's terms of reference, Panel Report, paras. 7.515 – 7.516, and it refused to address this claim, Panel Report, para. 7.517;

b. then to conclude that Japan's Panel Request is consistent with Article 6.2 of the DSU and that Japan's claim is within the terms of reference of this dispute; and

c. then to complete the analysis, and find that Korea failed to inform the interested parties of the fourteen essential facts relating to the volume of dumped imports, price effects, the state of the domestic industry, and alleged causation factors before the issuance of the Korea Trade Commission, Resolution of Final Determination on Dumping and Injury to Domestic Industry of Valves for Pneumatic Transmissions from Japan (20 January 2015) Investigation No.: 23-2013-5 ("KTC's Final Resolution") and the Office of Trade Investigation, Final Investigation Report on Dumping and Injury to Domestic Industry of Valves for Pneumatic Transmissions from Japan (20 January 2015), Investigation No. 23-2013-5 ("OTI Final Report"), as required by Article 6.9 of the Anti-Dumping Agreement.

In sum, Japan considers that the Panel erred in law in its interpretation and application of Article 6.2 of the DSU with regard to several claims, and improperly refused to address those claims. The Panel also erred in law with its interpretations of Articles 3.1, 3.2, 3.4, 3.5, 4.1, and 6.9. Japan requests that the Appellate Body recommend that Korea bring its measures found to be WTO-inconsistent into conformity with its obligations under the Anti-Dumping Agreement and the GATT 1994. Japan also requests that, upon reversal of the Panel's erroneous findings and conclusions identified above and after completing the analysis where indicated, the Appellate Body help the parties resolve this dispute promptly by finding the Korean anti-dumping measures to be contrary to the numerous specific obligations under the Anti-Dumping Agreement identified by Japan in this appeal. Moreover, doing so will help clarify numerous important issues about the obligations on national authorities under the Anti-Dumping Agreement.

[8] Panel Request, page 2, para. 4.
[9] Panel Request, page 2, para. 10.

ANNEX A-2

KOREA'S NOTICE OF OTHER APPEAL*

Pursuant to Articles 16.4 and 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Rule 23(1) of the Working Procedures for Appellate Review ("Working Procedures"), the Republic of Korea ("Korea") hereby notifies the Dispute Settlement Body ("DSB") of its decision to appeal to the Appellate Body certain issues of law and certain legal interpretations developed by the Panel in its report on *Korea – Anti-Dumping Duties on Pneumatic Valves from Japan* (WT/DS504) ("Panel Report").

Pursuant to Rules 23(1) and 23(3) of the Working Procedures, Korea files this Notice of Other Appeal together with its Other Appellant Submission to the Appellate Body Secretariat.[1]

Korea seeks the review by the Appellate Body of the Panel's conclusions that Japan has demonstrated that the Korean Investigating Authorities acted inconsistently (i) with Articles 3.1 and 3.5 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "Anti-Dumping Agreement") in their causation analysis as a result of flaws in their analysis of the effect of the dumped imports on prices in the domestic market;[2] and (ii) with Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement with respect to the treatment of information as confidential and the obligation to require the furnishing of non-confidential summaries.[3] Korea appeals these findings based on a series of errors of law and legal interpretation of the Panel, as summarized below. In addition, Korea considers that the Panel failed to make an objective assessment of the facts of the case as called for by Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement and that this failure vitiated its above-identified findings.

With respect to the Panel's findings of violation under Articles 3.1 and 3.5 of the Anti-Dumping Agreement, Korea's other appeal consists of three sets of claims.

First, Korea requests the Appellate Body to reverse the Panel's finding that Japan's "causation" claims under Articles 3.1 and 3.5 of the Anti-Dumping Agreement were within the Panel's terms of reference.[4] In making this erroneous finding, the Panel erred in law since Japan's panel request with respect to Articles 3.1 and 3.5 of the Anti-Dumping Agreement failed to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly in accordance with Article 6.2 of the DSU. The Panel's contrary findings are in error. In addition, the Panel erred in law by reaching a conclusion that Japan's panel request was consistent with Article 6.2 of the DSU only after "carefully review[ing]" Japan's written submissions, rather than simply on the face of the request.[5]

Second, should the Appellate Body find that Japan's "independent" causation claim is properly within the Panel's terms of reference, Korea requests the Appellate Body to reverse the Panel's finding that Korea acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement as a result of flaws in the analysis of the effect of the dumped imports on prices in the domestic market,[6] since this finding is vitiated by a number of errors of law and legal interpretation. In particular, and without prejudice to the arguments developed in Korea's Other Appellant Submission, the Panel's interpretation and application of Articles 3.1 and 3.5 of the Anti-Dumping Agreement is in error since the Panel (i) erroneously subsumed all of the obligations under Articles 3.2 and 3.4 into Article 3.5

*This notification, dated 4 June 2018, was circulated to Members as document WT/DS504/6.

[1] Pursuant to Rule 23(2)(c)(ii) of the Working Procedures, this Notice of Other Appeal includes a brief statement of the nature of this appeal, including identification of the legal errors in the Panel Report, a list of the legal provisions of the covered agreements the Panel erred in interpreting and applying, and an indicative list of the relevant paragraphs of the Panel Report containing the errors – without prejudice to Korea's ability to rely on other paragraphs of the Panel Report in its appeal.

[2] Panel Report, para. 8.4(a).

[3] Panel Report, para. 8.4(b)-(c).

[4] Panel Report, paras. 7.244, and 8.2(b)-(d).

[5] Panel Report, paras. 7.222, 7.234, and 7.241.

[6] Panel Report, paras. 7.349, and 8.4(a).

thereby rendering inutile Articles 3.2 and 3.4;[7] (ii) erred in making findings in the absence of Japan establishing a *prima facie* case relating to the question of competition and price comparability that was the premise of its claim;[8] (iii) erred by imposing a price effects and price comparability analysis that has no basis in the text of Article 3.5 and that went well beyond what is required even under Article 3.2 of the Anti-Dumping Agreement;[9] and (iv) unduly made findings about the investigating authorities' causation determination based only on isolated aspects of this determination and without considering the Panel's contrary findings on causation as a whole.[10]

Third, in reaching its findings of violation under Articles 3.1 and 3.5 of the Anti-Dumping Agreement, the Panel failed to make an objective examination of the matter before it as required by Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement. In particular, the Panel failed to provide a reasoned and adequate explanation for its finding that Japan's claims under Articles 3.1 and 3.5 of the Anti-Dumping Agreement were within its terms of reference and made findings on the sufficiency of the brief summary of the legal basis of the complaint that were internally inconsistent and contradictory. Furthermore, in reaching its finding of violation of Articles 3.1 and 3.5 of the Anti-Dumping Agreement, the Panel failed to make an objective examination of the matter before it as required by Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement since, among others, the Panel made the case for Japan, failed to provide a reasoned and adequate explanation that its findings were supported by a sufficient evidentiary basis, and made findings that were internally inconsistent and contradictory.

For the reasons to be further elaborated in its submission to the Appellate Body, Korea requests the Appellate Body to reverse and declare moot and of no legal effect, the findings, conclusions and recommendations of the Panel, with respect to the above-identified errors of law and legal interpretations contained in the Panel Report. In particular, Korea requests the Appellate Body to reverse the Panel's finding in paragraphs 7.244 and 8.2(b)-(d) of the Panel Report that certain of Japan's claims relating to Articles 3.1 and 3.5 of the Anti-Dumping Agreement were within its terms of reference. In addition, Korea requests the Appellate Body to reverse and declare moot and of no legal effect the Panel's finding in, among others, paragraphs 7.349 and 8.4(a) of the Panel Report that Korea acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

With respect to the Panel's finding that Korea acted inconsistently with Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement relating to the treatment of confidential information and the provision of non-confidential summaries, Korea's request for reversal of the Panel's finding consists of the following three part claim.

First, Korea submits that the Panel's finding that Japan's panel request with respect to its claims under Article 6.5 and 6.5.1 of the Anti-Dumping Agreement presented the problem clearly in accordance with Article 6.2 of the DSU is in error and should be reversed.[11] Japan's panel request suffered from the same shortcomings as other claims which the Panel correctly rejected as outside its terms of reference. The Panel's finding to the contrary is based on an erroneous application of the law to the facts as the panel request, when examined on its face, fails to present the problem with the required clarity through linking any specific aspects of the challenged measures, or of the underlying investigation, to any of the specific obligations in these provisions. In addition, the Panel erred in law when examining Japan's compliance with Article 6.2 of the DSU by taking into account the scope of the allegations under Articles 6.5 and 6.5.1 as presented in Japan's written submissions.[12]

Second, the Panel erroneously interpreted Article 6.5 of the Anti-Dumping Agreement as requiring investigating authorities to make express statements as to whether good cause is shown with respect to confidential information and erred in applying the law to the facts when it found that the

[7] Panel Report, paras. 7.250-258 (Volume), 7.259-323 (Prices), and 7.324-347 (Impact).

[8] Panel Report, para. 7.259. The Panel confirms that Japan's relevant claim was that there is no competitive relationship between the dumped imports and the domestic like product, such that their prices are not comparable. The Panel rejected this claim and thus there was no basis for additional findings absent a prima facie case. See, e.g. Panel report paras. 7.295 (c), 7.315, 7.318, 7.320 confirming that there was such competition between both products.

[9] Panel Report, paras. 7.266-7.272, and 7.297-7.323.

[10] Panel Report, para. 7.323, 7.349 without consideration of Panel Report, para. 7.361, para. 7.389.

[11] Panel Report, paras. 7.418, and 8.2(e).

[12] Panel Report, para. 7.416.

submitters did not show good cause for the confidential treatment of that information.[13] In particular, the Panel erred in law when it considered that absent an express "indication" on the record that the Korean Investigating Authorities took into account whether the information in question fell into any of the categories for confidential information set forth under Korean law, no good cause was shown to exist.[14] This finding is in error since, absent a legal obligation to do so, the Korean Investigating Authorities could not be faulted for not making specific statements or indicating its consideration about each of the requests for confidentiality.

Third, the Panel also erred in law when applying Article 6.5.1 of the Anti-Dumping Agreement to the facts of the dispute by finding that Korea failed to require the applicants to furnish the required non-confidential summaries.[15] The applicants submitted "non-confidential summaries" of the confidential information, prepared by designating the information that they deemed were entitled to confidential treatment in accordance with Korean law and the guidelines for filling out the questionnaires. In the public versions of the submissions, certain non-confidential descriptive narratives are found with respect to all confidential information, and these narratives permitted a reasonable understanding of the substance of the information and thus enabled interested parties to defend their interests. The Panel's findings to the contrary are in error and should be reversed.

For the reasons to be further elaborated upon in its submission to the Appellate Body, Korea therefore requests the Appellate Body to reverse the Panel's findings that Japan's claims under Articles 6.5 and 6.5.1 were within its terms of reference, as set forth in, among others, paragraphs 7.418 and 8.2(e) of the Panel Report. In addition, Korea requests the Appellate Body to reverse and declare moot and of no effect the Panel's finding of violation of Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement, as set forth in, in particular, paragraphs 7.451 and 8.4(b)-(c) of the Panel Report.

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[13] Panel Report, para. 7.441.
[14] Panel Report, paras. 7.438 - 7.440.
[15] Panel Report, paras. 7.450, 7.451, and 8.4(c).

ANNEX B

ARGUMENTS OF THE PARTICIPANTS

ANNEX B-1

EXECUTIVE SUMMARY OF JAPAN'S APPELLANT'S SUBMISSION[1]

1. The Panel Report in *Korea – Anti-Dumping Duties on Pneumatic Valves from Japan* is very unusual. Although Japan's Panel Request presented 12 specific claims, the Panel decided not to address in whole or substantial part 7 out of these 12 claims on the grounds that Japan's "brief summary of the legal basis of the complaint{s}" was not "sufficient to present the problem clearly". The Panel made these findings notwithstanding that Japan used essentially the same language used by many other WTO Members in their challenges to anti-dumping measures under the same provisions raised by Japan. The Panel largely ignored this past practice, and the extensive Appellant Body precedent on the requirements of Article 6.2 of the DSU. Rather than apply the legal standard from the text of Article 6.2, the Panel instead used an Appellate Body phrase — the need to explain "how or why" — to disregard the well-established legal principle that a Member need only describe its claim, and need not present the arguments in support of its claim to satisfy Article 6.2.

2. This dispute is also about a deeply flawed anti-dumping determination imposed by Korea that did not respect the obligations of the Anti-Dumping Agreement. The Panel agreed with some of Japan's claims, but never addressed the merits of many of Japan's claims. Japan is asking that the Appellate Body reverse the Panel's erroneous application of Article 6.2 of the DSU as regards five of its claims, find that Japan's Panel Request in fact complied with Article 6.2, and then complete the analysis on the merits of these claims.

I. THE PANEL ERRED IN ITS INTERPRETATION OF ARTICLE 6.2 OF THE DSU AND REFUSED TO CONSIDER MANY OF JAPAN'S CLAIMS

A. The Panel's Legal Errors

3. Article 6.2 of the DSU sets forth two interconnected requirements for a panel request: to "identify the specific measures at issue" and to "provide a brief summary of the legal basis of the complaint". As regards this second requirement, the panel request does not need to show the entire "legal basis" of the complaint, rather needs to provide only a "summary of" such legal basis, and that summary need only be "brief". Both of these items together should be "sufficient to present the problem clearly".

4. The Appellate Body has identified a number of principles that clarify this obligation. First, the panel request must not only "identify the specific measures at issue", but also "plainly connect" those measures to the alleged inconsistencies that constitute the "legal basis". Second, a merely listing of the provision may not be sufficient; but while a mere listing is usually insufficient, it is not *necessarily* insufficient. Third, in respect of provisions containing multiple obligations, a panel request must sufficiently specify or otherwise make clear which of the multiple obligations are at issue. Fourth, it is also critical to consider the "nature and scope" of the particular obligation at issue: some are broad and general, and thus require more explanation; others are narrow and well-defined on their face, and thus require less explanation.

5. In addition, while the Appellate Body has sometimes used the phrase "how or why" to clarify the nature of the obligation to "present the problem clearly", this phrase "how or why" does not change the core principles setting forth what is necessary to comply with Article 6.2. First, there is a fundamental distinction between explaining the claim and presenting arguments in support of that claim. The "how or why" relates to the "legal basis", but explaining the "how or why" does not require providing the arguments in support of the claim. Second, multiple arguments do not turn a single claim into multiple claims. Third, a careful case-by-case analysis of each claim needs to be conducted, keeping in mind: (1) the "nature of the measure", and (2) the "nature and scope" of the legal provisions.

[1] The Appellant Submission being summarized has 60,130 words. This Executive Summary has 5,948 words, and thus complies with the Appellate Body guidance for executive summaries.

6. The Panel paraphrased, and tried to follow the legal standards as set out in the past Appellate Body decisions; however, the Panel fundamentally misunderstood these legal principles, made errors when applying its flawed understanding of the legal principles to this case, and erroneously treated Japan's claims as outside the Panel's terms of reference.

7. First, in examining each of the claims contained in Japan's Panel Request, the Panel did not consider the nature of that obligation. The Panel focused inordinately on Article 3.1 of the Anti-Dumping Agreement, ignoring the remaining language related to other relevant provisions such as Articles 3.2, 3.4, 3.5 and 4.1. Japan's Panel Request never identified Article 3.1 alone as the "legal basis of the complaint". On the contrary, Japan's Panel Request also identified one or more of other more specific provisions in conjunction with the obligations from the overarching chapeau set forth in Article 3.1. The use of the language of the other provisions thus described the deficiencies of the specific measures at issue with reference to those specific provisions.

8. Second, the Panel also failed to consider at all the individual claims in light of the nature of the specific measure being challenged. This failure by the Panel is particularly ironic in this case, since the Korean anti-dumping measure at issue often actually cross-referenced the particular obligation under the Anti-Dumping Agreement. Moreover, four out of five of Japan's legal claims correspond to specific sections of the Korean anti-dumping measure that list or paraphrase the same provision of the Anti-Dumping Agreement identified by Japan in its Panel Request.

9. Third, rather than rely on the need to consider the nature of the obligation and the nature of the measure, the Panel used the phrase "how or why" as one single standard that somehow requires Japan to show not only a "claim", but also the "argument" in support of that claim. The Panel also mistakenly observed that the language used by Japan is not precise enough to serve such "double function" of a panel request. But this line of reasoning ignores the ordinary meaning of the key phrase "legal basis" in Article 6.2, which refers to the claims and not the arguments.

10. Fourth, the Panel also mistakenly used the arguments that Japan presented later during the panel proceeding to attack the sufficiency of Japan's Panel Request. Compliance with the requirement of Article 6.2 must be determined on the face of the panel request, and a panel request should be evaluated based on what existed at the time the request was made. The Panel noted that Japan raised many "allegations", implying Japan somehow expanded its claims. But Japan did not change its claims, or add any new claims. In its First Written Submission, Japan only presented *arguments* in support of the *claims*.

11. These four legal errors permeate the Panel's findings. The Panel's approach to each of these five claims is not particularized to each claim, and careful case-by-case consideration required to properly apply the requirements of Article 6.2 of the DSU is absent. The following table shows where the Panel committed each of these errors:

Summary of Panel's Legal Errors

Japan's Claim	Failure to Consider the Nature of the Obligation	Failure to Consider the Nature of the Measure	Improper Reliance on "How or Why"	Improper Reliance on Later Arguments
Article 3.2 – significant increase of imports	Para. 7.91	Paras. 7.89 through 7.94	Paras. 7.89, 7.91	Para. 7.93
Article 3.2 – effect of imports on prices	Para. 7.126	Paras. 7.123 through 7.131	Paras. 7.123, 7.125, 7.126, 7.127, 7.129	Para. 7.130
Article 3.4 – impact of imports on domestic industry	Paras. 7.168, 7.173	Paras. 7.165 through 7.175	Paras. 7.165, 7.167, 7.173	Para. 7.172
Article 4.1 – defining the domestic industry	Para. 7.64	Paras. 7.60 through 7.67	Paras. 7.60, 7.61, 7.64	Para. 7.66
Article 6.9 – disclosing essential facts	Para. 7.514	Paras. 7.511 through 7.516	Paras. 7.512, 7.514	Para. 7.516

12. The Panel's approach imposes needless burdens on the parties. The Panel did not rule on these issues until the very end of the process even though Korea raised its objections early in dispute. This resulted in unnecessarily burdening Japan by requiring it to present detailed arguments for claims the Panel refused to consider, and then using those arguments to challenge Japan's claims.

13. Furthermore, the Panel's approach will disrupt settled expectations of the WTO Members. Japan's Panel Request was completely consistent with the general practice of other WTO Members in framing such claims. Disrupting these settled expectations will have consequences detrimental to the operation of the dispute settlement system. First, the logic of the Panel's approach will encourage numerous and unnecessary challenges in the vast majority of challenges to anti-dumping measures. Second, any effort to add more details to panel requests might well prove counterproductive, increasing the risk of panels construing the claims more narrowly. Third, this Panel did not provide any concrete guidance as to the additional level of detail that would be necessary.

B. The Appellate Body should complete the analysis of the issues mistakenly rejected as outside the terms of reference by the Panel

14. The Panel erroneously refused to consider claims number 1-3, 7 and 10 from Japan's Panel Request. For each of these claims, the Appellate Body should complete the analysis.

15. The most important factor in deciding to complete the analysis has been the existence of sufficient undisputed facts. The Appellate Body must rely on either facts that are undisputed by the parties, or facts that have been found by the panel. The Appellate Body has also been willing to complete the analysis and examine claims under provisions that the panel has not examined at all, when the provision that was not examined by the panel is "closely related" to a provision actually examined by the panel and both provisions are "part of a logical continuum".

16. In this case, the various provisions at issue are closely related and very much part of a logical continuum. The Appellate Body has previously found Article 3 to consist of a "logical progression" of the investigating authority's examination leading to its determination of whether dumped imports are causing material injury to the domestic industry. Four of Japan's five claims relate to different building blocks that lead to the ultimate conclusion of causation under Articles 3.1 and 3.5, a claim that was addressed by the Panel at some length. And the final claim under Article 6.9 relates to the key facts that were part of this analysis under Article 3 but were not disclosed.

17. These claims often depend on the same underlying facts, which are not in dispute. The Appellate body has completed the analysis on the basis of the investigating authority's final determination on the panel record, finding it a sufficient factual basis for completing the analysis — even in the absence of other express findings by the panel or undisputed evidence. The anti-dumping measure at issue resulted from a KTC determination based on a report prepared by OTI. These two documents present all of the undisputed facts necessary to resolve the substantive issues in this dispute.

II. THE PANEL ERRED IN REFUSING TO CONSIDER JAPAN'S CLAIM UNDER ARTICLES 3.1 AND 4.1 OF THE ANTI-DUMPING AGREEMENT REGARDING THE PROPER DEFINITION OF THE DOMESTIC INDUSTRY

18. Japan's claim regarding the improper definition of the domestic industry was within the terms of reference. Paragraph 7 of Japan's Panel Request expressly identifies Articles 3.1 and 4.1 as the specific provisions at issue for this claim. These two provisions together result in a narrow, well-defined obligation. Considering the nature of this obligation, Japan's claim that Korea's definition of the domestic industry did not reflect an objective examination based on positive evidence presented the problem raised by this claim clearly. Paragraph 7 of Japan's panel request also plainly connected the measure to the alleged inconsistency by referring specifically to "defining the domestic industry", an issue explicitly addressed by the Korean measures.

19. The Appellate Body should complete the analysis and address Japan's claim under Articles 3.1 and 4.1 because this claim rests on undisputed facts, and is closely related to the Article 3 claims the Panel did address. There is no dispute that the KTC defined the industry to consist of only two out of nine companies, and that the KTC took no steps to ensure the representativeness of these two companies.

20. Korea's measures were inconsistent with Articles 3.1 and 4.1 of the Anti-Dumping Agreement because the KTC failed to make an objective examination based on positive evidence when it defined the domestic industry as limited to the two firms that filed the petition. The KTC failed to ensure that the process of defining the domestic industry did not give rise to a material risk of distortion.

21. The Korean Investigating Authorities did not meet the qualitative element of the "major proportion" requirement by failing to ensure that the domestic industry definition is representative of the total domestic production. Of the nine domestic producers, the KTC's definition of the domestic industry included only two petitioning firms, firms that together accounted for just over half of the total domestic production. The KTC's discussion of certain information regarding two domestic producers that were not formally included in the definition of the "domestic industry" was not adequately reasoned, and failed to resolve the material risk of distortion. The KTC's approach to the domestic industry definition predominantly focused on the numerical threshold, i.e., the quantitative aspect, and made no effort whatsoever to ensure the qualitative aspect of the "major proportion" requirement.

22. The quantitative assessment of the Korean Investigating Authorities was not based on positive evidence and did not involve objective examination. The analysis, based on only about half of the domestic production, posed a material risk of distortion, especially since the definition included only the applicants seeking the imposition of anti-dumping duties. The KTC failed to make any qualitative assessment to ensure this potentially biased definition of the domestic industry could nevertheless be used as the basis for an appropriate analysis of injury as required under Article 3.

III. THE PANEL ERRED IN REFUSING TO CONSIDER JAPAN'S CLAIM UNDER ARTICLES 3.1 AND 3.2 OF THE ANTI-DUMPING AGREEMENT REGARDING THE FINDING OF SIGNIFICANT VOLUME EFFECTS

23. Japan's claim regarding the lack of any significant volume of imports was within the terms of reference. Paragraph 1 of Japan's Panel Request expressly identifies Articles 3.1 and 3.2 as the specific provisions at issue for this claim. Japan's language focused expressly on the first sentence of Article 3.2 and the analysis of any significant increase in the volume of imports. Paragraph 1 of Japan's Panel Request plainly connected the measure to the alleged inconsistency by referring specifically to the "significant increase of the imports", an issue the Korean authorities understood full well as the KTC's Final Resolution expressly cites to Article 3.2 when discussing this obligation.

24. The Appellate Body should complete the analysis and address Japan's claim under Article 3.1 and the first sentence of Article 3.2 because this claim rests on undisputed facts, and is closely related to and overlaps with the claims the Panel did address. There is no dispute about the volume, market share, or trends in imports, or about what the KTC said about those facts.

25. The Korean Measures are inconsistent with Article 3.1 and the First Sentence of Article 3.2. Considering the "logical progression" between the obligations in Articles 3.2, 3.4 and 3.5, as the Appellate Body established, and its context referring to a "significant" increase, clearly the first sentence of Article 3.2 requires the authority to objectively examine the market interactions between dumped import volumes and of domestic like product volumes, and additional positive evidence of their competitive relationship.

26. However, the KTC's limited and flawed volume determination did not constitute an objective examination of positive evidence. Specifically, the KTC's Final Resolution improperly found a "significant increase": (i) despite the lack of continuous increase of subject imports in either absolute or relative terms; (ii) improperly assuming a competitive relationship between domestic and imported products without an objective examination based on positive evidence; and (iii) improperly finding displacement of domestic sales by subject imports without examining whether the increased imports actually replaced domestic products through market competition.

IV. THE PANEL ERRED IN REFUSING TO CONSIDER JAPAN'S CLAIM UNDER ARTICLES 3.1 AND 3.2 OF THE ANTI-DUMPING AGREEMENT REGARDING THE FINDING OF SIGNIFICANT PRICE EFFECTS

27. Japan's claim regarding the lack of significant price effects was within the terms of reference. Paragraph 2 of Japan's Panel Request expressly identifies Articles 3.2 and 3.1 as the provisions at

issue for this claim. Under the second sentence of Article 3.2, Korea is required to consider whether there has been price undercutting, price depression, or price suppression to a significant degree based on an objective examination of positive evidence as required under Article 3.1. Although the second sentence of Article 3.2 provides three alternative approaches to price effects, Japan's Panel Request focused on price depression and price suppression. Paragraph 2 of Japan's Panel Request plainly connected the measure to the alleged inconsistency by referring specifically to the "analysis of the effect of the imports . . . on prices", an issue well understood by the Korean authorities as confirmed by the text of both KTC's Final Resolution and the OTI Final Report.

28. The Appellate Body should complete the analysis and address Japan's claim under Article 3.1 and the second sentence of Article 3.2 because this claim rests on undisputed facts, and is closely related to and overlaps with the claims the Panel did address. There is no dispute about the existence or magnitude of overselling, the diverging price trends, the KTC focus on a single year, or about what the KTC said about those facts.

29. The KTC provided a limited and inadequate discussion of whether "the effect of" subject imports was to cause price depression or price suppression, or whether the alleged price effects took place "to a significant degree". The proper approach for analyzing price effects under Article 3.2 requires the investigating authority to objectively examine any positive evidence pertaining to: (i) interaction in the market between the price of the subject imports and that of the like domestic products; and, (ii) the degree of the competitive relationship between the subject imports and the domestic like products. Articles 3.1 and 3.2 require Members to provide a reasonable explanation based on positive evidence for their conclusions about the price effects of the subject imports. There is also a need to address the counterfactual question of whether there are truly price effects; that is, whether the price of domestic like products would have been higher if the subject imports had been sold at their normal value rather than at dumped prices.

30. The KTC did not address any part of the core question before it: to consider what would have happened to domestic prices in the absence of dumping. In finding the price effects of the dumped imports on the domestic like products, the KTC ignored even the significant overselling of the dumped imports, and the absence of correlations between the prices of the subject imports and those of the domestic like products during the period of investigation. The KTC also failed to ensure comparability between the prices of specific products or product segments of the dumped imports and the domestic like product.

31. Regarding price depression, the KTC also largely ignored the dramatically diverging price trends. It ignored situations when subject imports and domestic prices were moving in different directions and when the magnitudes of differences were substantially different. These facts strongly suggested the lack of interaction in the market between the price of the subject imports and that of the domestic products.

32. Regarding price suppression, the KTC also ignored the absence of any evidence of price suppression in 2011 and 2012, and drew improper conclusions from the limited evidence in 2013. In fact, contrary to the KTC findings, the OTI data on "reasonable selling price" actually undermined any finding of price suppression. Like its price depression analysis, the KTC's price suppression analysis wholly ignored the consistent and significant price overselling by subject imports. It also failed to consider the diverging price trends between the two. Both of these failures fundamentally undermined the KTC's finding of a relationship between subject import and domestic prices.

33. Regarding the price comparability between subject imports and domestic like products, the KTC did not demonstrate any actual and specific competition between them as required to establish the required "explanatory force". The KTC instead largely relied on its broader "like product" finding. The KTC and OTI findings largely ignored the diverging price trends, different physical characteristics, and consumer opinions and other evidence suggesting the absence of any such competitive relationship.

V. THE PANEL ERRED IN REFUSING TO CONSIDER PARTS OF JAPAN'S CLAIM UNDER ARTICLES 3.1 AND 3.4 OF THE ANTI-DUMPING AGREEMENT REGARDING THE PROPER FINDING OF ADVERSE IMPACT

34. Japan's claim regarding the improper finding of any adverse impact was within the terms of reference. Paragraph 3 of Japan's Panel Request refers specifically to the examination of the impact of these imports on domestic producers by evaluating all relevant economic factors and indices, and expressly identified Articles 3.4 and 3.1 as the provisions at issue. The Panel refused to consider most of Japan's claim, including the failures (a) to link the analysis of volume and price effects to the analysis of impact; (b) to demonstrate any explanatory force of the dumped imports on the state of the domestic industry; and (c) to take into account positive trends, all part of a proper finding of "the impact of these imports". Paragraph 3 of Japan's Panel Request plainly connected the measure to the alleged inconsistency by referring specifically to the "analysis of the impact of the imports". However, in contravention of the plain language of Japan's Panel Request, the Panel arbitrarily determined that this claim was "limited to the allegation that KTC failed to evaluate two of the specific factors listed in Article 3.4".

35. The Appellate Body should complete the analysis and address the remaining parts of Japan's claim under Articles 3.1 and 3.4 because this claim rests on undisputed facts, and the remaining parts of the claim not addressed by the Panel are closely related to the claims the Panel did address.

36. Article 3.4 requires an "examination" of certain specified factors. The Appellate Body has established that the volume, price effects, and impact inquiries are "closely interrelated" (*EC – Tube or Pipe Fittings*, para. 115); the various paragraphs of Article 3 "contemplate a logical progression of inquiry"; and Article 3.4 requires "an examination of the explanatory force of subject imports for the state of the domestic industry" (*China – GOES*, paras. 128 and 149).

37. The Korean measures are inconsistent with Articles 3.1 and 3.4 because the KTC's examination of the impact of the dumped imports on the state of the domestic industry was inadequate. Beyond the many logical disconnects in the analysis of volume and price effects under Article 3.2, the KTC Final Resolution more generally failed to show any explanatory force from subject imports regarding the trends related to the condition of the domestic industry. Rather, the KTC discussion of impact was more suggestive of other factors having explanatory force, not subject imports.

38. The KTC failed to conduct "an examination of the explanatory force of subject imports for the state of the domestic industry", as required under Article 3.4. Japan's argument comprises at least three interrelated points. First, subject imports consistently oversold domestic products. Second, there is no evidence that subject imports displaced domestic products. Third, the market share of subject imports actually declined in 2013 by almost three points compared to 2010.

39. The Panel's finding regarding the "logical link" issue of whether Korea failed to link its volume and price effects analyses with the alleged consequent impact of the imports on the domestic industry ignores the guidance provided by the Appellate Body. Similarly, in addressing the issue of whether Korea adequately considered the positive trends, the Panel erroneously conflated mere acknowledgement of increasing trends with an adequate explanation of those trends and how they relate to the ultimate conclusion.

VI. THE PANEL ERRED IN REJECTING JAPAN'S ARGUMENT THAT THE KOREAN AUTHORITIES DID NOT EVALUATE THE MAGNITUDE OF THE MARGIN OF DUMPING AS REQUIRED BY ARTICLE 3.4

40. The Panel did not address most of Japan's claim under Article 3.1 and 3.4, addressing only the magnitude of the margin of dumping. Japan disagrees with the Panel to the extent that the Panel seems to assume that a mere conclusory statement that the dumping margin is not insignificant suffices to demonstrate that the investigating authority evaluated the magnitude of the margins of dumping.

41. Under Article 3.4, an investigating authority is required to evaluate the magnitude of the margin of dumping and to assess its relevance and the weight to be attributed to it in the injury assessment. However, the KTC Final Resolution was severely deficient in its limited discussion of the

margins of dumping. There is no discussion at all by the Korean authorities of how they conducted this "evaluation" or why they reached this conclusion, and on what factual basis they did so. The KTC provided no meaningful analysis of the margin of dumping or how that margin related to the ultimate impact of the dumped imports on the domestic industry.

42. In this particular case, overselling was consistent and significant. In their investigations, authorities often draw connections between the margin of dumping and the effects of the underselling. But in a case where import prices are overselling the domestic prices, the authorities cannot assume without more that the "margin of dumping" is having any impact on the domestic industry at all. The "evaluation" of this factor is particularly important to understand what the state of the domestic industry would have been without any dumping. The burden is on the authorities to say something substantive about the "magnitude of the margin of dumping" and how it relates to the ultimate conclusion that the imports were having some adverse impact within the meaning of Article 3.4.

VII. THE PANEL ERRED IN ITS APPROACH TO RESOLVING JAPAN'S CAUSATION CLAIMS UNDER ARTICLES 3.1 AND 3.5

A. The Panel Erred in Its Approach to Resolving Japan's Independent Causation Claim

43. With regard to the first causation claim, the Panel applied the wrong legal standard and ignored the interconnection nature of the various findings under Article 3. Japan stressed a series of flaws that rendered the KTC's final conclusion about the existence of a "causal relationship" deeply flawed and thus inconsistent with Articles 3.1 and 3.5.

44. First, the Panel did not consider volume as an essential building block for any finding of causation. The Panel focused too narrowly on the requirements of the first sentence of Article 3.2 regarding volume and not on the proper analysis under Article 3.5 regarding causation. The point is not whether the decline in imports earlier in the period "in itself" precludes a finding of causation, or that the small overall increase "necessarily contradicted or undermined" the finding of causation. Neither is the point whether either of the two volume-related arguments raised by Japan "itself", "necessarily", or "independently" disproved causation. Rather the point of proper causation analysis under Article 3.5 is for the Panel to consider these facts and other facts as part of a holistic analysis of the KTC's finding of causation and how the KTC explained that finding. Japan's stresses that even if these facts were to be deemed sufficient to satisfy the specific obligations of the first sentence of Article 3.2, these facts about the volume of imports are not sufficient to provide appropriate building blocks for the KTC's ultimate conclusion of causation.

45. Second, the Panel did not consider price effects as an essential building block for any finding of causation. The Panel did not repeat the same legal error it made when considering volume, and did not focus too narrowly on the requirements of the second sentence of Article 3.2 regarding price to the exclusion of the ultimate conclusion about causation under Article 3.5. But the Panel made different errors. The Panel erred by concluding the diverging price trends "do not in themselves demonstrate" the KTC causation finding is inconsistent with Articles 3.1 and 3.5. In reaching this conclusion, the Panel viewed the KTC explanations in isolation. The Panel also mistakenly concluded that isolated instances of lower priced sales, characterized by the KTC as "fierce competition", somehow "lends support" to the KTC's price suppression and depression findings. The Panel's conclusion based on its vague formulation of "lends support" is wrong for two key reasons: (a) the Panel never explained how these isolated examples demonstrated that *all* domestic like products are in competition with the dumped imports and thus met the legal standard under either Article 3.2 or Article 3.5; and (b) the Panel never put these isolated examples into the context of the other evidence it was considering as required by Articles 3.1 and 3.5.

46. Third, the Panel did not consider impact as an essential building block for any finding of causation by focusing too narrowly on the requirements of Article 3.2 concerning volume and price and Article 3.4 regarding impact and not on the proper analysis under Article 3.5 regarding causation. The Panel misunderstood the required "logical progression" of the analysis under Article 3. The Panel ignored that the analysis of the relationship between imports and the domestic industry under Article 3.4 is "analytically akin to the type of link" contemplated by the analysis under the second sentence of Article 3.2.

47. Fourth, the Panel acted contrary to its standard of review under Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement by failing to consider Japan's rebuttal arguments on a key issue regarding the "reasonable sales price". Had it considered Japan's rebuttal, the Panel would have realized that the Korean authorities never explained why the profit margins selected were in fact a reasonable proxy for the prices that the Korean producers should have been able to charge as "reasonable sales prices".

B. The Panel Also Erred in its Approach to Resolving Japan's Claim about the Failure to Demonstrate a Causal Relationship

48. Japan's second causation claim involved the failure of the KTC to establish a proper causal link, focusing on the lack of correlation among various factors. The Panel improperly refused to address the lack of meaningful correlation at all, in the context of the obligation under Article 3.5. The determination of causal relationship under Article 3.5 encompasses more than the underlying considerations under Article 3.2 and Article 3.4. The authority must still consider "all relevant evidence" that establishes or negates a causal relationship. However, rather than address this issue presented by Japan, the Panel ignored it.

49. The Panel said only that insufficient correlation "would not preclude" a finding of causal relationship, depending on "other facts considered" and the "explanations given" by the authority. Yet neither the KTC Final Resolution nor the Panel discussed what facts or what explanations countered the lack of volume correlation and price correlation identified by Japan. Japan's basic point was simply that the lack of sufficient correlation called into doubt the existence of any causal relationship.

50. Specifically, there was insufficient correlation in any of the key trends. There was insufficient correlation in the key volume trends to "demonstrate" a causal relationship. There was also insufficient correlation in key pricing trends to "demonstrate" a causal relationship. Whether measured based on simple averages or the price fluctuation index method, prices followed very different trends. Moreover, Korea's flawed analysis of correlations in price trends was made worse by the failure to ensure price comparability in their determination of causation. Finally, there was insufficient correlation in the trends regarding the domestic industry's condition to "demonstrate" a causal relationship.

51. The Panel incorrectly imputed to Japan a premise about profit trends. The Panel argued that Japan must be assuming that the failure of domestic profitability to improve means "there can be no injury caused by dumped imports". But that was not Japan's point. Japan never argued "there can be no injury", but simply pointed out yet another example of the lack of correlation that called into question the finding of a causal relationship. Moreover, the Panel embraced without any discussion a logically inconsistent KTC explanation of profit trends. Overall the Panel seemed more interested in quickly dismissing this claim than in seriously considering the extent to which the KTC reasonably addressed the lack of correlation in volume, prices, and profits.

VIII. THE PANEL ERRED IN REFUSING TO CONSIDER JAPAN'S CLAIM UNDER ARTICLE 6.9 OF THE ANTI-DUMPING AGREEMENT REGARDING THE DISCLOSURE OF ESSENTIAL FACTS

52. Japan's claim regarding the failure to disclose essential facts was within the terms of reference. Paragraph 10 of Japan's Panel Request refers specifically to the failure to disclose essential facts, and expressly identified Article 6.9 as the provision at issue. The obligation to disclose essential facts is narrow and well-defined on its face. Considering the nature of the obligation, Japan's claim that Korea failed to disclose the essential facts to all interested parties is "sufficient to present the problem clearly". Paragraph 10 of Japan's Panel Request also plainly connected the measure to the alleged inconsistency by referring specifically to Korea's failure to "inform the interested parties of the essential facts under consideration".

53. The Appellate Body should complete the analysis and address Japan's claim under Article 6.9 because this claim rests on undisputed facts. The only question before the Panel was the status of the KTC Final Resolution, but this was not a factual issue but a legal question as to whether the KTC Final Resolution constitutes a "final determination" of injury for purposes of Article 6.9. There is no dispute about what was disclosed prior to the KTC Final Resolution. Furthermore, this claim is closely related to the claims the Article 3 claims the Panel did address as the "essential facts" not disclosed

are intertwined with the claims under Articles 3.1, 3.2, 3.4 and 3.5, and arguments in support of those claims.

54. The KTC breached Article 6.9 of the Anti-Dumping Agreement by failing to disclose the "essential facts" that formed the basis of its injury determination before making the final determination. Article 6.9 requires the authority to disclose "essential facts" before a "final determination" is made. Korea argued that "a final determination" means a decision to impose duties, and therefore, that the KTC's Final Resolution was not a "final determination" within the meaning of Article 6.9. Article 6.9 read in the context of the Anti-Dumping Agreement more generally, however, makes clear that the term "a final determination" refers back to "a final determination" under either Article 2 for dumping or Article 3 for injury, which then leads to the final "decision" under Article 9 to impose and begin collecting duties. Consequently, the KTC's Final Resolution constituted the "final determination" for purposes of Article 6.9, as it encompassed the conclusion of the investigation of dumping and injury.

55. The KTC violated Article 6.9 because of the inadequate manner in which it disclosed certain information to the Japanese respondents. Some of the failures were to disclose any information at all, even though the KTC would ultimately rely on that information to make key findings. Some other failures were to provide no adequate public summary of certain information, which essentially left the parties with no disclosure. For both categories the KTC deprived the Japanese respondents of the opportunity to defend their interests.

ANNEX B-2

EXECUTIVE SUMMARY OF KOREA'S OTHER APPELLANT'S SUBMISSION[1]

I. INTRODUCTION

1. Pursuant to Articles 16.4 and 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Rule 23 of the Working Procedures for Appellate Review, the Republic of Korea ("Korea") appeals certain issues of law and interpretation developed by the Panel in *Korea – Anti-Dumping Measures on Pneumatic Valves from Japan* (WT/DS504/R) ("Panel Report").

2. The Panel Report that is the subject of the present appeal contains a number of errors of law and legal interpretation of the provisions of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "Anti-Dumping Agreement") and the DSU, which led the Panel to erroneous findings and conclusions.

3. Korea considers that the Panel's findings of violation of Articles 3.1 and 3.5 of the Anti-Dumping Agreement, as well as of Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement[2] are to be reversed. Korea develops four claims in this respect.

II. CLAIM 1: THE PANEL ERRED WHEN FINDING THAT JAPAN'S PANEL REQUEST WITH RESPECT TO CERTAIN OF ITS CLAIMS UNDER ARTICLES 3.1 AND 3.5 OF THE ANTI-DUMPING AGREEMENT WAS CONSISTENT WITH ARTICLE 6.2 OF THE DSU

4. The Panel erred when finding that Japan's panel request with respect to its claims under Articles 3.1 and 3.5 of the Anti-Dumping Agreement complied with the obligation under Article 6.2 of the DSU to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly and that these claims were thus within the Panel's terms of reference.[3] In particular, as was the case for the claims of Japan that the Panel considered *not* to have met the standard of Article 6.2 of the DSU, Japan's panel request in respect of its three causation claims also simply paraphrased the text of Articles 3.1 and 3.5 without offering any "how" and "why" the measures violated this causation obligation.

5. Japan's panel request fails to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. The Panel's analysis supporting its contrary finding is circular and fails to address the relevant question of whether the panel request, when examined on its face, makes any attempt to present the problem with the required clarity by linking any specific aspects of the challenged measures, or of the underlying investigation, to any of the specific obligations in these provisions. Given the multi-faceted nature of Articles 3.1 and 3.5 and the complex factual basis of the challenged measures, there was no basis for the Panel's conclusion that Japan's abstract paraphrasing of the obligation in Articles 3.1 and 3.5 was sufficient to present the problem clearly.

6. In addition, the Panel erred in law when deciding to "carefully review" Japan's written submissions to examine the consistency of its panel request with the requirement of Article 6.2 of the DSU. It is established WTO law that compliance with the requirement of Article 6.2 must be demonstrated "on the face of the request for the establishment of a panel", as it existed at the time of filing and on the basis of the language used. The Panel failed to adhere to these principles as it did not examine the panel request "on its face" and "at the time of filing", but rather felt it was necessary to look at "subsequent submissions" to fill the gap left by the lack of explanation in Japan's panel request. This constitutes another error of law.

7. Korea requests the Appellate Body to reverse the Panel's findings that certain of Japan's claims relating to Articles 3.1 and 3.5 of the Anti-Dumping Agreement were within its terms of reference

[1] Total number of words of the Other Appellant Submission = 46,011; total number of words of the Executive Summary = 4032.

[2] Panel Report, para. 8.4.

[3] Panel Report, paras. 7.226-7.227, 7.234-235, 7.241, 7.244, and 8.2(b)-(d).

(as set forth in paragraphs 7.226, 7.235, 7.243, 7.244(a)-(c) and 8.2(b)-(d) of the Panel Report), and, as a consequence, to declare moot and of no effect the Panel's finding of violation of Articles 3.1 and 3.5 of the Anti-Dumping Agreement (as set forth in, *inter alia*, paragraph 8.4(a)).

III. CLAIM 2: THE PANEL ERRED WHEN FINDING THAT KOREA ACTED INCONSISTENTLY WITH ARTICLES 3.1 AND 3.5 OF THE ANTI-DUMPING AGREEMENT

8. Should the Appellate Body find that Japan's "independent" causation claim is properly within the Panel's terms of reference, Korea submits that the Panel erred when finding that Korea acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement[4] since (i) it erroneously subsumed all of the obligations under Articles 3.2 and 3.4 into Article 3.5; (ii) it erred in relieving Japan of its burden of proof relating to the question of price comparability; (iii) it imposed a price comparability analysis that has no basis in the text of Article 3.5 and went well beyond what is required even under Article 3.2; and (iv) it made findings about the investigating authorities' causation determination based only on isolated aspects of this determination.

9. First, the Panel erred in law by reading an independent requirement into Article 3.5 of conducting a fully-fledged analysis of the volume, price effects and overall impact of dumped imports on the domestic industry. The Appellate Body has referred to Article 3.1 as an "overarching" provision and to Articles 3.2, 3.4 and 3.5 as together setting forth a "logical progression of enquiry" that culminates in a causation of injury finding. This implies that Articles 3.2 and 3.4, on volume, price effects and overall impact of the dumped imports on the domestic industry, on the one hand, and Article 3.5, on causation, on the other hand, are separate, albeit related, provisions that each set forth their own, separate parts of the obligation to demonstrate that dumped imports are causing injury to the domestic industry. The obligation to consider the volume of dumped imports, the price effects of the dumped imports and the obligation to examine the consequent impact of these imports on domestic producers of such products are set forth in Articles 3.1, 3.2 and 3.4 of the Anti-Dumping Agreement, not in Article 3.5 of the Anti-Dumping Agreement. The Panel's approach of reading all of the obligations of Articles 3.2 and 3.4 into Article 3.5 is thus in error.

10. An interpretation of Article 3.5 that comprehensively sets forth the entire obligation of demonstrating injury *and* causation would render redundant the obligations of Articles 3.2 and 3.4, in violation of the principle of effective treaty interpretation. That is, however, exactly what the Panel did. It effectively interpreted Article 3.5 as setting forth an independent, comprehensive obligation to examine the volume, price effects and consequent impact of the dumped imports as part of the causation obligation of Article 3.5. Its finding under Articles 3.1 and 3.5 that are based on Korea's price effects analysis are thus based on an error of law and should be reversed.

11. Second, the Panel erred in relieving Japan of its burden of proving that there was a problem of price comparability between the dumped imports and the like domestic products. In the underlying investigation, KTC properly addressed the issues and concerns raised by the interested parties relating to the question of price comparability. Among others, KTC found that the dumped imports and the domestic like products were in competition with one another in the Korean market during the period of investigation. In this dispute, Japan argued that KTC failed to ensure price comparability because it erred in finding a competitive relationship between the dumped and the domestic products. When the Panel rejected Japan's argument and found that the two products were in competition, it should have been for Japan to demonstrate that any further concerns over the specific price comparisons that were made as part of the overall price effects analysis undermined the general price comparability that was found to exist. Japan did not present a *prima facie* case to this effect as the Panel shifted the burden of proof asking Korea to demonstrate that the specific price comparisons ensured a fair comparison.

12. Third, assuming that the Panel was correct in examining the price effects under Article 3.5 (*quod non*), it committed in any event a legal error by requiring a demonstration of price undercutting for the product as a whole and by requiring a weighted average to weighted average or transaction to transaction comparison between comparable models when no such methodology is required by the text of Article 3.5 of the Anti-Dumping Agreement, nor by Article 3.2 for that matter. Article 3.5 is completely silent on the nature of the price effects analysis that allegedly would be required. To the extent that any obligation can be found in Article 3.5, it consist of a reference to

[4] Panel Report, para. 7.349.

"paragraph 2" of Article 3, which also does not impose a specific methodology for demonstrating price effects and does not require a price undercutting analysis for the product as a whole.

13. In the present case, the Panel examined different aspects of KTC's price effects findings in clinical isolation, and ultimately faulted Korea for failing to demonstrate that the selective underselling applied to the domestic like product "as a whole". Although no price undercutting finding was made by the investigating authority, the Panel considered that KTC should have examined the extent to which domestic prices as a whole were affected by *individual instances* of lower dumped import prices. Similarly, KTC examined certain prices of certain models in support of its conclusion that, despite the on average higher prices of dumped imports, there was competitive interaction between the dumped imports and the domestic like products which confirmed the explanatory force of the dumped imports in the price suppression and depression that was found to exist. The Panel faulted KTC for not having made a weighted average to weighted average or transaction to transaction model comparison when no such obligation exists under Article 3.2, let alone under Article 3.5 of the Anti-Dumping Agreement.

14. The complete silence on the kind of price effects analysis that would allegedly be required by Article 3.5 stands in stark contrast with the Panel's very specific findings relating to detailed aspects of the much broader price effects analysis that was undertaken by KTC. Thus, the Panel's interpretation and application of Article 3.5 as requiring a particular price effects analysis lacks any textual basis and imposes an obligation that is not even contained in Article 3.2 of the Anti-Dumping Agreement. The Panel's finding of violation of Articles 3.1 and 3.5 of the Anti-Dumping Agreement is based on a legal error relating to the obligations set forth in Articles 3.1 and 3.5 of the Anti-Dumping Agreement and should be reversed.

15. Fourth, assuming that the Panel was correct to entertain all of the price-related claims that should have been examined under Article 3.2 in the context of the Article 3.5 analysis (*quod non*), and assuming that the Panel was correct to consider that there were certain gaps in the price comparability and overselling analyses of KTC (*quod non*), that still would not justify the Panel's finding of inconsistency with Article 3.5 absent a holistic examination of these alleged flaws in the context of the causation analysis as a whole. Indeed, Article 3.5 requires a causation analysis that holistically assesses whether a genuine and substantial relationship of cause and effect has been demonstrated to exist between the dumped imports and the injury to the domestic industry. The alleged flaws found with respect to certain aspects of KTC's price effect analysis could only amount to a violation of Articles 3.1 and 3.5 if those alleged flaws, when taken together with all the other relevant analyses on volume, price, impact, etc., sufficiently and plainly disprove the causal link that KTC found to exist in the underlying investigation. It was incumbent on the Panel to examine how and to what extent the alleged minor flaws in respect of one aspect of the price analysis undermined the overall causation analysis. The Panel failed to do so. Thus, the Panel erred in law by making findings about the investigating authorities' causation determination under Articles 3.1 and 3.5 based only on isolated aspects of the determination. Its finding of violation of Articles 3.1 and 3.5 should thus be reversed.

16. In sum, Korea requests the Appellate Body to reverse the Panel's findings that Korea violated Articles 3.1 and 3.5 of the Anti-Dumping Agreement as set forth in paragraphs 7.272, 7.322, 7.323(a) and (c), 7.349, and 8.4(a) of the Panel Report.

IV. CLAIM 3: THE PANEL FAILED TO MAKE AN OBJECTIVE ASSESSMENT OF THE MATTER IN VIOLATION OF ARTICLE 11 OF THE DSU AND ARTICLE 17.6 OF THE ANTI-DUMPING AGREEMENT

17. The Panel failed to conduct an "objective assessment" of the matter before it in violation of Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement when reaching the conclusion that Japan's causation claims were within its terms of reference and that Korea acted in violation of Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

18. First, Korea considers that the finding on the terms of reference under Article 6.2 of the DSU that was made by the Panel in the context of the three claims under Articles 3.1 and 3.5 was not the result of an objective assessment of the matter. The Panel's unexplained, arbitrary and contradictory statements about the alleged sufficiency of Japan's panel request with regard to these claims reflected an inappropriate desire on the part of the Panel to salvage at least some of Japan's

claims. In fact, a proper interpretation of Article 6.2 DSU as applied by the Panel to all of the other claims of Japan, would have resulted in a finding that also the claims under Articles 3.1 and 3.5 were not properly before the Panel because they also merely paraphrased the obligation set forth in these legal provisions. The Panel thus failed to provide an adequate and reasonable explanation supporting its finding as it acted in violation of the legal standard it set out itself in relation to the other claims. Its findings in relation to the application of the test under Article 6.2 of the DSU are internally inconsistent. For all of these reasons, the Panel's finding that Japan's causation claims are properly within its terms of reference results from a lack of objective assessment in violation of Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement and should be reversed for that reason as well.

19. Second, the Panel made the case for the complaining party and engaged in a *de novo* review. In particular, it addressed the legal argument actually developed by Japan under Articles 3.1 and 3.5 concerning an alleged lack of competition between the imported and the like domestic products and found in favor of Korea. It then, however, continued to address a claim not made by Japan as the Panel constructed an argument about the lack of "fair comparison" as a result of the transaction-to-average comparison of prices. However, this was never the argument, let alone the claim, made by Japan. In so doing, the Panel made the case for Japan, determining that a violation existed based on a claim that was never made or developed by Japan. The Panel did not review the determination that was actually made but constructed its own price effects analysis and engaged in a *de novo* analysis of the determination that was never made. The Panel thus acted in a manner inconsistent with Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement.

20. Third, the Panel willfully ignored and disregarded certain evidence that was presented by Korea supporting its determination of the dumped imports' price effects. The Panel focused exclusively on the evidence relating to the instances of aggressive pricing and underselling and disregarded the relevant evidence for corroborating the existence of competition between the dumped and the domestic products that the investigating authorities relied on for their findings of price suppression and depression. Indeed, KTC's price effects findings were based on many facts on the record other than the alleged instances of price underselling and aggressive marketing. An objective assessment by the Panel would have considered the determination as presented and examined by the investigating authorities. By reducing the price effects analysis done by KTC and thereby disregarding significant amounts of evidence on the record, the Panel distorted the determination that was actually made which rendered its assessment neither objective nor fair, in violation of Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement.

21. Fourth, the Panel made findings that were internally inconsistent and contradictory. In relation to two of the three claims by Japan under Articles 3.1 and 3.5 of the Anti-Dumping Agreement, the Panel upheld KTC's causation and non-attribution analysis as consistent with these provisions, but in relation to the third claim found that the "causation analysis, as a result of flaws in their analysis of the effect of the dumped imports on prices in the domestic market" violated Articles 3.1 and 3.5. The Panel fails to provide any explanation of how these contradictory and internally inconsistent findings could be squared. A WTO panel does not comply with its obligation under Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement if, as in this case, its findings are internally incoherent and inconsistent.

22. Finally, even at the very basic level of the analysis of the facts relating to the price comparisons and the overselling, the Panel's analysis was not supported by the facts on the record and reflects a disregard of relevant, material evidence. The Panel's effective disregard of relevant record evidence and its erroneous findings demonstrate a lack of objective examination in violation of Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement.

23. In sum, Korea requests the Appellate Body to find that the Panel failed to make an objective assessment of the matter as required by Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement in relation to whether Japan's causation claims were properly within its terms of reference and in relation to its finding that Korea violated Articles 3.1 and 3.5 of the Anti-Dumping Agreement as set forth in, *inter alia*, paragraphs 7.226, 7.235, 7.243, 7.244(a)-(c), 7.272, 7.322, 7.323(a) and (c), 7.349 of the Panel Report and for that reason as well requests the Appellate Body to reverse the Panel's conclusions in paragraph 8.2(b), (c) and (d) and paragraph 8.4(a) of the Panel Report.

V. CLAIM 4: THE PANEL ERRED WHEN FINDING THAT KOREA ACTED INCONSISTENTLY WITH ARTICLES 6.5 AND 6.5.1 OF THE ANTI-DUMPING AGREEMENT

24. Korea submits that the Panel erred when finding that Korea acted inconsistently with Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement,[5] because (i) it erroneously found that Japan's panel request with respect to these claims presented the problem clearly in accordance with Article 6.2 of the DSU; (ii) it erroneously interpreted Article 6.5 as requiring investigating authorities to make express "statements" as to whether good cause is shown with respect to confidential information; and (iii) it erroneously applied the law to the facts by finding that there was no good cause for the treatment of certain information as confidential, and that KTC failed to require the applicants to furnish the required non-confidential summaries.

25. First, Japan's panel request failed to provide the requisite brief summary of the legal basis of the complaint sufficient to present the problem clearly. The Panel's finding to the contrary is based on erroneous application of the law to the facts as the panel request, when examined on its face, fails to present the problem with the required clarity through linking any specific aspects of the challenged measures, or of the underlying investigation, to any of the specific obligations in these provisions. The panel request merely paraphrases the text of the relevant provisions without anything additional. Given the multi-faceted nature of Articles 6.5 and 6.5.1 and the complex nature of anti-dumping investigations (in which large volumes of confidential information are received and examined by the investigating authority), there was an obligation on Japan to present the problem clearly as opposed to the abstract, paraphrasing of these provisions. Thus, there was no basis for the Panel's conclusion that Japan's panel request satisfied the minimum requirement of Article 6.2 of the DSU.

26. In addition, the Panel erred in law when examining Japan's compliance with Article 6.2 of the DSU by taking into account the scope of the allegations under Articles 6.5 and 6.5.1 as presented in Japan's written submissions. It is established WTO law that compliance with the requirement of Article 6.2 must be demonstrated "on the face of the request for the establishment of a panel", as it existed at the time of filing and on the basis of the language used. The Panel failed to adhere to these principles as it did not examine the panel request "on its face" and "at the time of filing", but rather felt it was necessary to look at "subsequent submissions" to fill the gap left by the lack of explanation in Japan's panel request. This constitutes another error of law.

27. Korea requests the Appellate Body to reverse the Panel's findings that Japan's claims under Articles 6.5 and 6.5.1 were within its terms of reference, as set forth in paragraphs 7.418 and 8.2(e), and, as a consequence, to declare moot and of no effect the Panel's finding of violation of Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement (as set forth in paragraphs 7.451 and 8.4(b)-(c)).

28. Second, should the Appellate Body find that Japan's claims under Articles 6.5 and 6.5.1 were properly within the Panel's terms of reference, Korea submits that the Panel erroneously interpreted Article 6.5 as requiring investigating authorities to make express "statements" as to whether good cause is shown for the confidential information. There is no such obligation in the relevant provision as interpreted based on the applicable rules of treaty interpretation. Based on the text of Article 6.5 of the Anti-Dumping Agreement, the obligation on investigating authorities is to treat any information as confidential "upon good cause shown" by the provider of the information. Thus, an authority must satisfy itself (i.e. "ensure") that good cause is shown before treating the information in question as confidential.

29. Third, given the error in legal interpretation, the Panel also erred by finding that KTC failed to show that good cause were shown for certain pieces of information as there was no evidence on the record "linking the information for which confidential treatment was granted to the categories of confidential treatment identified in Korean law". In light of the fact that Article 6.5 only requires investigating authorities to satisfy themselves that good cause is shown before treating the information in question as confidential, KTC was not obliged to make specific statements about each of the requests for confidentiality other than to satisfy itself that good cause was shown before treating the information in question as confidential.

30. Finally, the Panel also erred in its application of Article 6.5.1 to the facts of the dispute by finding that KTC failed to require the applicants to furnish the required non-confidential summaries.

[5] Panel Report, para. 7.451.

In the underlying investigation, the applicants submitted "non-confidential summaries" of the confidential information, prepared by designating the information that they deemed were entitled to confidential treatment (i.e. by leaving blank or, sometimes, replacing with "XXX") in accordance with Korean law and the guidelines for filling out the questionnaires. When the Korean Investigating Authorities received such non-confidential summaries designating the information that should be treated as confidential, it objectively considered that "good cause" was shown – in accordance with the relevant Korean laws and pursuant to relevant WTO jurisprudence. Thus, the applicants provided the required non-confidential summaries for the relevant confidential information, and these summaries were in sufficient detail to permit reasonable understanding of the substance of the confidential information.

31. In sum, Korea requests the Appellate Body to reverse the Panel's findings that Korea violated Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement as set forth in paragraphs 7.451 and 8.4(b)-(c) of the Panel Report.

ANNEX B-3

EXECUTIVE SUMMARY OF KOREA'S APPELLEE'S SUBMISSION[1]

1. Japan appeals a number of the Panel's findings under Article 6.2 of the DSU that several of its claims were outside the Panel's terms of reference, requesting reversal of such findings and a completion of the analysis by the Appellate Body in respect of such claims. Japan also appeals a number of findings of the Panel that Japan failed to demonstrate that Korea acted inconsistently with its obligations under the Anti-Dumping Agreement.

2. Korea considers that all of Japan's claims on appeal are without merit and should be rejected. Specifically, Korea requests the Appellate Body (i) to uphold the findings of the Panel under Article 6.2 of the DSU with respect to the claims under appeal, (ii) to reject Japan's requests to complete the analysis given that there are not sufficient factual findings by the Panel and undisputed facts on the Panel record, and (iii) should the Appellate Body decide to nevertheless consider the merits of Japan's substantive claims, reject Japan's claims that Korea acted inconsistently with its obligations under the Anti-Dumping Agreement. In addition, Korea requests the Appellate Body to reject the two claims on appeal by Japan that relate to findings the Panel did make, rejecting Japan's claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement and Articles 3.1 and 3.5 of the Anti-Dumping Agreement, and thus to uphold the findings of the Panel in this respect.

I. JAPAN'S APPEAL RELATED TO THE CLAIMS NOT CONSIDERED TO BE WITHIN THE PANEL'S TERMS OF REFERENCE IS TO BE REJECTED

I.1. Japan's claims that the Panel erred in law in respect of its findings pursuant to Article 6.2 of the DSU are without merit

3. The focus of Japan's appellant submission is on the Panel's findings under Article 6.2 of the DSU. In particular, Japan challenges the Panel's findings under Article 6.2 of the DSU with respect to Japan's claims under Articles 3.1, 3.2, 3.4, 4.1 and 6.9 of the Anti-Dumping Agreement which led the Panel to consider that the five related claims of Japan were not within the Panel's terms of reference. Japan takes issue with the Panel's findings that more than merely paraphrasing the provisions of the Anti-Dumping Agreement in question was required in order to satisfy the burden of a complainant to "present the problem clearly" in accordance with Article 6.2 of the DSU. For each of the claims that were considered not to be within the Panel's terms of reference, Japan develops the same four arguments to demonstrate that each of the challenged findings of the Panel under Article 6.2 of the DSU are in error. All four arguments are equally flawed.

4. As a preliminary point, Korea submits that Japan has wrongly characterized its appeal claims under Article 6.2 as concerned with the legal interpretation and application of the law of the facts by the Panel. In fact Japan's claims are essentially concerned with the Panel's alleged lack of reasoned and adequate explanation, its alleged failure to consider certain facts, the allegedly "unfair" nature of the Panel's approach, etc. Such claims seem to be claims that should have been presented as part of a challenge under Article 11 of the DSU that the Panel failed to undertake an objective assessment of the matter. However, Japan failed to include such a claim in its Notice of Appeal with respect to the Panel's findings under Article 6.2 of the DSU. On that basis alone, the Appellate Body should reject Japan's claims relating to the Panel's findings under Article 6.2 of the DSU and the related requests to complete the analysis.

5. In any case, Japan's claims of legal error are equally baseless.

6. First, Japan errs when it asserts that the Panel failed to consider the nature of the measure. Japan argues that in anti-dumping disputes, the investigating authority knows exactly what the claim is about given the frequent references in the report of the authorities to the relevant legal obligations under the WTO Anti-Dumping Agreement. There is no basis for this assertion. The standard of Article 6.2 of the DSU is not different for anti-dumping disputes. Nor is there any basis for the

[1] Total number of words of the Appellee Submission (including footnotes but excluding executive summary) = 69,232; total number of words of the Executive Summary = 5,600.

argument of Japan that the Panel failed to consider the nature of the measure when making its findings under Article 6.2 of the DSU. In its submissions before the Panel, Korea provided specific arguments relating to the complex nature of an anti-dumping measure that consists of many intermediate findings and a great number of facts and arguments on the record. Precisely in such circumstances it is important to be sufficiently clear in the panel request about which of these intermediate findings are being challenged and why. In that respect, anti-dumping measures are at least as complex, if not more complex, than other disputes about tax discrimination or import restrictions. Furthermore, the Appellate Body has stressed that it cannot be assumed that the range of issues raised in an anti-dumping investigation will be the same as the claims that a Member chooses to bring in WTO dispute settlement. Thus, any pre-existing knowledge of the facts of the underlying investigation is not a factor for determining the sufficiency of the claims made in a request for the establishment of a panel.[2] Yet, that is exactly what Japan is erroneously arguing that the Panel should have done: to read the panel request in light of the pre-existing knowledge of the facts and issues by the investigating authority. The Panel was correct not to adopt this approach.

7. Second, Japan errs when it asserts that the Panel failed to consider the nature of the legal obligation. Japan argues that the Panel failed to examine the specific violations alleged in the panel request of Japan. According to Japan, the legal obligations it alleged to have been violated were clear and did not set forth multiple obligations. Japan's claim is baseless. The record shows that Korea explained that the claims of Japan referred to a number of legal obligations that could be the basis for a number of different claims of violations, none of which were clearly identified or summarized in Japan's panel request. There is no basis for the allegation that the Panel failed to consider the nature of the legal obligation. In fact, it is because of the multi-faceted nature of such obligations - which were pointed out by Korea in its submissions - that the Panel considered that Japan's panel request failed to summarize the "how or why" of the violation.

8. Third, Japan errs when it alleges that the Panel confused the required brief summary of the "how or why" of the violation with a requirement to present a summary of the arguments supporting the claim. In fact, the Panel clearly indicates in its report that a complainant is not required to present a summary of the arguments supporting the claim but is required to provide not simply an indication of the legal basis of the complaint, but a brief summary of the legal basis "sufficient to present the problem clearly". As per the guidance of the Appellate Body, the Panel correctly examined whether Japan's panel request provided a brief summary of the "how or why" of the alleged violation. There is no basis for Japan's assertion that, in so doing, the Panel erroneously required a summary of the arguments of Japan. Japan is effectively arguing that it can comply with Article 6.2 of the DSU by simply indicating the legal basis of the claim and paraphrasing the obligation, exactly as it did in its request for consultations. The Panel found that this approach is incorrect and that something more is required in terms of presenting the problem clearly.

9. Fourth, Japan errs when it alleges that the Panel committed legal error by looking at Japan's submissions to confirm its conclusion that the panel request failed to meet the "brief summary" standard of Article 6.2 of the DSU. Korea agrees that a panel is to examine the consistency of the panel request on its face and that an incomplete panel request cannot be "cured" by a complainant's subsequent submissions. However, in this case, the Panel did not seek to "cure" the panel request by looking at the subsequent submissions. Rather, it examined such submissions to confirm its view that the measure consisted of various intermediate findings and that the claims of violation related to specific aspects of the measure and focused on certain aspects of the legal obligation alleged to have been violated. The analysis of the submissions of Japan thus appeared to have been undertaken to confirm the Panel's conclusion based on an analysis of the panel request on its face that Japan's panel request was unduly generic and did not briefly summarize the claims of Japan.

10. In sum, all four arguments of Japan with respect to the Panel's findings under Article 6.2 of the DSU are baseless.

11. In addition, Korea notes that Japan acknowledges that the panel request was not generic by accident. Rather, it argues that the "demanding" approach of the Panel would force complainants to be more specific in their panel requests and that this could be unfair since it would mean that the complainant could not later in the course of the proceeding develop new, albeit related, claims since these were not expressly set out in the panel request. In particular, Japan acknowledges that its panel request was drafted to be sufficiently broad in nature, to ensure it would not be limited in later

[2] Appellate Body Report, *Thailand – H-Beams*, paras. 94-95.

stages of the panel proceeding to specific allegations under each claim.[3] Japan is aware of the fact that a properly presented panel request that informs the respondent of the specific case it has to answer will limit the freedom of the complainant to develop its argument. The vagueness of Japan's panel request was therefore deliberate and strategic to ensure it was not restricted. However, Japan should not be rewarded for being strategically vague but rather faulted for having failed to provide the required brief summary sufficient to present the problem clearly. Article 6.2 plays an important due process role and is not simply a nuisance that should be circumvented. Indeed, the strategic advantage which Japan has sought to obtain is the source of the infringement to Korea's due process rights. Korea considers that this is exactly why the Panel was right to be as demanding as it was in respect of the sufficiency of the panel request with Article 6.2 DSU. A defendant, as well as the third parties for that matter, is entitled to know the case it has to answer. The deliberately vague nature of a panel request in order to give the complainant the freedom to develop specific claims at a later stage is exactly what Article 6.2 of the DSU is there to prevent. Japan's defense confirms that the Panel was correct in its approach.

12. In this dispute, Japan has been advocating and continues to advocate a standard under Article 6.2 of the DSU that is divorced from the jurisprudence as developed over time by the Appellate Body. Japan is arguing for a standard where it is sufficient for the complainant to list merely in the panel request the relevant provisions of the Anti-Dumping Agreement and essentially paraphrase the text of these provisions. But that is not the relevant legal standard under Article 6.2 of the DSU. More is required of complainants to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". Indeed, Article 6.2 of the DSU is an essential provision that safeguards a fundamental aspect of the due process rights of respondents in WTO disputes. Its purpose is to notify the respondent of the nature of the complainant's case with respect to the specific measure challenged. It is well-established that, to safeguard the respondent's due process rights, the panel request must "explain succinctly *how* or *why* the measure at issue is considered by the complaining Member to be violating the WTO obligation in question".[4] The panel request must provide sufficient narrative description of each claim so that the respondent can "know what case it has to answer… so that it can begin preparing its defence".[5]

13. The Panel correctly noted, and repeated at several occasions, that Japan's panel request makes "essentially generic" references to provisions of the Anti-Dumping Agreement as "nothing in the panel request links the claim to the particular circumstances of the investigation at issue".[6] Indeed, Japan's panel request simply identifies the measure, does not provide any additional narrative description of the relevant findings, and then just identifies the legal basis of the complaint, paraphrasing what is set forth in the provision that Japan alleges to be violated. There was no brief summary of any kind, let alone a brief summary sufficient to present the problem clearly. The Panel did not set out a new standard for examining the sufficiency of a panel request under Article 6.2 of the DSU, but simply applied the established jurisprudence to the facts of this case in which there was no narrative of any kind by Japan. Japan errs in trying to turn this case-specific finding into a systemic concern.

14. For these reasons, Korea respectfully requests the Appellate Body to reject Japan's claims that the Panel's finding that five of Japan's claims under Articles 3.1, 3.2, 3.4, 4.1, and 6.9 of the Anti-Dumping Agreement were in error and thus to uphold the Panel's finding that Japan's panel request in respect of these claims failed to "present the problem clearly" as required by Article 6.2 of the DSU, and that these claims were thus not within the Panel's terms of reference.

[3] See, e.g. Japan's appellant submission, para. 323; and Japan's response to Panel Question 11 (as commented on in Korea's second written submission, Annex, paras. 8-9).

[4] Appellate Body Report, *China – Raw Materials*, para. 226 (referring to Appellate Body Report, *EC – Selected Customs Matters*, para. 130 (italics in original)); see also Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.9.

[5] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162 (quoting Appellate Body Report, *Thailand – H-Beams*, para. 88).

[6] See, e.g., Panel Report, paras. 7.64, 7.91, 7.129, 7.514.

I.2. Japan's requests for the Appellate Body to complete the legal analysis are to be rejected

15. In the event the Appellate Body reverses any of the Panel's findings under Article 6.2 of the DSU, Korea considers that Japan's request to complete the analysis should be rejected due to a lack of sufficient factual findings of the Panel and undisputed facts on the Panel record.

16. It is established jurisprudence at the WTO that the Appellate Body may only complete the analysis to the extent that there are sufficient factual findings made in the panel report or undisputed facts on the panel record.[7] It is essentially required that the panel fully explores the issue in question in order for the Appellate Body to complete the legal analysis.[8] General observations by the panel are unlikely to contain sufficient factual findings or undisputed facts that would allow the Appellate Body to complete the analysis.[9]

17. In this dispute, the Panel report merely contains a brief and incomplete description of certain relevant facts, essentially summarizing some but obviously not all of the factual findings made by the investigating authorities. Japan disputes these factual findings and argues that the investigating authorities erred when making these findings in light of a number of other facts, most of them not included in the Panel's description of the facts. Therefore, the facts as reflected in the report of the Panel are incomplete and disputed. Clearly, they cannot form the basis for completing the analysis. In addition, with respect to those claims that were not within the Panel's terms of reference, there was no analysis at all by the Panel and therefore no analysis "to complete" by the Appellate Body after correction of the alleged legal error. The Panel did not explore the substantive issue and did not make any factual findings, let alone sufficient factual findings that would allow the Appellate Body to complete the analysis. And the very few findings that were made under Japan's claim of violation of Articles 3.1 and 3.5 of the Anti-Dumping Agreement are being appealed and are in any case insufficient for purposes of completing the analysis under other provisions such as Articles 3.1, 3.2, 3.4, 4.1 or 6.9 of the Anti-Dumping Agreement.

18. Japan's request for the Appellate Body to complete the legal analysis is effectively requesting the Appellate Body to engage in the role of a panel as the trier of fact and law. However, that is not the mandate of the Appellate Body under Article 17 of the DSU.

19. For these reasons, Korea respectfully requests the Appellate Body to reject Japan's request to complete the legal analysis with respect to the five claims that were found not to be within the Panel's terms of reference.

I.3. Japan's claims of violation of the Anti-Dumping Agreement by Korea with respect to the claims not within the Panel's terms of reference are in any case unsubstantiated and baseless

20. In the event the Appellate Body finds it possible to complete the legal analysis, notwithstanding Korea's arguments to the contrary, Korea submits that the Appellate Body should find that Japan has failed to demonstrate that Korea acted inconsistently with its obligations under the Anti-Dumping Agreement.

21. At the outset, Korea notes that the substantive arguments advanced by Japan in its appellant submission are essentially a summary version of the same arguments that it developed before the Panel. Korea notes that Japan's substantive claims are undeveloped in its appellant submission. Japan simply lumps together in a summary fashion a number of assertions and allegations made before the Panel, dropping footnotes to its submissions before the Panel. Japan does not develop a proper legal argument and fails to link its claims and arguments to the alleged "undisputed facts" on the record. In order to respond more fully to each of these allegations, Korea would almost be obliged to first develop Japan's claim and its factual basis before rebutting it by pointing to other facts on the record. This is not the task of Korea obviously.

[7] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 342.
[8] Appellate Body Reports, *Colombia – Textiles*, para. 5.30; and *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.124.
[9] Appellate Body Report, *EC – Selected Customs Matters*, paras. 278-287.

22. In any case, in terms of substance, Korea submits that Japan's allegations are all groundless.

23. First, in respect of the claim pursuant to Articles 3.1 and 4.1 of the Anti-Dumping Agreement regarding the domestic industry definition, Korea submits that the definition of the domestic industry by the Korean Trade Commission ("KTC") was based on the fact that it received questionnaire responses from domestic producers accounting for more than 55% of total domestic production. These producers satisfied the "major proportion" requirement both by quantitatively covering the majority of producers and by qualitatively being defined on the basis of an objective process that did not involve any risk of material distortion and by sufficiently representing the total production of the domestic producers as a whole.

24. Second, in respect of the claim pursuant to Articles 3.1 and 3.2 of the Anti-Dumping Agreement regarding the consideration of the volume of the dumped imports, Korea submits that KTC's analysis was based on findings of both absolute and relative increases in dumped imports. In particular, the volume of dumped imports increased in absolute terms by 78.9% in 2013 compared to 2012, and over the entire POI by [[9.7]]%. The finding was also corroborated by the fact that the dumped imports significantly increased their market share in the Korean market from [[59]]% in 2012 to [[70]]% in 2013, at the expense of the domestic industry whose market share dropped from [[39]]% to [[27]]% in the same period. Relatedly, KTC noted that the dumped imports' drastic price reduction and market share increase took place between 2012 and 2013 when the dominant Japanese exporter, [[SMC]], implemented an aggressive policy to expand its global market share from 32% to 50%. All of these findings demonstrate that KTC's consideration of the volume of dumped imports under Articles 3.1 and 3.2 was proper.

25. Third, in respect of the claim pursuant to Articles 3.1 and 3.2 of the Anti-Dumping Agreement regarding the consideration of the price effects of the dumped imports, Korea submits that KTC's analysis was consistent with the obligation to consider the price effects of the dumped imports. The investigating authorities dynamically considered the evolution of prices of both the dumped imports and the like domestic products, as well as the impact of the dumped products on the price of the like domestic products. It was found that prices were suppressed during the POI and even decreased at the end of the POI. While demand increased and costs increased as well, prices of the domestic products stayed low and even decreased. At the same time, prices of the dumped imports significantly decreased and the dumped imports gained back the market share it had previously lost before the dumping period of investigation. There was therefore a reasonable and reasoned basis for the findings of the investigating authorities. This analysis was based on a finding of substitutability and competitiveness between the dumped imports and the like products, which the Panel confirmed were in a competitive relationship. In addition, KTC calculated a "reasonable sales price", which provided a reasonable basis for considering that the dumped imports were depressing or suppressing domestic prices to a significant degree. Thus contrary to Japan's naked assertions, KTC explained, in a reasonable and reasoned manner, that the dumped imports imposed competitive price pressure on the prices of the domestic like products leading to price suppression and even price decreases at the end of the period of investigation.

26. Fourth, in respect of the claim pursuant to Articles 3.1 and 3.4 regarding the impact of the dumped imports on the domestic industry, Korea submits that KTC examined and adequately explained the explanatory force of the dumped imports when analyzing the state of the domestic industry. The authorities found that at least twelve of the indicative factors in Article 3.4 trended negatively, in particular during the period in which dumping was found to exist. Thus, record evidence shows that, through its analysis and findings, KTC derived the requisite understanding of the impact of the dumped imports on the state of the domestic industry. Japan errs when it argues that the investigating authorities should have examined the extent to which the injury factors were affected not just by the dumped imports but rather by the volume and price effects of the dumped imports. Although there is a logical progression of enquiry under Articles 3.2, 3.4 and 3.5 as part of an injury analysis, that does not mean that a full-fledged and holistic causation analysis is required under Article 3.4, nor that it must be demonstrated that the price effects in particular explain the negative trends in the injury factors.

27. Fifth, and finally in respect of the claims that were not considered to be within the Panel's terms of reference, Japan's claim that Korea failed to meet the obligation under Article 6.9 regarding disclosure of the essential facts is equally baseless. The Korean investigating authorities released several documents that ensured compliance with Article 6.9, in sufficient time for interested parties to defend their interests. In particular, the KTC's Final Resolution and the Final Investigation Report

by the Office of Trade Investigation ("OTI") constitute the last and complete piece of the disclosure documents for the purpose of Article 6.9. These documents undoubtedly disclosed all essential facts that formed the basis for the Final Decision by the Ministry of Strategy and Finance ("MOSF"). In fact, the Japanese respondents had full opportunities to review these disclosure documents and to defend their interests. MOSF took the final decision whether to impose duties only seven months after the final disclosure of the essential acts by KTC and OTI, and after having received further comments from interested parties based on these disclosure documents. Moreover, Korea submits that the 14 separate pieces of facts Japan argues were not properly disclosed although they constituted "essential facts", were in fact not "essential". Japan even acknowledges this by confirming that the information in question concerned "intermediate" findings for the overall finding of injury.

28. For these reasons, Korea respectfully requests the Appellate Body to reject Japan's substantive claims of violation, even if the Appellate Body considers it is able to complete the analysis with respect to the five claims that the Panel considered not to be within its terms of reference and thus to find that Japan has failed to demonstrate that Korea acted inconsistently with Articles, 3.1, 3.2, 3.4, 4.1 and 6.9 of the Anti-Dumping Agreement.

II. JAPAN'S CLAIMS OF LEGAL ERROR BY THE PANEL IN RESPECT OF ITS FINDINGS UNDER ARTICLES 3.1 AND 3.4 OF THE ANTI-DUMPING AGREEMENT AND ARTICLES 3.1 AND 3.5 OF THE ANTI-DUMPING AGREEMENT ARE TO BE REJECTED

29. Japan also appeals two sets of findings that the Panel made in respect of Japan's claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement and Articles 3.1 and 3.5 of the Anti-Dumping Agreement. The Panel considered these claims to be within its terms of reference, but found that Korea did not act inconsistently with these legal provisions in its analysis of injury factors and in its causation and non-attribution analysis.

II.1. Japan's claim of legal error by the Panel in respect of the evaluation of the magnitude of the margin of dumping under Articles 3.1 and 3.4 is without merit

30. Japan claims that the Panel erred in law in respect of its finding under Articles 3.1 and 3.4 rejecting Japan's claim of violation with respect to the Korean investigating authorities' evaluation of the magnitude of the margin of dumping. Japan's claim on appeal is to be rejected.

31. The Panel correctly found that KTC complied with its obligation by engaging in a substantive analysis of the impact of the margin of dumping on the domestic industry. Indeed, KTC examined and adequately explained that the margin of dumping was significant and thus considered the magnitude of the margin of dumping as part of its injury analysis. It found that the dumping margins ranging between 12 to 32% were significant, and consequently that dumping had had a significant impact on prices of the domestic like products. Japan errs when it asserts that more was required and that the analysis of this factor would have required the authorities to examine the state of the domestic industry in case the imports had been sold at normal value and thus "without any dumping".[10]

32. Japan claims that the burden is on the authorities to "say something 'substantive' about the 'magnitude of the margin of dumping' and how it relates to the ultimate conclusion that the imports were having some adverse impact within the meaning of Article 3.4",[11] but does not explain what that "something substantive" is. Nor does it explain why the analysis of one factor should in fact encapsulate the entire injury and causation analysis. Japan fails to demonstrate any legal error in the Panel's analysis given that it is undisputed that the authorities did evaluate this factor and did make findings confirming that the magnitude of the margin of dumping was significant and impactful.

33. For the reasons stated above, Korea respectfully requests the Appellate Body to reject Japan's claim on appeal under Articles 3.1 and 3.4 of the Anti-Dumping Agreement and to uphold the relevant findings of the Panel in this respect.

[10] Japan's appellant submission, para. 267.
[11] Japan's appellant submission, para. 268.

II.2. Japan's claim of legal error by the Panel in respect of the causation and non-attribution analysis under Articles 3.1 and 3.5 is undeveloped and without merit

34. Japan claims that the Panel erred in law when it found that Korea did not act inconsistently with Articles 3.1 and 3.5 in its causation and non-attribution analysis. In particular, Japan claims that the Panel erred in its interpretation of Articles 3.1 and 3.5 in the context of the analysis of Japan's "independent" causation claim. In addition, Japan asserts that in the context of that same analysis the Panel failed to make an objective assessment of the matter in violation of Article 11 of the DSU. Finally, Japan alleges that the Panel erred in its approach to resolving Japan's claim about the failure to demonstrate a causal relationship more generally. All three claims are to be rejected.

35. Korea submits that the Panel was correct in its legal approach and in its application of the law to the facts.

36. First, Japan's claim that the Panel erred in law by failing to consider the volume, price effects, and impact of the dumped imports on the domestic industry in examining the "independent" causation claim is undeveloped and in any case without merit. It is difficult to understand fully the nature of Japan's appeal claim. In fact, the arguments that Japan is presenting in this respect suggest that Japan should have brought an Article 11 DSU claim. Indeed, Japan asserts that the Panel was internally inconsistent in its approach as it allegedly "ignored its own findings"[12] and "never explained"[13] its findings or simply failed to make "an objective examination"[14] of positive evidence by considering facts in isolation. However, Japan fails to bring such an Article 11 DSU claim in respect of these aspects of the Panel's analysis. That is one reason for rejecting Japan's claim. In any case, Japan's claims of error are baseless. Japan fails to explain why the Panel's approach which was largely based on examining volume, price effects and overall impact of the dumped imports, was "myopic"[15] or "too narrowly"[16] focused and how the Panel would have erred in law. The Panel was simply following the text of Article 3.5 of the Anti-Dumping Agreement, which expressly refers to the effects of dumping, as set forth in paragraphs 2 and 4. The Panel otherwise addressed the specific claims and arguments that were made by Japan and rejected most of these.

37. In addition, Japan's separate claim under Article 11 of the DSU with respect to the Panel's alleged failure to consider Japan's rebuttal argument on the issue of the "reasonable sales price" is equally flawed. Japan acknowledges that it "did not focus"[17] on any such rebuttal arguments as part of its claims on causation which were part of the Panel's terms of reference. Since Japan never raised such rebuttal argument in the context of the claim in question, it is unclear on what basis the Panel could be accused of having "ignored"[18] these rebuttal arguments. In any case, it does not suffice under Article 11 of the DSU to assert that an argument, let alone a rebuttal argument, was not addressed by the Panel to conclude that the Panel failed to make an objective assessment of the matter. Japan has failed to demonstrate that the alleged disregard of this argument constituted an egregious error that calls into question the good faith of the Panel. Japan's bare assertion of an alleged failure to respect the proper standard of review is thus undeveloped and in any case baseless.

38. Finally, Japan claims that the Panel failed to address the alleged lack of correlation among various factors when evaluating Japan's other claim about the causal relationship under Articles 3.1 and 3.5 of the Anti-Dumping Agreement. Japan's claim is merely a repetition of the failed argument it made before the Panel and is to be rejected. Japan's claim is again more akin to an Article 11 DSU claim as it asserts that the Panel "improperly refused to address the lack of meaningful correlation"[19] and "ignored"[20] Japan's arguments. However, Japan did not bring an Article 11 DSU claim in respect of these matters. In any case, Japan's claim is not supported by the facts on the record. The findings of the Panel clearly show that it examined the question of correlation and considered that the investigating authorities provided a reasoned and adequate explanation of the existence of correlation during the period of investigation. Japan disagrees. However, that does not make the Panel's contrary finding an error of law. Japan does not develop any legal claims but simply asserts

[12] Japan's appellant submission, para. 284.
[13] Japan's appellant submission, para. 286.
[14] Japan's appellant submission, para. 287.
[15] See, e.g. Japan's appellant submission, para. 281.
[16] See, e.g. Japan's appellant submission, paras. 277, 282.
[17] Japan's appellant submission, para. 295.
[18] Japan's appellant submission, para. 295.
[19] Japan's appellant submission, para. 299.
[20] Japan's appellant submission, para. 299.

that "Japan's point [that there was not sufficient correlation] is correct, and it was legal error for the Panel to dismiss it".[21] Korea disagrees.

39. For the reasons stated above, Korea respectfully requests the Appellate Body to reject Japan's claim on appeal under Articles 3.1 and 3.5 of the Anti-Dumping Agreement as well as its limited claim under Article 11 of the DSU and to uphold the relevant findings of the Panel in this respect.

III. CONCLUSION

40. Korea respectfully requests the Appellate Body to reject in their entirety Japan's claims on appeal as reflected in its Notice of Appeal and as developed in its appellant submission, and to uphold the Panel's findings in respect of the matters covered by Japan's claims on appeal.

[21] Japan's appellant submission, para. 300.

ANNEX B-4

EXECUTIVE SUMMARY OF JAPAN'S APPELLEE'S SUBMISSION[1]

1. Korea seems determined to shield the deeply flawed KTC determination of injury from any critical scrutiny. Korea's position is that Japan's Panel Request should have been rejected in its entirety, and the Panel should not have addressed any of Japan's substantive claims. Korea's arguments are basically that the Panel findings were internally inconsistent, and that Japan's request did not provide any "how or why". Japan's Appellant Submission has already demonstrated the serious and pervasive errors in the Panel's approach to Article 6.2 of the DSU with regard to those claims found not to be within the terms of reference, and has extensively addressed the Panel's fundamental error in allowing the phrase "how or why" to replace the actual standard of Article 6.2.

2. Korea's attack on the substance of the Panel's findings also has little credible basis. Korea misunderstands the proper standard under Articles 3.1 and 3.5 of the Anti-Dumping Agreement to find that dumped imports are "causing injury". The Panel was correct to find that a flawed finding of price effects eliminates a fundamental building block of a proper finding of "causing injury", and thus renders that finding of causation invalid and inconsistent with Articles 3.1 and 3.5. Korea tries to bolster its arguments with complaints that the Panel ignored the proper standard of review under Article 11 of the DSU, but these arguments are nothing more than recycled arguments on the merits, and do not provide any basis to conclude the Panel applied the wrong standard of review. And Korea's arguments about Article 17.6 of the Anti-Dumping Agreement largely repeat its arguments about Article 11.

I. THE PANEL CORRECTLY FOUND JAPAN'S CLAIMS UNDER ARTICLES 3.1 AND 3.5 OF THE ANTI-DUMPING AGREEMENT TO BE WITHIN ITS TERMS OF REFERENCE IN ACCORDANCE WITH ARTICLE 6.2 OF THE DSU

3. All of Japan's claims in its Panel Request were properly within the Panel's terms of reference in accordance with Article 6.2 of the DSU. The Panel's analysis as to whether Japan's claims were properly before the Panel was deficient in multiple respects. But whereas the Panel limited its errors to some of Japan's claims, while finding the others to be within the terms of reference, Korea now seeks to expand the Panel's errors rather than to correct them.

4. All of the claims brought by Japan in its Panel Request satisfy the specific legal standard set forth by Article 6.2 of the DSU, which sets forth two requirements: to "identify the specific measures at issue" and to "provide a brief summary of the legal basis of the complaint", which, taken together, should be "sufficient to present the problem clearly". The analysis as to whether a claim satisfies the requirements of Article 6.2 "must be made on a case-by-case basis, taking into account the nature of the measure at issue and the manner in which it is described in the panel request, as well as the nature and scope of the provision(s) of the covered agreements alleged to have been violated". Notwithstanding the foregoing, the Panel incorrectly relied on the phrase "how or why" as *the* standard for determining whether the claims by Japan were outside of its terms of reference.

5. Article 6.2 of the DSU does not contain an obligation to provide the arguments in support of a claim in the terms of reference. Moreover, a panel request should be interpreted as a whole as it existed on the date of its submission. Although Korea seems to agree with these principles, in its analysis, Korea disregards them and builds its appeal on the basis that Japan did not explain "how or why" the measures were inconsistent with the WTO Agreements.

6. Instead of submitting one general claim that Korea's anti-dumping measures were inconsistent with Articles 3.1 and 3.5, Japan presented three different claims, each referring to a distinct obligation set forth in Article 3.5. In doing so, the language of Japan's claims 4, 5, and 6, identified very specifically which of these obligations each claim referred to. Claim 4 focused on the "causal relationship" between imports and the condition of the domestic industry. Claim 5 focused on other known factors and non-attribution. Claim 6 focused on the ultimate finding of "causing injury" based

[1] The Appellee Submission being summarized has 28,265 words. This Executive Summary has 2,803 words, and thus complies with the Appellate Body guidance for executive summaries.

on all facts, including the facts about volume, price effects, and impact; specifically, it focused on the ultimate conclusion of causation, and whether that ultimate conclusion had a proper foundation in the underlying facts about volume, price effects, and impact. Because each of these claims refers to one specific obligation within Articles 3.1 and 3.5, there is no ambiguity or misunderstanding, and they present the problem clearly given the nature and scope of the obligations.

II. THE PANEL CORRECTLY FOUND THAT KOREA HAD ACTED INCONSISTENTLY WITH ARTICLES 3.1 AND 3.5 OF THE ANTI-DUMPING AGREEMENT

7. Korea interprets the obligations of Article 3.5 too narrowly, leaving this key provision with little substantive meaning. Findings about volume, price effects, and impact pursuant to Articles 3.2 and 3.4 are important building blocks, but do not answer the distinct question about "causal relationship" that must be addressed under Article 3.5. Nor do the findings under Articles 3.2 and 3.4 immunize those issues from further scrutiny as part of the analysis under Article 3.5. For any alleged findings under Articles 3.2 and 3.4 must be "linked" and follow a "logical progression" through the causation analysis under Article 3.5. Thus, flaws in an earlier analytic step may also infect the final step of finding that imports were in fact causing injury.

8. The Panel correctly found that Articles 3.1 and 3.5 require more than confirming that the authority had complied with the second sentence of Article 3.2 regarding price effects. Price effects under the second sentence of Article 3.2 are certainly part of the causation analysis, but that analysis alone does not complete what is required by Articles 3.1 and 3.5 to reach an ultimate conclusion about "causing injury."

9. The Panel correctly found that price comparability was a fundamental part of price effects under Article 3.2 and causation under Articles 3.1 and 3.5. The existence of some degree of general competition or "likeness" is not enough nor does it establish the existence of a genuine competitive relationship. If the authority is comparing prices, and using those comparisons to draw inferences about price effects and causation − as the KTC did in this case − the authority must ensure that it is comparing prices that are in fact comparable. Japan made this argument before the Panel, the Panel found the argument to be legally and factually correct, and thus reached a procedurally and substantively proper conclusion that the KTC failed to ensure the comparability of prices it was comparing.

10. The Panel correctly faulted the KTC for failing to recognize the extent to which the evidence of pervasive overselling for the product overall fatally undermined the KTC's price effects analysis and determination of causation and was thus contrary to Articles 3.1 and 3.5. The KTC relied on individual and isolated instances of underselling and competitive pricing behaviour to reach a conclusion that imports caused price suppression and depression for the domestic like product as a whole. The Panel found that the KTC failed to provide an explanation and analysis of how and to what extent the prices of the domestic like product as a whole were actually affected in light of the undisputed and consistent overselling by the subject imports, even though such explanation and analysis is necessary.

11. The Panel correctly found that the flaws in the KTC's analysis of price effects under Article 3.2 and the integration of these findings in the KTC's analysis of causation were so substantial as necessarily to render its determination of causation inconsistent with Articles 3.1 and 3.5. The Panel did not, as Korea claims, characterize some flaws in certain parts of KTC's price effect analysis as constituting a violation of Article 3.5 in isolation. Rather, the Panel found the basis for the KTC's price effects analysis and findings of price suppression and depression was so fundamentally flawed that it could not sustain the KTC determination that dumped imports were "causing injury" under Article 3.5. The KTC failed to consider adequately the important evidence of consistent overselling and failed to ensure price comparability in reaching its conclusion on causation. These errors did "plainly disprove" the alleged causation.

12. In its Other Appellant Submission, Korea repeats the KTC's flawed findings of price suppression and depression from its Final Resolution, cites the individual examples of alleged "aggressive pricing behaviour," and attempts to provide a more reasoned explanation of how individual examples support its broader price effects determination. Korea's arguments, however, ignore key parts of the Panel's findings on causation, ignore the other key evidence that the KTC also disregarded, and

should be dismissed; Korea faults the Panel for failing to conduct the complete and reasoned analysis the Panel in fact actually provided.

13. Korea's argument about Article 3.5 in its Other Appellant Submission appears to contradict what Korea argued before the Panel in response to Japan's claims that the Korean authorities' findings were inconsistent with Articles 3.2 and 3.4. Having argued for the analysis not to be part of Articles 3.2 and 3.4, now Korea wants to put the analysis back in those provisions. Japan welcomes Korea's arbitrary change in its legal position as substantive support for Japan's claims on appeal about Articles 3.2 and 3.4, and the Panel's overly narrow view of those provisions.

III. THE PANEL PROPERLY MADE AN OBJECTIVE ASSESSMENT OF THE MATTER AS REQUIRED BY ARTICLE 11 OF THE DSU AND ARTICLE 17.6 OF THE ANTI-DUMPING AGREEMENT

14. There was no violation of Article 11 of the DSU. Not every error gives rise to a violation of Article 11. Korea's claim under Article 11 of the DSU is really just a repackaged version of its disagreement with the Panel findings on the merits of these issues, and has not been supported by specific and independent arguments.

15. First, the Panel findings about the terms of reference were correct, and did not reflect the lack of any objective assessment. The Panel applied Article 6.2 of the DSU to various claims and reached different conclusions. But the mere fact that the Panel reached different conclusions does not establish a violation of Article 11 of the DSU.

16. Second, the Panel did not "make Japan's case" regarding the lack of competition. Contrary to Korea's argument, the existence of a competitive relationship depends very much on the "the details of the comparison." The Panel was well within its authority to critically examine Korea's evidence, and such careful and critical examination is very much part of the Panel's job under Article 11, and the Panel can properly consider what the evidence shows, but also what the evidence does not show.

17. Third, the Panel did not disregard any evidence about the effect of imports presented by Korea that had been part of the KTC analysis. The Panel properly focused on what the KTC said in its determination, and not on *post hoc* arguments presented by Korea that could not be found in the KTC determination. This part of Korea's argument is simply a subsidiary claim and subsidiary arguments alone cannot establish a violation of Article 11.

18. Fourth, the Panel findings were not internally inconsistent. This argument by Korea ignores the fact that the Panel was addressing three separate claims, each with a distinct focus. That the Panel may have disagreed with parts of Japan's arguments on other issues relating to distinct claims grounded in different parts of Article 3.5 of the Anti-Dumping Agreement does not create any internal inconsistently. This argument is another "subsidiary argument" that alone cannot establish a violation of Article 11.

19. Fifth, contrary to Korea's argument, the Panel did not disregard any evidence about price comparisons and overselling. The two specific items of evidence allegedly ignored — the comparison of average price trends, and Exhibit KOR-57 — were in fact fully considered by the Panel. Regarding price trends, Korea's own submission cites to the portion of the report where the Panel considered this point, making clear that the Panel is referring specifically to a KTC finding of price undercutting in the sense of the second sentence of Article 3.2. Regarding Exhibit KOR-57, the Panel correctly rejected Korea's efforts to present *post hoc* justifications with no basis in the KTC Determination as written.

20. There was no violation of Article 17.6 of the Anti-Dumping Agreement. A careful review by the Panel is consistent with the proper standard of review, and is not an improper *de novo* review. Korea has not distinguished the standard of review under Article 17.6 of the Anti-Dumping Agreement from the standard of review under Article 11 of the DSU and has not provided any argument that Article 17.6 of the Anti-Dumping Agreement imposes a different standard than Article 11 of the DSU. Both preclude a panel from engaging in *de novo* review. Korea presented four specific arguments, but none of these arguments show the Panel actually engaged in improper *de novo* review.

IV. THE PANEL CORRECTLY FOUND THAT KOREA HAD ACTED INCONSISTENTLY WITH ARTICLES 6.5 AND 6.5.1 OF THE ANTI-DUMPING AGREEMENT

21. Japan's claim 8 — that Korea treated certain information as confidential without good cause — and claim 9 — that Korea did not furnish non-confidential summaries of confidential information, and where it did, such summaries were deficient — provide a "brief summary of the legal basis" and "present the problem clearly" and were therefore properly before the Panel. Japan expressly identified Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement as the specific provisions at issue for these two claims. Moreover, Japan identified the obligation to treat as confidential information provided as confidential by the parties "upon good cause shown" (claim 8 related to Article 6.5), and the obligation to furnish non-confidential summaries "in sufficient detail" (claim 9 related to Article 6.5.1). The language used by Japan in claims 8 and 9 presented the problem clearly by connecting the measure at issue and the alleged inconsistencies, in light of the nature and scope of the particular obligations, and regardless of Korea's "how or why" standard. Moreover, the Panel's determination that the claims were within its terms of reference, was based on the language of the Panel Request, not any subsequent submissions by Japan.

22. The Panel properly found that Korea acted inconsistently with Article 6.5 when it granted confidential treatment without any showing of good cause that would justify the confidential treatment required from the applicants. The Panel also correctly found that the KTC failed to require that the submitting parties provide a sufficient non-confidential summary of certain information, thus acting inconsistently with Articles 6.5.1 of the Anti-Dumping Agreement.

23. The requirement under Article 6.5 to show good cause applies to all information for which confidential treatment is sought, whether it is by nature confidential or submitted on a confidential basis. The requirement is "upon good cause shown", and so the status as confidential information exists only "upon" the meeting of the condition; and that good cause must be affirmatively "shown". Absent some showing of "good cause", a panel has no way to review what the authority has done and whether it complies with Article 6.5.

24. Thus, the text of Article 6.5 requires more than an "implicit assertion". As the Panel correctly found, there is no evidence on the record that a showing of good cause was required or made by the applicants before the KTC granted confidential treatment. Despite Korea's claim, there was an absence of anything in the record, linking the information for which confidential treatment was granted to the categories of confidential treatment identified in Korean law. Moreover, the existence of legislation containing defined categories of information that will normally be treated as confidential does not relieve the investigating authority of its obligation under Article 6.5 to determine that "good cause" has been "shown" to justify the confidential treatment requested by the submitting party.

25. The requirement under Article 6.5.1 is to ensure non-confidential summaries contain "sufficient detail" to know the substance of the information, and thus to allow a party to defend its interests. The non-confidential summaries submitted by interested parties did not contain sufficient detail to permit a reasonable understanding of the substance of the confidential information. Thus, the Panel properly concluded that the KTC violated Article 6.5.1 as the communications identified by Japan cannot be said to have contained a summary in sufficient detail to "permit a reasonable understanding of the substance of the information submitted in confidence."

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ANNEX C

ARGUMENTS OF THE THIRD PARTICIPANTS

ANNEX C-1

EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S THIRD PARTICIPANT'S SUBMISSION[1]

A. Article 6.2 DSU

1. The European Union considers that the crucial point in the present dispute is the degree of specificity required for the clear presentation of the problem, pursuant to Article 6.2 of the DSU. The Appellate Body has specified that the brief summary "aims to explain succinctly how or why the measure at issue is considered (...) to be violating the WTO obligation in question." In the European Union's understanding, this "how or why" is not an additional condition; it is rather a clarification of the notion of "brief summary sufficient to present the problem clearly".

2. A mere listing of the treaty provisions claimed to have been violated can be, but is not always sufficient to present the problem clearly.

3. For example, mere listing can be insufficient where the articles listed establish not one single, distinct obligation, but rather multiple obligations. In light of the rationale underlying this example (to allow the respondent to identify what "the problem is" so that it can duly defend itself), the European Union considers that, in principle, anything that has as its effect that the mere reference to an allegedly violated treaty provision doesn't allow the complainant to identify what is concretely the case brought against it can potentially make the mere listing insufficient.

4. The nature and scope of the obligations at stake play a crucial role. Thus, the Appellate Body will have to look closely at the complexity or not of the obligations at stake in the present case, in particular those of Article 3 of the Anti-Dumping Agreement; and the impact of the fact that Japan's claims were *combined* claims of violations of the overarching general obligation under Article 3.1, and the subsequent paragraphs of Article 3, as well as Article 4.

5. Furthermore, the European Union considers that a possible complexity concerning the measure at issue can have a bearing on the assessment whether the summary of the legal basis is sufficient to present the problem clearly. While for the *identification* of the measure at issue, requests for establishment do not require the "specific aspects" of the "specific measures" to be identified, it should not be ruled out that this could be necessary, in certain circumstances, to "present the problem clearly"; in particular in cases where a broad and complex measure is alleged to violate a broad, multi-faceted or complex obligation.

B. Article 3.5 ADA

6. The European Union considers that since the examination under Article 3.5 encompasses "all relevant evidence" before the investigating authority, including the volume of dumped imports and their price effects listed under Article 3.2, as well as all relevant economic factors concerning the state of the domestic industry as listed in Article 3.4, the Panel was entitled to take into account the volumes, prices effects and impact considered under Articles 3.2 and 3.4 for the purpose of determining causation under Article 3.5

7. Moreover, an investigating authority is required to consider cumulatively all relevant evidence and properly weigh positive and negative factors when considering causation.

8. When assessing causation under Article 3.5 an investigating authority is entitled to carry out price comparisons that are generally used under Article 3.2.

9. The European Union also considers that the lack of correlation does not preclude the existence of a causal link, provided that a very compelling analysis is provided.

[1] Total number of words (including footnotes but excluding executive summary) = 6824; total number of words of the executive summary = 610.

10. Furthermore, when a panel identifies an error in the causation determination of an investigating authority, it cannot further assess that error taking into account the entire evidence since this would amount to conducting a de novo review of the evidence or to substituting its judgment for that of the investigating authority.

ANNEX C-2

EXECUTIVE SUMMARY OF THE UNITED STATES' THIRD PARTICIPANT'S SUBMISSION

1. Among other matters, Japan and Korea appeal findings that certain claims were within or outside the Panel's terms of reference. The Parties dispute whether DSU Article 6.2 requires complainants to articulate "how and why" a challenged measure is inconsistent with a provision of a covered agreement.

2. DSU Article 6.2's requirement that a panel request "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly" entails connecting the challenged measure with the provision allegedly infringed. Thus, a panel request that identifies the measure at issue and links the measure directly to a provision of a covered agreement meets the prerequisite for stating a claim under DSU Article 6.2. Where the provision is detailed and specific, paraphrasing the provision may be precise enough to "present the problem clearly."

3. DSU Article 6.2 does not require complainants to explain "how or why" a measure is inconsistent with a provision. Such an exercise might require complainants to develop legal theories or present examples in their panel requests and such statements would amount to argumentation. Indeed, the Appellate Body has found examples in panel requests to be "in the nature of arguments rather than claims." DSU Article 6.2 requires "the claims − not the arguments be set out in a panel request in a way that is sufficient to present the problem clearly."

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ANNEX D

PROCEDURAL RULINGS

ANNEX D-1

PROCEDURAL RULING

6 June 2018

1. On Wednesday, 30 May 2018, the Chair of the Appellate Body received a communication from the European Union requesting that the Division hearing this appeal modify the deadline for the filing of third participants' submissions in this appeal. In its letter, the European Union noted that the Working Schedule set the date for the submission of appellees' submissions as Friday, 15 June 2018, and the date for the filing of the third participants' submissions as Monday, 18 June 2018. The European Union highlighted that this allowed third participants less than one working day to consider and react to the appellees' submissions in their third participants' submissions. The European Union requested the Division to extend the deadline for the filing of the third participants' submissions to Friday, 22 June 2018, and thus to provide third participants with four full working days following the deadline for submission of the appellees' submissions.

2. On 31 May 2018, and on behalf of the Division hearing this appeal, the Chair of the Appellate Body invited Korea, Japan and the other third participants in this dispute to comment in writing on the communication from the European Union by 12:00 noon on Monday, 4 June 2018.

3. On 1 June 2018 the Chair received a letter from Korea stating it would defer to the Appellate Body and has no specific additional comments to offer; and on 4 June 2018 the Chair received a letter from Japan indicating it had no specific comments on the European Union's request.

4. In light of the above considerations, I would like to inform you that the Division hearing this appeal has decided, pursuant to Rule 16(2) of the Working Procedures, to extend the deadline for filing third participant's submissions and notifications under Rule 24(1) and (2) of the Working Procedures to Friday, 22 June 2018. The revised Working Schedule is attached to this Ruling.

Pursuant to Rule 26 of the Working Procedures, the revised Working Schedule for this appeal is as follows:

Modified Dates for the Submission of Documents

Process	Rule	Date
Notice of Appeal	Rule 20	Monday, 28 May 2018
Appellant's submission and executive summary	Rule 21(1)	Monday, 28 May 2018
Notice of Other Appeal	Rule 23(1)	Monday, 4 June 2018
Other appellant's submission and executive summary	Rule 23(3)	Monday, 4 June 2018
Appellee's submission(s) and executive summary(ies)	Rules 22 and 23(4)	Friday, 15 June 2018
Third participants' submissions and executive summaries	Rule 24(1)	~~Monday, 18 June 2018~~ Friday, 22 June 2018
Third participants' notifications	Rule 24(2)	~~Monday, 18 June 2018~~ Friday, 22 June 2018

ANNEX D-2

PROCEDURAL RULING

26 March 2019

1. On 4 March 2019, Japan and Korea addressed a joint communication to the Presiding Member of the Appellate Body Division hearing this appeal. In its joint communication, the participants recalled that the Panel adopted the additional working procedures on business confidential information (BCI) in its proceedings.[1] With a view to providing the same level of protection in these appellate proceedings for the BCI submitted to the Panel and on the Panel record, the participants requested the Appellate Body Division hearing this appeal to adopt additional working procedures for the protection of BCI pursuant to Rule 16(1) of the Working Procedures for Appellate Review (Working Procedures). The participants attached to the joint communication a proposal on draft additional working procedures for the Appellate Body Division's consideration.

2. On 5 March 2019, the Presiding Member of the Division hearing this appeal invited third participants to provide any comments on the joint communication, should they so wish, by 12 noon on 8 March 2019. No responses were received from the third participants.

3. The Division makes its ruling having considered the joint communication addressed by Japan and Korea substantiating the need for additional protection of BCI, together with proposed additional working procedures attached thereto.[2]

4. We recall that any additional procedures adopted by the Appellate Body to protect sensitive information must conform to the requirement in Rule 16(1) of the Working Procedures that such procedures not be inconsistent with the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), the other covered agreements, or the Working Procedures themselves.[3] Moreover, in adopting such procedures, the Appellate Body must ensure that an appropriate balance is struck between the need to guard against the risk of harm that could result from the disclosure of particularly sensitive information, on the one hand, and the integrity of the adjudicative process, the participation rights of third participants, and the rights and systemic interests of the WTO membership at large, on the other hand.[4] This means, among other things, that the Appellate Body should bear in mind the need for transparency and "the rights of third parties and other WTO Members under various provisions of the DSU"[5], and "ensure that the public version of its report circulated to all Members of the WTO is understandable."[6]

5. We also recall that it is for the adjudicator to decide whether certain information calls for additional protection of confidentiality. Likewise, it is for the adjudicator to decide whether and to what extent specific arrangements are necessary, while safeguarding the various rights and duties that are implicated in any decision to adopt additional protection.[7] In that connection, the Appellate Body has considered that the treatment of information as confidential by an investigative authority in domestic proceedings should not be conflated with "the confidential treatment of information provided *by a WTO Member to a panel or the Appellate Body in the context of WTO dispute*

[1] Panel Report, para. 1.7 and Annex A-2.

[2] These include the disputes in *EC and certain member States – Large Civil Aircraft*, *US – Large Civil Aircraft (2nd complaint)*, *US – Tax Incentives*, *US – Washing Machines*, and *EU – Fatty Alcohols*.

[3] Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, Annex D-1, Procedural Ruling of 26 October 2016, para. 10.

[4] Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 5.3 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 15).

[5] For example, Articles 12.7 and 16 of the DSU. See Appellate Body Report, *Japan – DRAMS (Korea)*, para. 279.

[6] Appellate Body Report, *Japan – DRAMS (Korea)*, para. 279.

[7] Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, Annex D-1, Procedural Ruling of 26 October 2016, para. 13.

settlement proceedings"[8], and that "whether information treated as confidential pursuant to Article 6.5 of the Anti-Dumping Agreement, and submitted by a party to a WTO panel under the confidentiality requirements generally applicable in WTO dispute settlement, should receive additional confidential treatment as BCI is to be determined in each case by the WTO panel".[9] We also note that neither participant has appealed the Panel's decisions regarding the protection of BCI, and that there are also issues of practicality to consider. We will therefore proceed on the basis of how the information was treated before the Panel.

6. Having reaffirmed the relevant considerations that guide our decision, we turn to the participants' proposed procedures, which are, to a large extent, similar to the procedures adopted by the Appellate Body in *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea* and *European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia*, insofar as they protect BCI.

7. We take note of the procedures that the participants have jointly proposed and do not consider that they unduly affect the Appellate Body's ability to adjudicate the dispute, the rights of the third participants to be heard, or the rights and interests of the WTO membership at large. We note in this respect the absence of comments by third participants regarding the participants' joint request for additional protection of BCI. In light of similar procedures we have adopted in the past, we have taken into account the proposed procedures in the additional procedures that we adopt below. These procedures ensure that Appellate Body Members and assigned Appellate Body Secretariat staff have sufficient access to the entirety of the Panel Report, the submissions, and the record of the dispute, while limiting the risk of inadvertent disclosure of BCI. Finally, we note that, as in past disputes in which additional procedures to protect BCI were adopted, we will make every effort to draft our report without including BCI.

8. Bearing in mind the above considerations, we adopt the following additional procedures for the purposes of this appeal:

Additional Procedures to Protect Business Confidential Information

i. For the purpose of these appellate proceedings, BCI shall include: (i) the information marked by the participants as BCI and enclosed within square brackets in their submissions to the Appellate Body; and (ii) the information designated by the Panel as BCI in its Report and on the Panel record.

ii. The additional BCI protection in these appellate proceedings is provided according to the following terms, bearing in mind that the participants and third participants have already filed their written submissions:

a. No person may have access to information that qualifies as BCI, except a member of the Appellate Body or the staff of the Appellate Body Secretariat, an employee of a participant or third participant, or an outside advisor for the purposes of this dispute to a participant or third participant. 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, export, or import of the products that were the subject of the anti-dumping investigation at issue in this dispute.

b. A participant or third participant having access to BCI shall treat it as confidential and shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Each participant and third participant shall have responsibility in this regard for its employees as well as for any outside advisors employed 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.

c. A participant or third participant that submits a document (including written submissions and oral statements) containing BCI to the Appellate Body after the adoption of these BCI procedures shall clearly identify such information in the document filed. The participant or

[8] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.313. (emphasis original)

[9] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.316.

third participant shall mark the cover and/or first page of the document containing BCI, and each subsequent page of the document, to indicate the presence of such information. The specific information in question shall be placed within double brackets, as follows: [[…]]. 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.

d. A participant or third participant that intends to make an oral statement at the hearing containing BCI shall inform the Division in advance, such that the Division can ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement.

e. The Appellate Body 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 Appellate Body may, however, make statements of conclusion drawn from that information.

f. These terms shall apply to the presentation of information designated as BCI submitted to the Appellate Body prior to the adoption of these BCI procedures.

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