



## **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

<b>Contents</b>		<b>Page</b>
Annex A-1	Japan's Notice of Appeal	4
Annex A-2	Korea's Notice of Other Appeal	8

**ANNEX B**

## ARGUMENTS OF THE PARTICIPANTS

<b>Contents</b>		<b>Page</b>
Annex B-1	Executive summary of Japan's appellant's submission	12
Annex B-2	Executive summary of Korea's other appellant's submission	21
Annex B-3	Executive summary of Korea's appellee's submission	27
Annex B-4	Executive summary of Japan's appellee's submission	35

**ANNEX C**

## ARGUMENTS OF THE THIRD PARTICIPANTS

<b>Contents</b>		<b>Page</b>
Annex C-1	Executive summary of the European Union's third participant's submission	40
Annex C-2	Executive summary of the United States' third participant's submission	42

**ANNEX D**

## PROCEDURAL RULINGS

<b>Contents</b>		<b>Page</b>
Annex D-1	Procedural ruling of 6 June 2018 regarding the European Union's request to extend the third participants' submission deadline	44
Annex D-2	Procedural ruling of 26 March 2019 regarding BCI	45

**ANNEX A**

NOTICES OF APPEAL AND OTHER APPEAL

<b>Contents</b>		<b>Page</b>
Annex A-1	Japan's Notice of Appeal	4
Annex A-2	Korea's Notice of Other Appeal	8

**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,<sup>1</sup> and where indicated to complete the analysis.

1. With respect to Japan's claim<sup>2</sup> 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<sup>3</sup> 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

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\* This notification, dated 28 May 2018, was circulated to Members as document WT/DS504/5.

<sup>1</sup> 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.

<sup>2</sup> Panel Request, page 2, para. 7.

<sup>3</sup> 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<sup>4</sup> 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<sup>5</sup> 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

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<sup>4</sup> Panel Request, page 1, para. 2.

<sup>5</sup> 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<sup>6</sup> 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<sup>7</sup> 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

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<sup>6</sup> Panel Request, page 1, para. 3.

<sup>7</sup> Panel Request, page 2, para. 6.

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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<sup>8</sup> 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<sup>9</sup> 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.

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<sup>8</sup> Panel Request, page 2, para. 4.

<sup>9</sup> 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.<sup>1</sup>

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;<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup>

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,<sup>6</sup> 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

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\*This notification, dated 4 June 2018, was circulated to Members as document WT/DS504/6.

<sup>1</sup> 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.

<sup>2</sup> Panel Report, para. 8.4(a).

<sup>3</sup> Panel Report, para. 8.4(b)-(c).

<sup>4</sup> Panel Report, paras. 7.244, and 8.2(b)-(d).

<sup>5</sup> Panel Report, paras. 7.222, 7.234, and 7.241.

<sup>6</sup> Panel Report, paras. 7.349, and 8.4(a).

thereby rendering inutile Articles 3.2 and 3.4;<sup>7</sup> (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;<sup>8</sup> (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;<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup> 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.<sup>12</sup>

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

<sup>7</sup> Panel Report, paras. 7.250-258 (Volume), 7.259-323 (Prices), and 7.324-347 (Impact).

<sup>8</sup> 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.

<sup>9</sup> Panel Report, paras. 7.266-7.272, and 7.297-7.323.

<sup>10</sup> Panel Report, para. 7.323, 7.349 without consideration of Panel Report, para. 7.361, para. 7.389.

<sup>11</sup> Panel Report, paras. 7.418, and 8.2(e).

<sup>12</sup> Panel Report, para. 7.416.

submitters did not show good cause for the confidential treatment of that information.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> 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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<sup>13</sup> Panel Report, para. 7.441.

<sup>14</sup> Panel Report, paras. 7.438 - 7.440.

<sup>15</sup> Panel Report, paras. 7.450, 7.451, and 8.4(c).

**ANNEX B**

ARGUMENTS OF THE PARTICIPANTS

<b>Contents</b>		<b>Page</b>
Annex B-1	Executive summary of Japan's appellant's submission	12
Annex B-2	Executive summary of Korea's other appellant's submission	21
Annex B-3	Executive summary of Korea's appellee's submission	27
Annex B-4	Executive summary of Japan's appellee's submission	35

**ANNEX B-1****EXECUTIVE SUMMARY OF JAPAN'S APPELLANT'S SUBMISSION<sup>1</sup>**

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.

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<sup>1</sup> 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.

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**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 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<sup>1</sup>****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<sup>2</sup> 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.<sup>3</sup> 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

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<sup>1</sup> Total number of words of the Other Appellant Submission = 46,011; total number of words of the Executive Summary = 4032.

<sup>2</sup> Panel Report, para. 8.4.

<sup>3</sup> 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<sup>4</sup> 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

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<sup>4</sup> 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,<sup>5</sup> 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.

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<sup>5</sup> 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<sup>1</sup>**

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

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<sup>1</sup> 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.<sup>2</sup> 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

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<sup>2</sup> Appellate Body Report, *Thailand – H-Beams*, paras. 94-95.

stages of the panel proceeding to specific allegations under each claim.<sup>3</sup> 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".<sup>4</sup> 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".<sup>5</sup>

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".<sup>6</sup> 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.

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<sup>3</sup> 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).

<sup>4</sup> 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.

<sup>5</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162 (quoting Appellate Body Report, *Thailand – H-Beams*, para. 88).

<sup>6</sup> 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.<sup>7</sup> It is essentially required that the panel fully explores the issue in question in order for the Appellate Body to complete the legal analysis.<sup>8</sup> 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.<sup>9</sup>

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.

<sup>7</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 342.

<sup>8</sup> Appellate Body Reports, *Colombia – Textiles*, para. 5.30; and *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.124.

<sup>9</sup> 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".<sup>10</sup>

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",<sup>11</sup> 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.

<sup>10</sup> Japan's appellant submission, para. 267.

<sup>11</sup> 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"<sup>12</sup> and "never explained"<sup>13</sup> its findings or simply failed to make "an objective examination"<sup>14</sup> 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"<sup>15</sup> or "too narrowly"<sup>16</sup> 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"<sup>17</sup> 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"<sup>18</sup> 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"<sup>19</sup> and "ignored"<sup>20</sup> 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

<sup>12</sup> Japan's appellant submission, para. 284.

<sup>13</sup> Japan's appellant submission, para. 286.

<sup>14</sup> Japan's appellant submission, para. 287.

<sup>15</sup> See, e.g. Japan's appellant submission, para. 281.

<sup>16</sup> See, e.g. Japan's appellant submission, paras. 277, 282.

<sup>17</sup> Japan's appellant submission, para. 295.

<sup>18</sup> Japan's appellant submission, para. 295.

<sup>19</sup> Japan's appellant submission, para. 299.

<sup>20</sup> 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".<sup>21</sup> 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.

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<sup>21</sup> Japan's appellant submission, para. 300.

**ANNEX B-4****EXECUTIVE SUMMARY OF JAPAN'S APPELLEE'S SUBMISSION<sup>1</sup>**

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

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<sup>1</sup> 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 inconsistency. 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

<b>Contents</b>		<b>Page</b>
Annex C-1	Executive summary of the European Union's third participant's submission	40
Annex C-2	Executive summary of the United States' third participant's submission	42

**ANNEX C-1****EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S THIRD PARTICIPANT'S SUBMISSION<sup>1</sup>****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.

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<sup>1</sup> 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

<b>Contents</b>		<b>Page</b>
Annex D-1	Procedural ruling of 6 June 2018 regarding the European Union's request to extend the third participants' submission deadline	44
Annex D-2	Procedural ruling of 26 March 2019 regarding BCI	45

**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**

<u>Process</u>	<u>Rule</u>	<u>Date</u>
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)	<del>Monday, 18 June 2018</del> <b>Friday, 22 June 2018</b>
Third participants' notifications	Rule 24(2)	<del>Monday, 18 June 2018</del> <b>Friday, 22 June 2018</b>

**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.<sup>1</sup> 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.<sup>2</sup>
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.<sup>3</sup> 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.<sup>4</sup> 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"<sup>5</sup>, and "ensure that the public version of its report circulated to all Members of the WTO is understandable."<sup>6</sup>
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.<sup>7</sup> 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

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<sup>1</sup> Panel Report, para. 1.7 and Annex A-2.

<sup>2</sup> These include the disputes in *EC and certain member States – Large Civil Aircraft, US – Large Civil Aircraft (2<sup>nd</sup> complaint), US – Tax Incentives, US – Washing Machines, and EU – Fatty Alcohols*.

<sup>3</sup> 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.

<sup>4</sup> 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).

<sup>5</sup> For example, Articles 12.7 and 16 of the DSU. See Appellate Body Report, *Japan – DRAMS (Korea)*, para. 279.

<sup>6</sup> Appellate Body Report, *Japan – DRAMS (Korea)*, para. 279.

<sup>7</sup> 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*"<sup>8</sup>, 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".<sup>9</sup> 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

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<sup>8</sup> Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.313. (emphasis original)

<sup>9</sup> 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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