

the meaning of Article 6.9, prior to which the required disclosure of essential facts should have occurred. Moreover, the Panel made no findings as to whether, in the investigation at issue, the KTC's Final Resolution and the OTI's Final Report constitute the last and complete piece of the disclosure documents that formed the basis for the Final Decision by the MOSF, or, alternatively, whether the disclosure of essential facts was made *earlier* in the proceedings through the OTI's Preliminary Report dated 26 June 2014, the KTC's Preliminary Resolution dated 26 June 2014, and the OTI's Interim Report dated 23 October 2014. Findings regarding these issues are necessary in order to determine which of the documents referred to by the participants may be regarded as the disclosure documents, whose content must be scrutinized for assessing the Korean investigating authorities' compliance with Article 6.9.

5.479. The participants present conflicting views with respect to the issues described above. Therefore, there is considerable uncertainty regarding which documents should be examined for purposes of determining whether the Korean investigating authorities properly disclosed the "essential facts" under consideration, as required by Article 6.9 of the Anti-Dumping Agreement. Agreeing with Japan that the "final determination" within the meaning of Article 6.9 is the KTC's Final Resolution would mean that the assessment under Article 6.9 should be conducted on the basis of the documents issued *before* the KTC's Final Resolution, which include: (i) the OTI's Preliminary Report; (ii) the KTC's Preliminary Resolution; and (iii) the OTI's Interim Report. By contrast, agreeing with Korea that the "final determination" under Article 6.9 is the MOSF's decision from 19 August 2015 that resulted in the adoption of Decree No. 498 would mean that compliance with Article 6.9 should be primarily determined on the basis of: (i) the KTC's Final Resolution; and (ii) the OTI's Final Report.

5.480. In light of the above considerations, it is clear that there are no Panel findings, undisputed facts on the record, or a sufficient exploration by the Panel of certain key issues<sup>1202</sup>, for the purpose of determining *when* the "final determination" within the meaning of Article 6.9 was reached in the investigation at issue and *which* are the "disclosure" documents for purposes of Article 6.9. Therefore, we are unable to ascertain which document constitutes the "final determination" in the investigation at issue, such that the relevant documents issued by the Korean investigating authorities *prior to* the issuance of that final determination could be examined to assess whether they properly disclosed the essential facts "before a final determination is made" and "in sufficient time for the parties to defend their interests". Resolution of these issues is needed to determine whether Korea acted inconsistently with Article 6.9 by failing to disclose the "essential facts" with respect to price effects, the volume of the dumped imports, the state of the domestic industry, and causation.<sup>1203</sup>

5.481. We conclude that, because key issues were left unexplored by the Panel and there is a lack of sufficient factual findings by the Panel and uncontested facts on the record, there is considerable uncertainty regarding *when* the "final determination" was reached in the investigation at issue and *which* are the "disclosure" documents for purposes of Article 6.9. There is therefore no basis for us to determine whether Korea acted inconsistently with Article 6.9 by failing to disclose the "essential facts" under consideration. Consequently, we find ourselves unable to complete the legal analysis with regard to Japan's claim that Korea acted inconsistently with Article 6.9 of the Anti-Dumping Agreement.

## 6 FINDINGS AND CONCLUSIONS

6.1. For the reasons set out in this Report, the Appellate Body makes the following findings and conclusions:

### 6.1 Overall considerations regarding the legal standard under Article 6.2 of the DSU

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

<sup>1202</sup> See para. 5.475 above.

<sup>1203</sup> Japan's appellant's submission, para. 334.

determined on the face of the panel request, on a case-by-case basis. Defects in the request for the establishment of a panel cannot be cured in the subsequent submissions of the parties during the panel proceedings. However, in considering the sufficiency of a panel request, submissions and statements made during the course of the panel proceedings, in particular the first written submission of the complaining party, may be consulted in order to confirm the meaning of the words used in the panel request.

6.3. In order to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly" pursuant to Article 6.2 of the DSU, a panel request must plainly connect the measure(s) with the provision(s) of the covered agreements claimed to have been infringed. The identification of the treaty provision claimed to have been violated by the respondent is "always necessary" and a "minimum prerequisite", but may not be sufficient to meet the above requirement of Article 6.2 depending on the particular circumstances of a case. Such circumstances include the nature of the measure at issue and the manner in which it is described in the panel request, as well as the nature of the provisions of the covered agreements alleged to have been breached.

## **6.2 Domestic industry**

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

6.4. Japan's panel request refers to both Articles 3.1 and 4.1 of the Anti-Dumping Agreement and thus identifies the provisions of the covered agreements alleged to have been breached. Japan's claim also makes clear that it relates specifically to the portion of the measure at issue concerning the definition of the domestic industry and its alleged inconsistency with Korea's obligation under Articles 3.1 and 4.1. In turn, Articles 3.1 and 4.1 together establish a distinct, well-delineated obligation regarding the definition of the domestic industry. Thus, Japan's claim 7 "provide[s] a brief summary of the legal basis of the complaint sufficient to present the problem clearly" within the meaning of Article 6.2 of the DSU. For the foregoing reasons, we find that the Panel erred in finding that claim 7 in Japan's panel request was not within its terms of reference.

- a. Consequently, we reverse the Panel's finding, in paragraphs 7.67 and 8.1.a of the Panel Report, and find that Japan's claim 7 is within the Panel's terms of reference.

### **6.2.2 Whether the Appellate Body can complete the legal analysis**

6.5. In defining the domestic industry as a "major proportion" of the total domestic production, an investigating authority is required to assess both quantitative and qualitative aspects, and ensure that it does not act in a manner that gives rise to a material risk of distortion. As discussed in section 5.2.2 above, we are unable to complete the legal analysis with regard to the above aspects of the "major proportion" requirement. First, in the absence of relevant factual findings by the Panel or undisputed facts on the Panel record, we are unable to assess whether the KTC considered the available evidence objectively in calculating the proportion of the total domestic production accounted for by the applicants. In addition, we do not have sufficient factual findings by the Panel or undisputed facts on the Panel record to assess whether the two applicants included in the definition of the domestic industry were sufficiently representative of the total domestic production, or whether the Korean investigating authorities' process of defining the domestic industry introduced a material risk of distortion.

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

## **6.3 Determination of injury**

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

6.6. Japan's claim 1 identifies both Articles 3.1 and 3.2 of the Anti-Dumping Agreement as the provisions alleged to have been breached, and indicates that it relates to "Korea's analysis of a significant increase of the imports under investigation". This claim thus identifies the provisions of

the covered agreements alleged to have been breached. It further makes clear that it concerns the specific portion of the measure at issue relating to the Korean investigating authorities' consideration of the volume of the dumped imports and its alleged inconsistency with Articles 3.1 and 3.2 of the Anti-Dumping Agreement. With regard to volume, Article 3.1 and the first sentence of Article 3.2 together establish a distinct and well-delineated obligation that the investigating authorities make an objective examination of whether there has been a significant increase in dumped imports on the basis of positive evidence. Thus, Japan's claim 1 "provide[s] a brief summary of the legal basis of the complaint sufficient to present the problem clearly" within the meaning of Article 6.2 of the DSU. For the foregoing reasons, we find that the Panel erred in finding that Japan's claim 1, concerning the volume of the dumped imports, was not within its terms of reference.

- a. Consequently, we reverse the Panel's finding, in paragraphs 7.94 and 8.1.b of the Panel Report, and find that Japan's claim 1 is within the Panel's terms of reference.

### **6.3.2 Whether the Panel erred in finding that Japan's claim 2 concerning the price effects was not within its terms of reference**

6.7. Japan's claim 2 identifies both Articles 3.1 and 3.2 of the Anti-Dumping Agreement as the provisions alleged to have been breached. In addition, Japan's panel request indicates that this claim concerns the specific portion of the measure at issue that relates to the Korean investigating authorities' consideration of the price effects of the dumped imports, more precisely significant price suppression and price depression, and its alleged inconsistency with Articles 3.1 and 3.2. With regard to price effects, the second sentence of Article 3.2, in conjunction with Article 3.1, sets out an obligation that is distinct and well defined, with, at its core, the requirement to consider, on the basis of an objective examination of positive evidence, whether the effect of the dumped imports on domestic prices consists of the economic phenomena contained therein, including significant price suppression and price depression. Therefore, Japan's claim 2 "provide[s] a brief summary of the legal basis of the complaint sufficient to present the problem clearly" within the meaning of Article 6.2 of the DSU. For the foregoing reasons, we find that the Panel erred in finding that Japan's claim 2, concerning the price effects of the dumped imports, was not within its terms of reference.

- a. Consequently, we reverse the Panel's finding, in paragraphs 7.131 and 8.1.c of the Panel Report, and find that Japan's claim 2 is within the Panel's terms of reference.

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

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

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

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

6.9. Japan's claim 4 identifies Articles 3.1 and 3.5 of the Anti-Dumping Agreement as the provisions alleged to have been breached, and relates specifically to the Korean investigating authorities' alleged failure to demonstrate that the imports under investigation were causing injury to the domestic industry. While Article 3.5, together with Article 3.1, establishes obligations that are multilayered, Japan has indicated which aspect of the obligations set forth in Articles 3.1 and 3.5 is alleged to have been breached. Japan's claim 4, on its face, is about the alleged failure to demonstrate the causal relationship on the basis of an "objective examination" of "all relevant ... evidence before the authorities" as required under Article 3.5, in particular its second sentence, as well as under Article 3.1. Thus, Japan's claim 4 "provide[s] a brief summary of the legal basis of the complaint sufficient to present the problem clearly" within the meaning of Article 6.2 of the DSU. For these reasons, we find that the Panel did not err in finding that Japan's claim 4 was within its terms of reference.

- a. Consequently, we uphold the Panel's finding in paragraphs 7.235 and 8.2.c of the Panel Report.

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

6.10. Japan's claim 5 identifies Articles 3.1 and 3.5 of the Anti-Dumping Agreement as the provisions alleged to have been breached, and relates to a specific aspect of the causation determination, namely the Korean investigating authorities' examination of the non-attribution factors. While Articles 3.1 and 3.5 establish obligations that are multilayered, Japan has identified which aspect of the provisions its claim concerns, namely the requirement not to attribute to the dumped imports the injuries caused by any known factors other than the dumped imports. Thus, Japan's claim 5 "provide[s] a brief summary of the legal basis of its complaint sufficient to present the problem clearly" within the meaning of Article 6.2 of the DSU. For the foregoing reasons, we find that the Panel did not err in finding that part of Japan's claim 5, with regard to Korea's alleged failure to consider adequately all known factors other than the dumped imports causing injury, was within its terms of reference.

- a. Consequently, we uphold the Panel's finding, in paragraphs 7.241 and 8.2.d of the Panel Report, that Japan's claim under Articles 3.1 and 3.5 of the Anti-Dumping Agreement, insofar as it relates to the alleged failure of the Korean investigating authorities to examine certain known factors adequately and their examination of those factors in isolation, is properly within the Panel's terms of reference.

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

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

- a. Consequently, we uphold the Panel's finding in paragraphs 7.226 and 8.2.b of the Panel Report.

### **6.3.7 Magnitude of the margin of dumping**

6.12. Articles 3.1 and 3.4 require an investigating authority to evaluate the magnitude of the margin of dumping, and to assess its relevance and the weight to be attributed to it in the injury assessment. However, we do not consider that these provisions require any one of the listed factors, such as the magnitude of the margin of dumping, to be evaluated in a particular manner or given a particular relevance or weight, in examining the impact of the dumped imports on the domestic industry. Therefore, we find that the Panel did not err in its interpretation of Articles 3.1 and 3.4 of the Anti-Dumping Agreement with respect to the evaluation of the magnitude of the margin of dumping. In addition, we find that Japan has failed to substantiate that: (i) the Korean investigating authorities did not evaluate the magnitude of the margin of dumping as required under Articles 3.1 and 3.4; and (ii) the Korean investigating authorities were required to conduct a counterfactual analysis in light of the facts of the case.

- a. Consequently, we uphold the Panel's finding, in paragraphs 7.189-7.192 and 8.3.a of the Panel Report, that Japan failed to establish that the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement with respect to their evaluation of the magnitude of the margin of dumping.

### **6.3.8 Causation**

#### **6.3.8.1 Whether the Panel erred in its interpretation or application of Article 3.5 in addressing Japan's claim 6**

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

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

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

assessment of the causation claim at issue. We therefore consider the Panel to have erred in its application of Article 3.5.

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

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

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



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

#### **6.3.8.2 Whether the Panel erred in its interpretation or application of Article 3.5 in addressing Japan's claim 4**

6.19. In addressing Japan's volume-related arguments in the context of claim 6, the Panel reviewed the requirements under Article 3.2, first sentence, as opposed to those under Article 3.5. Thus, the Panel effectively incorporated the requirements in Article 3.2, first sentence, concerning the volume of dumped imports in its assessment of Japan's claim under Article 3.5, rather than applying properly the requirements set out in Article 3.5. Given that the Panel relied on the same considerations in rejecting Japan's arguments concerning the lack of correlation in volume trends in the context of the causation claim at issue (claim 4), we find the Panel's finding in this regard to be in error.

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

6.21. With respect to profit trends, neither the Panel nor the KTC ignored the alleged lack of correlation between the domestic-industry profit, dumped import prices, and the volume and market share of the dumped imports. For these reasons, we reject Japan's argument that the KTC's discussion on this issue was deficient, and that the Panel should have recognized this alleged deficiency. We do not see any error in the Panel's finding that Japan has failed to establish that the insufficient correlation between dumped imports and trends in domestic-industry profits demonstrates that a reasonable and unbiased investigating authority could not have properly found the required causal relationship between the dumped imports and injury to the domestic industry in light of the facts and arguments that were before the KTC.

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

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

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

6.22. Japan makes certain arguments in support of its present claim under Articles 3.1 and 3.2 that are identical to those addressed by the Panel in the context of claim 6. Japan argues that the KTC

acted inconsistently with Articles 3.1 and 3.2 by "improperly" finding a "significant increase" in subject imports, even though the volume of such imports "actually fell in two out of three of the comparison periods and ended the overall period up only slightly on an absolute basis and actually down on a relative basis". Thus, like its argument in the context of claim 6, Japan focuses on the alleged failure by the KTC to take into account the decrease of import volumes in absolute terms during the first two years of the POI, and the decrease of import volumes in relative terms, in finding that there was a "significant increase" in the volume of imports. The Panel's analysis of Japan's identical arguments in the context of claim 6 properly reviewed the requirements set out in Article 3.2, first sentence.

6.23. However, Japan's arguments in the context of its present claim under Articles 3.1 and 3.2 concerning the volume of dumped imports, regarding which it requests us to complete the legal analysis, encompass broader considerations than those contained in the findings by the Panel, namely that: (i) the KTC improperly assumed a competitive relationship between domestic like products and subject imports; and (ii) the KTC improperly found a "significant increase" in subject imports without examining whether the increased imports actually replaced domestic like products through market competition. The Panel did not sufficiently explore these issues with the participants. Moreover, the underlying factual bases pertaining to these issues are contested between the participants. Confronted with these circumstances, completion of the legal analysis with respect to these issues is hindered by the absence of relevant factual findings, sufficient undisputed facts on the panel record, and a sufficient exploration by the Panel. Thus, engaging in the completion exercise would require us to review and consider evidence and arguments that were not sufficiently addressed by the Panel or sufficiently explored and developed before the Panel.

- a. Consequently, we find ourselves unable to complete the legal analysis as to whether the Korean measures are inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement with respect to the Korean investigating authorities' consideration of the volume of dumped imports.

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

6.24. Japan requests us to complete the legal analysis and find that the Korean investigating authorities failed to meet their obligations under Articles 3.1 and 3.2 of the Anti-Dumping Agreement because: (i) the KTC failed to ensure the price comparability; (ii) the KTC failed to consider the implications of overselling by the dumped imports; and (iii) the KTC largely ignored the diverging price trends. Japan also contends that the KTC erred in its findings because it failed to address the counterfactual question of how prices might have been different in the absence of dumping and the KTC never considered whether the alleged price suppression and price depression were significant. Finally, Japan contends that the "reasonable sales price" analysis conducted by the KTC was "flawed and insufficient".

6.25. With respect to price comparability and price overselling, Japan raised identical arguments in the context of claim 6. The Panel's analyses and findings, although made in the context of claim 6, were nonetheless in line with and properly conducted under the requirements set out in Article 3.2, second sentence. The flaws that the Panel identified concerned the objectivity and evidentiary foundation of the KTC's price suppression and price depression findings under Articles 3.1 and 3.2. Therefore, as the Korean investigating authorities found price-suppressing and -depressing effects of dumped imports based on (i) the transaction-to-average price comparisons without ensuring price comparability and (ii) failed to provide an explanation and analysis of how and to what extent the prices of the domestic like product were affected in light of the consistent overselling by dumped imports, we find them to have acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement. With respect to diverging price trends, Japan raised an identical argument in the context of claim 6. The Panel's findings, although made in the context of claim 6, properly reviewed the Korean investigating authorities' examination of the relationship between the prices of the dumped imports and those of the domestic like products, in order to ascertain the effects of the former on the latter. This corresponds to an examination properly conducted pursuant to Article 3.2, second sentence. The Panel properly reviewed the Korean investigating authorities' consideration of the diverging price trends in light of the requirements set out in Article 3.2, second sentence, and found it reasonable and supported by facts. We therefore reject Japan's allegation that the KTC "largely ignored" the diverging price trends. Accordingly, we find that the Korean investigating authorities



did not act inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement with respect to their consideration of diverging price trends.

6.26. With respect to Japan's arguments concerning (i) the KTC's failure to address the counterfactual question of how prices might have been different in the absence of dumping, (ii) the KTC's failure to address whether the alleged price suppression and price depression were significant, and (iii) whether the "reasonable sales price" analysis conducted by the KTC was "flawed and insufficient", the Panel never explored these arguments with the parties. Moreover, the parties disagree with respect to the factual bases underlying these arguments. Therefore, given the limited scope and nature of the Panel's factual findings and the limited undisputed record evidence in this regard, our attempt to complete the legal analysis involving such competing arguments would require us to review and consider evidence and arguments that were not sufficiently addressed by the Panel or sufficiently explored and developed before the Panel.

- a. For the foregoing reasons, we find that we are able to complete the legal analysis in part. For the reasons explained above, we find that the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement: (i) to the extent that they found price-suppressing and -depressing effects of dumped imports based on the relevant price comparisons without ensuring price comparability; and (ii) in the absence of any explanation and analysis of how and to what extent the prices of the domestic like product were affected in light of the consistent overselling by the dumped imports when finding price suppression and price depression. We also find that the Korean investigating authorities did not act inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement with respect to their consideration of diverging price trends.
- b. However, for the reasons explained above, we find ourselves unable to complete the legal analysis as to whether the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.2 on the basis of Japan's arguments that: (i) the KTC failed to address the counterfactual question of how prices might have been different in the absence of dumping; (ii) the "reasonable sales price" analysis was flawed and insufficient, as the KTC failed to examine market interactions between the subject imports and domestic like products; and (iii) the KTC never considered whether the alleged price suppression and price depression were "significant".

#### **6.3.9.3 Whether the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement in their consideration of the impact of dumped imports on the state of the domestic industry**

6.27. Japan argues that the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement because the KTC did not establish any logical link between its findings regarding the volume and price effects under Article 3.2 of the Anti-Dumping Agreement and its finding of impact under Article 3.4. We recall that in reviewing the Panel's finding in the context of claim 6, where Japan raised an identical argument, we have agreed with the Panel that, in order to examine the impact of dumped imports on the domestic industry properly *for purposes of Article 3.4*, an investigating authority is not required to link that examination with its consideration of the volume and the price effects of the dumped imports. We have also rejected above Japan's understanding that Article 3.4 contemplates an exhaustive analysis of all known factors that may cause injury to the domestic industry. However, Japan's arguments in the context of its present claim under Articles 3.1 and 3.4, regarding which it requests us to complete the legal analysis, encompass broader considerations. Not only does Japan make an argument about the positive trend experienced by the domestic industry with respect to domestic sales, but Japan also asserts that the KTC attached a high degree of importance to the other relevant factors highlighting negative aspects of the domestic industry, while disregarding or downplaying those factors that showed positive trends. Thus, Japan's contention that, in so doing, the KTC acted inconsistently with Articles 3.1 and 3.4 would require us to review the KTC's examination of impact and the weight it attributed to each of the factors listed in Article 3.4 regarding which the Panel, notably, made no findings. Such an exercise would require us to review and consider evidence and arguments that were not sufficiently addressed by the Panel or sufficiently explored and developed before the Panel.

- a. Consequently, we find ourselves unable to complete the legal analysis as to whether the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement on the basis of Japan's argument that the KTC failed to explain

adequately how imports had negatively impacted the domestic like products as a whole in light of positive trends experienced by the domestic industry.

#### **6.4 Confidential treatment of information**

##### **6.4.1 Whether the Panel erred in finding that Japan's claims 8 and 9 concerning the confidential treatment of information were within its terms of reference**

6.28. Japan's claims 8 and 9 concerning the confidential treatment of information identify Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement, respectively, as the provisions alleged to have been breached. Japan's claims also indicate that they relate, respectively, to the specific portion of the measure concerning Korea's treatment of certain information as confidential under Article 6.5 of the Anti-Dumping Agreement and Korea's treatment of non-confidential summaries of confidential information under Article 6.5.1 of the Anti-Dumping Agreement. Article 6.5 establishes a clear and well-delineated obligation for investigating authorities to treat information submitted by parties to an investigation as confidential if it is "by nature" confidential or "provided on a confidential basis", and "upon good cause shown". In addition, Japan's claim 9 refers to the first two sentences of Article 6.5.1, which set forth a clear and well-delineated obligation for the investigating authority to require non-confidential summaries in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. Therefore, Japan's claims 8 and 9 each "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly" within the meaning of Article 6.2 of the DSU. For the foregoing reasons, we find that the Panel did not err in finding that Japan's claims 8 and 9, concerning the confidential treatment of information, were within its terms of reference.

- a. Consequently, we uphold the Panel's findings in paragraphs 7.418 and 8.2.e of the Panel Report.

##### **6.4.2 Whether the Panel erred in its interpretation or application of Article 6.5 of the Anti-Dumping Agreement**

6.29. In articulating the legal standard under Article 6.5, the Panel did *not* pronounce on the specific manner in which investigating authorities should specify that "good cause" was shown when granting confidential treatment to certain information. Under Article 6.5, an investigating authority is required to assess objectively whether the request for confidential treatment has been sufficiently substantiated such that "good cause" has been shown. The fact that the investigating authority has conducted this objective assessment must be *discernible* from its published report or related supporting documents. The Panel's analysis comports with the legal standard under Article 6.5. Consequently, we find that the Panel did not err in its interpretation of Article 6.5.

6.30. Furthermore, with respect to the investigation at issue, the Panel stated that it could not "conclude that the Korean Investigating Authorities actually engaged in a consideration of whether the submitters of the information had shown good cause for confidential treatment of the information in question". Korea argues that, in providing non-confidential summaries by way of deleting the relevant information from their submissions, the providers of the information "implicitly" asserted that such deleted information fell within the categories of "confidential information" set forth in the relevant Korean laws. In Korea's view, as a consequence of that "implicit" assertion, "good cause" was "shown" for granting confidential treatment to that information. As noted, the Panel was not convinced by this argument because there is *no evidence on the record* "linking the information for which confidential treatment was granted to the categories of information warranting confidential treatment identified in Korean law". Neither is there evidence suggesting that "the Korean Investigating Authorities themselves undertook to link the information for which confidential treatment was sought to the categories defined in Korean legislation and thereby determine whether good cause for confidential treatment existed." Given these Panel findings, we disagree with Korea's assertion that, "when [the] KTC received information that was considered confidential by the interested parties, it objectively assessed whether there was indeed 'good cause' by confirming whether the deleted information fell within a category of confidential information enumerated in the relevant Korean laws." Consequently, we find that the Panel did not err in its application of Article 6.5.

- a. Consequently, we uphold the Panel's finding, in paragraphs 7.441, 7.451, and 8.4.b of the Panel Report, that Japan demonstrated that the Korean investigating authorities acted inconsistently with Article 6.5 of the Anti-Dumping Agreement with respect to their treatment of information provided by the applicants as confidential without requiring that good cause be shown.

#### **6.4.3 Whether the Panel erred in its application of Article 6.5.1 of the Anti-Dumping Agreement**

6.31. Article 6.5.1 mandates investigating authorities to require non-confidential summaries from interested parties providing confidential information. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In the present dispute, the Panel found that, "[i]n the complete *absence of data*, and with *no narrative summary* with respect to the deleted information, the 'Disclosed' versions of the three communications identified by Japan cannot be said to contain a summary in sufficient detail to 'permit a reasonable understanding of the substance of the information submitted in confidence'." Korea does not challenge the Panel's appreciation of the facts under Article 11 of the DSU leading to the above finding. Instead, Korea repeats certain arguments that the Panel had already rejected without explaining why the Panel's analysis constitutes a *misapplication* of Article 6.5.1. In light of the applicable legal standard and the reasoning provided by the Panel, we fail to see how the versions of the submissions from which confidential information had been redacted could satisfy the legal standard of being non-confidential summaries that are "in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence". In these circumstances, we disagree with Korea's argument that "[the] KTC did not fail to require the applicants to provide sufficient non-confidential summaries of the confidential information."

- a. Consequently, we uphold the Panel's finding, in paragraphs 7.450, 7.451, and 8.4.c of the Panel Report, that Japan demonstrated that the Korean investigating authorities acted inconsistently with Article 6.5.1 of the Anti-Dumping Agreement by failing to require that the submitting parties provide a sufficient non-confidential summary of the information for which confidential treatment was sought.

#### **6.5 Essential facts**

##### **6.5.1 Whether the Panel erred in finding that Japan's claim 10 concerning the disclosure of essential facts was not within its terms of reference**

6.32. Japan's claim 10 concerning the disclosure of essential facts identifies Article 6.9 of the Anti-Dumping Agreement as the provision alleged to have been breached by Korea. Claim 10 also specifically refers to the Korean investigating authorities' failure "to inform the interested parties of the essential facts under consideration which formed the basis for the decision to impose definitive anti-dumping measures". In addition, Article 6.9 sets forth a distinct and well-delineated obligation requiring the investigating authority to disclose the essential facts to all interested parties in a timely manner, that is, before the final determination is made and in sufficient time for the parties to defend their interests. Thus, Japan's claim 10 "provide[s] a brief summary of the legal basis of the complaint sufficient to present the problem clearly" within the meaning of Article 6.2 of the DSU. For the foregoing reasons, we find that the Panel erred in finding that Japan's claim 10 concerning the disclosure of essential facts was not within its terms of reference.

- a. Consequently, we reverse the Panel's finding in paragraphs 7.517 and 8.1.f of the Panel Report, and find that Japan's claim 10 is within the Panel's terms of reference.

##### **6.5.2 Whether the Appellate Body can complete the legal analysis under Article 6.9 of the Anti-Dumping Agreement**

6.33. Because key issues were left unexplored by the Panel and there is a lack of sufficient factual findings by the Panel and uncontested facts on the record, there is considerable uncertainty regarding *when* the "final determination" was reached in the investigation at issue and *which* are the "disclosure" documents for purposes of Article 6.9 of the Anti-Dumping Agreement. There is therefore no basis for us to determine whether Korea acted inconsistently with Article 6.9 by failing to disclose the "essential facts" under consideration.

- a. Consequently, we find ourselves unable to complete the legal analysis with regard to Japan's claim that Korea acted inconsistently with Article 6.9 of the Anti-Dumping Agreement.

## **6.6 Recommendation**

6.34. The Appellate Body recommends that the DSB request Korea to bring its measures found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the Anti-Dumping Agreement, into conformity with its obligations under that Agreement.

Signed in the original in Geneva this 24th day of July 2019 by:

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Ujal Singh Bhatia  
Presiding Member

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Thomas R. Graham  
Member

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Shree B. C. Servansing  
Member

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