WORLD TRADE ORGANIZATION

WT/DS504/R/Add.1

12 Avril 2018

(18-2224)

KOREA - ANTI-DUMPING DUTIES ON PNEUMATIC VALVES FROM JAPAN

REPORT OF THE PANEL

Addendum

BCI deleted, as indicated [[***]]

This *addendum* contains Annexes A to D to the Report of the Panel to be found in document WT/DS504/R.

LIST OF ANNEXES

ANNEX A

WORKING PROCEDURES OF THE PANEL AND INTERIM REVIEW

ANNEX B

ARGUMENTS OF JAPAN

ANNEX C

ARGUMENTS OF KOREA

ANNEX D

ARGUMENTS OF THE THIRD PARTIES

ANNEX A

WORKING PROCEDURES OF THE PANEL AND INTERIM REVIEW

ANNEX A-1

WORKING PROCEDURES OF THE PANEL

KOREA — ANTI-DUMPING DUTIES ON PNEUMATIC VALVES FROM JAPAN (DS504)

Adopted on 15 November 2016

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public. The parties and third parties shall treat business confidential information in accordance with the procedures set forth in the Additional Working Procedures of the Panel Concerning Business Confidential Information.

3. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

5. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

6. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If Japan requests such a ruling, Korea shall submit its response to the request in its first written submission. If Korea requests such a ruling, Japan shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

7. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

8. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation of such exhibits or of their relevant parts into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. The Panel may grant exceptions to this procedure upon a showing of good cause. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation. Should a party become aware of any inaccuracies in the translations of the exhibits submitted by that party, it shall inform the Panel and the other party promptly, and provide a new translation.

9. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. For example, exhibits submitted by Japan could be numbered JPN-1, JPN-2, etc. If the last exhibit in connection with the first submission was numbered JPN-5, the first exhibit of the next submission thus would be numbered JPN-6.

Questions

10. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

Substantive meetings

11. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 12h00 (noon) the previous working day.

12. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite Japan to make an opening statement to present its case first. Subsequently, the Panel shall invite Korea to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 17h00 on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Japan presenting its statement first.

13. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask Korea if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite Korea to present its opening statement, followed by Japan. If Korea chooses not to avail itself of that right, the Panel shall invite Japan to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 17h00 of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

14. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

15. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 12h00 (noon) the previous working day.

16. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 17h00 of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to

which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive section

17. The description of the arguments of the parties and third parties in the descriptive section of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

18. Each party shall submit an integrated executive summary of the facts and arguments as presented to the Panel in its first written submission, first opening and closing oral statements and responses to questions following the first substantive meeting, and a separate integrated executive summary of its written rebuttal, second opening and closing oral statements and responses to questions following the second substantive meeting, in accordance with the timetable adopted by the Panel. Each integrated executive summary shall be limited to no more than 15 pages. The Panel will not summarize in a separate part of its report, or annex to its report, the parties' responses to questions.

19. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions, if relevant. The executive summary to be provided by each third party shall not exceed six pages.

20. The Panel reserves the right to request the parties and third parties to provide executive summaries of facts and arguments presented by a party or a third party in any other submissions to the Panel for which a deadline may not be specified in the timetable.

Interim review

21. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

22. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

23. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

24. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file three paper copies of all documents it submits to the Panel. Exhibits may be filed in two copies on CD-ROM or DVD and two paper copies. The DS Registrar shall stamp the documents with the date and time of the filing.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy to xxx@wto.org, xxx@wto.org and xxx@wto.org. If a CD-ROM or DVD is provided, it

shall be filed with the DS Registry. The paper version of documents shall constitute the official version for the purposes of the record of the dispute.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 17h00 (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive section, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

25. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES ON BUSINESS CONFIDENTIAL INFORMATION

KOREA — ANTI-DUMPING DUTIES ON PNEUMATIC VALVES FROM JAPAN (DS504)

Adopted on 15 November 2016

The following procedures apply to any business confidential information (BCI) submitted in the course of the Panel proceedings in DS504.

1. For the purposes of these Panel proceedings, BCI includes

    a. any information designated as such by the party submitting it that was previously treated as confidential by the investigating authority in the anti-dumping investigation at issue in this dispute unless the Panel decides it should not be treated as BCI for purposes of these Panel proceedings based on an objection by a party pursuant to paragraph 3 below.
    b. any other information designated as such by the party submitting it, unless the Panel decides it should not be treated as BCI for purposes of these Panel proceedings based on an objection by a party pursuant to paragraph 3 below.

2. Any information that is available in the public domain may not be designated as BCI. In addition, information previously treated as confidential by the investigating authority in the anti-dumping investigation at issue in this dispute may not be designated as BCI if the person who provided the information in the course of that investigation agrees in writing to make the information publicly available.

3. If a party or third party considers that information submitted by the other party or a third party should have been designated as BCI and objects to its submission without such designation, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, together with the reasons for the objection. Similarly, if a party or third party considers that the other party or a third party designated information as BCI which should not be so designated, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, together with the reasons for the objection. The Panel, in deciding whether information subject to an objection should be treated as BCI for purposes of these Panel proceedings, will consider whether disclosure of the information in question could cause serious harm to the interests of the originator(s) of the information.

4. No person may have access to BCI except a member of the Secretariat assisting the Panel or the Panel, an employee of a party or third party, or an outside advisor to a party or third party for the purposes of this dispute.

5. A party or third party having access to BCI in these Panel proceedings shall not disclose that information other than to persons authorized to have access to it pursuant to these procedures. Any information designated as BCI under these procedures shall only be used for the purposes of this dispute. Each party and third party is responsible for ensuring that its employees and/or outside advisors comply with these procedures to protect BCI.

6. An outside advisor of a party or third party is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the product(s) that was/were the subject of the investigation at issue in this dispute, or an officer or employee of an association of such enterprises. All third party access to BCI shall be subject to the terms of these working procedures.

7. The party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The

specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains Business Confidential Information", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page.

8. Any BCI that is submitted in binary-encoded form shall be clearly marked with the statement "Business Confidential Information" on a label of the storage medium, and clearly marked with the statement "Business Confidential Information" in the binary-encoded files.

9. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement. The written versions of such oral statements submitted to the Panel shall be marked as provided for in paragraph 7.

10. Any person authorized to have access to BCI under the terms of these procedures shall store all documents containing BCI in such a manner as to prevent unauthorized access to such information.

11. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not contain any information that the party has designated as BCI.

12. Submissions containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel's Report.

ANNEX A-3

INTERIM REVIEW

1 INTRODUCTION

1.1. In accordance with Article 15.3 of the DSU, this Annex sets out the Panel's discussion of the arguments made at the interim review stage. We have modified certain aspects of the Report in light of the parties' comments where we considered it appropriate, as explained below. In addition, we have made a number of changes of an editorial nature to improve the clarity and accuracy of the Report or to correct typographical and other non-substantive errors, certain of which were suggested by the parties.[1]

1.2. As a result of the changes that we have made, the numbering of paragraphs and footnotes in the Final Report has changed from that in the Interim Report. References to footnotes and paragraph numbers in this section relate to the Final Report, unless otherwise indicated.

2 SPECIFIC REQUESTS FOR REVIEW SUBMITTED BY THE PARTIES

2.1 Paragraph 7.41

2.1. Japan requests the Panel to modify paragraph 7.41 to more completely reflect the nature and structure of its arguments concerning the definition of the domestic industry. Korea objects to the proposed modifications. Korea argues that Japan's request does not explain why these modifications are necessary or in what way the Panel would have erred in describing Japan's arguments. Korea contends that the proposed changes are either not supported by Japan's written submissions, or are already accurately reflected in the Panel's characterization of Japan's arguments, or are in error.

2.2. In light of Japan's request, we have modified paragraph 7.41 to more completely reflect Japan's arguments.

2.2 Paragraph 7.49

2.3. Japan requests the Panel to modify paragraph 7.49 to reflect the fact that Japan challenged the objectivity of the 55.4% share of the domestic production by the two applicants forming part of the domestic industry. Korea does not support the proposed modifications. Korea argues that the proposed modifications are not accurate. Moreover, according to Korea, Japan fails to explain why its proposed additions are necessary in light of the already lengthy explanation provided by the Panel. Korea proposes alternative texts, in case the Panel accepts Japan's request.

2.4. In light of Japan's request, we have modified paragraph 7.49 to describe more completely the relevant facts.

2.3 Paragraph 7.52

2.5. Japan requests the Panel to modify paragraph 7.52 to record the details of the process in which the OTI examined the status of two domestic producers. Korea does not support the proposed modifications, which it considers to be unwarranted.

2.6. We have decided not to grant Japan's request. In our view, the proposed changes are not necessary and go beyond a factual description.

[1] These include changes in paragraphs 7.59; 7.100; 7.112(b) and (d); 7.130(d); 7.191; 7.192; 7.218; 7.330; 7.392; 7.542; and 8.2(a), and in footnotes 32; 68; 86; and 191.

2.4 Paragraph 7.68

2.7. Japan requests the Panel to modify paragraph 7.68 to more completely reflect the nature and structure of its arguments concerning the volume of the dumped imports. Korea objects to the proposed modifications. According to Korea, the Panel accurately summarized Japan's claims concerning the volume of the dumped imports, which is based on Japan's own summary of its claim in its first written submission.

2.8. With respect to the same paragraph, Korea requests that the Panel clarify that Japan's arguments were developed and submitted only in the course of the proceedings.

2.9. We have decided not to grant Japan's request. In our view, the text contains an accurate summary of Japan's arguments. Likewise, we have decided not to grant Korea's request. It is understood that the parties' arguments as set out by the Panel in the report are those developed and submitted in the course of the proceedings.

2.5 Paragraph 7.81

2.10. Japan requests the Panel to modify the wording in paragraph 7.81. According to Japan, the issue of whether the KTC considered if there was a significant increase in dumped imports is heavily contested. Korea objects to the proposed modifications. In Korea's view, the language used is accurate.

2.11. With respect to the third sentence of same paragraph, Korea requests that the Panel either delete the reference to the end-point to end-point market share or use the language in the KTC's Final Resolution. Korea suggests a revised text. Japan does not comment on this request.

2.12. We have decided not to grant Japan's request. The proposed changes are unnecessary, as the paragraph accurately reflects the Panel's understanding of the facts. With respect to Korea's request, we have adjusted the language used in the third sentence of paragraph 7.81 to reflect more closely the language used in the KTC's Final Resolution.

2.6 Paragraphs 7.98, 7.99, and 7.100

2.13. Japan requests the Panel to modify paragraphs 7.98 to 7.100 to better clarify its arguments. Korea objects to the proposed modifications. Korea argues that paragraphs 7.98 to 7.100 correctly summarize Japan's claim concerning price effect under Article 3.2 of the Anti-dumping Agreement as presented in Japan's submissions.

2.14. We have decided not to grant Japan's request. The proposed changes are unnecessary, as the paragraphs in question accurately reflect Japan's arguments concerning price effects as articulated in Japan's submissions.

2.7 Paragraph 7.99(b)

2.15. Japan requests the Panel to modify paragraph 7.99(b) to better clarify its arguments. Korea objects to the proposed modifications. In Korea's view, the suggested changes are an attempt by Japan to reconstruct its claims and arguments.

2.16. In light of Japan's request, we have modified paragraph 7.99(b) to more clearly reflect Japan's arguments.

2.8 Paragraph 7.103

2.17. Korea requests the Panel to modify paragraph 7.103 to clarify that it generally disagrees on the existence of a widely divergent price trend between the dumped imports and the domestic like products that would have undermined the explanatory force of the imported products for purposes of analysing developments in domestic prices. Japan does not comment on this request.

2.18. We have decided not to grant Korea's request. In our view, Korea's suggested addition is unnecessary and does not reflect the arguments of Korea as articulated in the course of the

proceedings. As noted in other sections of the Report and in the submissions quoted by Korea in its request, Korea did not dispute that there was some degree of divergence between the price trends of the dumped imports and the domestic like products. Korea's argument was that such divergent price trends did not undermine the KTC's finding of "market interaction".

2.9 Paragraph 7.108

2.19. Korea requests the Panel to modify paragraph 7.108 to more accurately reflect the findings in the KTC's Final Resolution. Japan does not comment on this request.

2.20. In light of Korea's request and the lack of objection from Japan, we have modified paragraph 7.108 to better reflect the language used in the KTC's Final Resolution and in Korea's own submissions.

2.10 Paragraph 7.109

2.21. Korea requests the Panel to modify paragraph 7.109 to indicate that the KTC was not, as argued by Japan, under an additional obligation to consider a counterfactual scenario under Article 3.2 of the Anti-Dumping Agreement. Japan does not comment on this request.

2.22. We have decided not to grant Korea's request. The paragraph in question accurately reflects Korea's arguments concerning price effects as articulated in Korea's submissions.

2.11 Paragraph 7.112

2.23. Japan requests the Panel to include a footnote to paragraph 7.112(b) to provide an explanation of the concept of the "price fluctuation index". Korea agrees with Japan that the mechanism of "price fluctuation index" should be explained in the Panel Report. Korea disagrees, however, with the inclusion in the footnote of a proposed factual finding regarding the price fluctuation index.

2.24. With respect to the same paragraph, Korea requests the Panel to modify subparagraphs (d) and (e), and to include a new subparagraph (f), to better reflect the KTC's considerations. Japan disagrees with the changes proposed by Korea at the end of subparagraph (d) and in subparagraph (e), as in its view this language is not part of the KTC's Final Resolution.

2.25. In light of Japan's request, we have inserted a footnote to paragraph 7.112(b) to explain the "price fluctuation index". We have decided not to grant Korea's request with respect to subparagraph (d), because the additional text suggested is not found in the part of the KTC's Final Resolution quoted in that section. In light of Korea's request, we have modified subparagraph (e) and added a new subparagraph (f), albeit not in the exact terms proposed by Korea, to better reflect the language used in the KTC's Final Resolution.

2.12 Paragraph 7.113

2.26. Korea requests the Panel to modify paragraph 7.113 to better reflect the KTC's considerations. Japan disagrees with the changes proposed by Korea, which in Japan's view are not part of the terms used in the KTC's Final Resolution.

2.27. We have decided not to grant Korea's request. The paragraph in question accurately reflects the language used in the KTC's Final Resolution. Also, some of the suggestions made by Korea refer to matters that are reflected elsewhere in the Report, but are not relevant for the Panel's findings in this section. We have, however, added to the second sentence in the paragraph the expression "*inter alia*" to reflect that this was not the only consideration for the KTC's findings of price suppression and price depression.

2.13 New paragraph between paragraphs 7.114 and 7.115

2.28. Japan requests the Panel to insert a new paragraph between paragraphs 7.114 and 7.115 to describe some facts, which in its view are relevant in assessing the objectiveness of the KTC's findings of "fierce competition" on the basis of the price differences. Korea objects to the

proposed modification. Korea argues that by including the proposed new paragraph, Japan is requesting the Panel to make a finding on an issue that was not raised or discussed during the course of the proceedings.

2.29. We have decided not to grant Japan's request. The proposed changes are unnecessary and Japan has not explained why the additional language is relevant to the question of "fierce competition".

2.14 Paragraph 7.115 and new paragraph between paragraphs 7.115 and 7.116

2.30. Japan requests the Panel to modify paragraph 7.115 and to insert a new paragraph between paragraphs 7.115 and 7.116 to more accurately reflect the facts on the record. Korea objects to the proposed modifications. Korea argues that Japan has not contested any of the facts described in this paragraph. Korea also considers that the text in Japan's proposed a new paragraph is misleading.

2.31. In light of Japan's request, we have made a small modification to paragraph 7.115. We see no reason to make other changes requested by Japan, as the text accurately reflects the Panel's understanding of the relevant facts.

2.15 Paragraph 7.116

2.32. Japan requests that the Panel modify paragraph 7.116 so that the "reasonable sales price" is not referred to as a "target domestic industry price". Korea objects to the proposed modification. In Korea's view, the paragraph in question merely summarizes the relevant facts based on the evidence.

2.33. We have decided not to grant Japan's request. In our view, the "reasonable sales price" constructed by the OTI can be properly referred to as a "target price".

2.16 New paragraph between paragraphs 7.116 and 7.117

2.34. Japan requests the Panel to insert a new paragraph between paragraphs 7.116 and 7.117 to provide further explanation as to "how and why the KTC used the Japanese respondents' profit ratio, as a basis of the 'reasonable sales price'". Korea objects to the proposed modification. In Korea's view the proposed new paragraph is misleading and unwarranted.

2.35. We have decided not to grant Japan's request. This section sets out the relevant facts concerning the Korean Investigating Authorities' consideration of price effects. It is not appropriate to include in this section the parties' arguments concerning whether the Japanese respondents' profit ratio was a proper element in calculating the "reasonable sales price", which the KTC used in considering price suppression.

2.17 Paragraph 7.140

2.36. Korea requests the Panel to modify paragraph 7.140 to more completely reflect its counter-arguments, which in its view are described in a short manner compared with the Panel's summary of Japan's arguments. Japan does not comment on this request.

2.37. In light of Korea's request and the lack of objection from Japan, we have modified paragraph 7.140 to more completely reflect Korea's counter-arguments.

2.18 Paragraph 7.142

2.38. Korea requests the Panel to modify paragraph 7.142 to more completely reflect its counter-arguments, which in its view are described in a short manner compared with the Panel's summary of Japan's arguments. Japan does not comment on this request.

2.39. In light of Korea's request and the lack of objection from Japan, we have modified paragraph 7.142 to more completely reflect Korea's counter-arguments.

2.19 Paragraph 7.151

2.40. Japan requests that the Panel modify the wording in paragraph 7.151. Japan argues that whether the Korean Investigating Authorities evaluated two of the factors set out in Article 3.4 is a contested issue. Korea objects to the proposed change as unwarranted.

2.41. We have decided not to grant Japan's request. The language used in the paragraph accurately reflects both Japan's arguments as articulated in the course of the proceedings and the Panel's understanding of the relevant facts.

2.20 Paragraph 7.180

2.42. Japan requests that the Panel modify paragraph 7.180 to more accurately reflect its arguments. Korea does not support Japan's request. Korea argues that the Panel's summary and characterization of Japan's arguments is correct.

2.43. We have decided not to grant Japan's request. While in some sections of its submissions Japan argued that the KTC did not evaluate the two factors at all, Japan also argued that the KTC's evaluation of these two factors was "conclusory" and "not sufficient". We understand from these arguments that Japan essentially challenged the adequacy of the KTC's evaluation. The language used in the paragraph accurately reflects Japan's arguments as articulated in the course of the proceedings. It is clear to us that, in Japan's view the KTC needed to evaluate these factors more thoroughly than it did in its Final Resolution. We are not persuaded by Japan's argument that an inadequate evaluation is no evaluation at all.

2.21 Paragraph 7.181

2.44. Japan requests that the Panel modify paragraph 7.181 to add another argument made by Japan concerning the domestic industry's ability to raise capital, and to make a finding concerning that argument. Korea does not support Japan's request. In Korea's view, the paragraph in question contains the Panel's evaluations and findings and not the parties' arguments.

2.45. In light of Japan's request, we have modified paragraphs 7.181 and 7.186 to better reflect Japan's arguments and the Panel's corresponding findings.

2.22 Paragraph 7.190

2.46. Japan requests the Panel to modify paragraph 7.190 to more accurately reflect its arguments. Korea does not support Japan's request. Korea argues that the paragraph in question contains the Panel's evaluations and findings and not the parties' arguments. Korea also asserts that Japan's proposed changes are unwarranted and incompatible with the Panel's findings.

2.47. We have decided not to grant Japan's request. The paragraph accurately expresses the Panel's understanding of Japan's arguments.

2.23 Paragraph 7.191

2.48. Japan requests that the Panel modify paragraph 7.191. Japan argues that it has not acknowledged that an investigating authority is not always required to conduct a counterfactual analysis in order to evaluate the magnitude of the margins of dumping. Japan also challenges the Panel's finding that Japan failed to demonstrate what specific factual circumstances would have made such an analysis obligatory in this case. Korea does not support Japan's request. In Korea's view, Japan's proposed changes are unwarranted.

2.49. We have decided not to grant Japan's request. The paragraph accurately expresses the Panel's understanding of Japan's arguments. We are also unpersuaded by Japan's request on the need to modify the Panel's finding in this regard. Japan has failed to demonstrate any special circumstances that would have made the alleged counterfactual analysis obligatory. We fail to see how Japan's argument that, in view of the magnitude of the dumping margin, it is not possible simply to assume that dumping margins had an impact on domestic prices, differentiates this case from any other, particularly in light of the Panel's findings.

2.24 Paragraph 7.196

2.50. Korea requests the Panel to modify paragraph 7.196. Korea considers that not all of Japan's arguments listed in the paragraph were developed in later submissions. In Korea's view, it would be inaccurate to list these arguments as if they were consistently raised and developed. Japan opposes Korea's request. Japan asserts that it raised some arguments in its first submission which Korea did not respond to. In Japan's view, because Korea did not respond, Japan had nothing further to add in subsequent submissions.

2.51. We have decided not to grant Korea's request. The paragraph references relevant sections in Japan's first written submission. Whether certain arguments were further developed in later submissions is irrelevant.

2.25 Paragraphs 7.199, 7.200, and 7.201

2.52. Japan requests the Panel to modify paragraphs 7.199, 7.200, and 7.201 to "completely reflect Japan's various arguments in the proceeding" with regard to non-attribution. Korea does not comment on this request.

2.53. In light of Japan's request and the lack of objection from Korea, we have modified paragraph 7.199 to better reflect Japan's arguments. We have decided not to grant Japan's request with respect to paragraphs 7.200 and 7.201. These two paragraphs accurately express the Panel's understanding of Japan's arguments.

2.26 Paragraph 7.200

2.54. Korea requests the Panel to modify paragraph 7.200. Korea considers that not all of Japan's arguments listed in the paragraph were developed in later submissions. In Korea's view, it would be inaccurate to list these arguments as if they were consistently raised and developed. Japan opposes Korea's request. Japan asserts that it raised some arguments in its first submission which Korea did not respond to. In Japan's view, because Korea did not respond, Japan had nothing further to add in subsequent submissions.

2.55. We have decided not to grant Korea's request. The paragraph references relevant sections in Japan's first written submission. Whether certain arguments were further developed in later submissions is irrelevant.

2.27 Paragraph 7.202

2.56. Korea requests the Panel to modify paragraph 7.202 to clarify that the non-attribution element concerns "the performance" of the domestic producers not part of the domestic industry definition. Japan does not comment on this request.

2.57. We have decided not to grant Korea's request. The paragraph accurately expresses the Panel's understanding of Japan's arguments.

2.28 Paragraph 7.212

2.58. Korea requests the Panel to modify the third sentence of paragraph 7.212 in relation to the non-attribution analysis. Japan does not comment on this request.

2.59. We have decided not to grant Korea's request. The language used in the paragraph mirrors that used in Korea's first written submission, to which the statement is cited.

2.29 Paragraph 7.214

2.60. Korea requests the Panel to modify paragraph 7.214 to more completely reflect its arguments. Japan does not comment on this request.

2.61. In light of Korea's request and the lack of objection from Japan, we have modified paragraph 7.214 to more completely reflect Korea's arguments.

2.30 Paragraph 7.227

2.62. Japan requests the Panel to delete paragraph 7.227. Japan disagrees with the Panel's statement that "[it] made a variety of arguments in support of its claims under Articles 3.1, 3.2 and 3.4 but … only referred to a selected few of those arguments in support of its independent causation claim". Japan also requests the Panel, in addressing Japan's Article 3.5 claims, to make findings with respect to all arguments Japan made in the context of its Articles 3.2 and 3.4 claims. Korea opposes Japan's requests. In Korea's view, Japan's proposed modifications confirm its argument that Japan has not made an independent causation claim but rather a consequential claim. In light of Japan's interim review claim, Korea requests the Panel to reverse its findings that Japan has made an independent causation claim.

2.63. We have decided not to grant Japan's requests. Japan has acknowledged that it has only expressly referred to a selected few arguments in support of its independent causation claim. It is not appropriate for the Panel to address arguments which Japan itself has not made in the course of the proceedings. We have also decided not to grant Korea's request. Korea has provided no justification for the Panel to revisit its finding that Japan made an independent causation claim.

2.31 Paragraph 7.254

2.64. Japan requests the Panel to modify paragraph 7.254. Japan argues that the KTC did not rely on the "effects of the 78.9% increase in the dumped imports", but on the increase itself. Korea does not comment on this request.

2.65. In light of Japan's request and the lack of objection from Korea, we have modified paragraph 7.254 to more completely reflect the KTC's findings.

2.32 Paragraph 7.257

2.66. Japan requests the Panel to modify paragraph 7.257. According to Japan, there is no evidence that the increase in the dumped imports resulted in an increase in the market share. Korea opposes Japan's request. In Korea's view, it is reasonable to conclude that the increase in the dumped imports' volume must have contributed to the increase in the dumped imports' market share.

2.67. In light of Japan's request, we have modified paragraph 7.257 to better reflect the facts that underlay the KTC's determination.

2.33 Paragraph 7.267

2.68. Korea agrees with the introductory sentence in paragraph 7.267 and requests the Panel to add a clarification to this sentence. Korea also requests the Panel to split subparagraph (b) into two subparagraphs (b) and (c), and to modify the text of the first of those subparagraphs to indicate that, for the purpose of examining price effects and comparing prices for price suppression and depression analyses, the KTC comprehensively considered various price-related elements. Japan opposes Korea's suggested addition to the introductory sentence. Japan also agrees with part of the text proposed by Korea for subparagraph (b).

2.69. We have decided not to grant Korea's request for the introductory sentence in paragraph 7.267. In light of Korea's request and Japan's comments, we have modified subparagraph (b) and added a footnote for additional clarification.

2.34 Paragraph 7.269

2.70. Japan requests the Panel to modify paragraph 7.269. According to Japan, the KTC's findings of price effects were at least partly based on the average-to-average price comparisons. Japan further requests the Panel to reconsider its finding in paragraph 7.269. Korea agrees with Japan that the average-to-average comparisons, especially the price development in 2013, formed an

important (although not exclusive) basis for the KTC's price effect analysis, and thus for its injury determination. However, Korea disagrees with Japan that as a result of this correction, the Panel should reconsider its finding and address Japan's argument that the KTC failed to ensure price comparability when conducting the average-to-average comparisons.

2.71. Korea also requests the Panel to make certain amendments to the second sentence of paragraph 7.269 to more accurately reflect its position. Japan does not comment on this request.

2.72. Korea finally requests the Panel to amend the fourth and fifth sentences of paragraph 7.269 to more accurately reflect the KTC's findings. Japan opposes Korea's suggested modifications. In Japan's view, the focus of review should be the KTC's Final Resolution as it was written.

2.73. We have decided not to grant Japan's request to modify the paragraph and reconsider the Panel's finding. It is apparent from its reasoning that the KTC did not rely on the average to average comparisons in its price suppression and depression analyses. The KTC stated that it made its findings of price suppression and depression "although the average sales price of the dumped products was higher than that of the like product".

2.74. With respect to the first part of paragraph 7.269, in light of Korea's request and the lack of objection from Japan, we have made some modifications to more completely reflect the record in this regard.

2.75. Finally, we have decided not to grant Korea's request to modify the fourth and fifth sentences of paragraph 7.269.

2.35 Paragraph 7.270

2.76. Korea requests the Panel to modify the first sentence of paragraph 7.270 to more completely reflect the KTC's findings. Korea also requests the Panel to reconsider its findings under Article 3.5. In addition, Korea proposes that the Panel merge its price comparability discussions in paragraphs 7.269 and 7.270 (first sentence) into a single section devoted to the general topic of "price comparability". Finally, Korea requests that the second sentence of paragraph 7.270 (including Table 1) should be, along with the discussions in paragraphs 7.271 and 7.272, moved and merged into paragraphs 7.297 to 7.322 where the issues of "average price overselling" are discussed.

2.77. Japan opposes with Korea's suggested changes to the first sentence of paragraph 7.270. Japan also opposes Korea's request for the Panel to reconsider its findings under Article 3.5. Japan does not comment on Korea's request to move and merge the second sentence of paragraph 7.270 along with the discussions in paragraphs 7.271 and 7.272 to the section where issues of "average price overselling" are discussed.

2.78. We have decided not to grant Korea's request to modify paragraph 7.270 and to reconsider the Panel's findings under Article 3.5. The use of the words "*inter alia*" indicates the Panel's understanding that the KTC's finding of price suppression and suppression had several bases, including the "transaction to average" comparisons. Other bases are not mentioned in this paragraph because they are not relevant for the purpose of addressing the issue of whether the Korean Investigating Authorities ensured price comparability. Also we have not found it either necessary or appropriate to grant Korea's request for the Panel to move or merge paragraphs as suggested. The key issue before the Panel in this section is whether the KTC failed to consider the comparability of products it used to reach its conclusions of price depression and suppression, and equally failed to conduct an objective examination of the overall extent of price competition between subject imports and domestic products.

2.36 Paragraphs 7.270 to 7.272

2.79. Japan requests the Panel to modify the language in paragraphs 7.270 to 7.272 when referring to models of the dumped imports and the domestic like products. Korea opposes Japan's request.

2.80. With respect to the same paragraphs, Korea requests that the discussions contained therein relate to the OTI's average price overselling analysis, rather than to the price comparability analysis, and should be reflected in the section corresponding to paragraphs 7.304 and 7.305. Japan opposes Korea's request. In Japan's view, there is no reason why the Panel's discussions should be moved as suggested by Korea.

2.81. In light of Japan's request, we have modified the language in paragraphs 7.270 to 7.272 for consistency reasons with other parts of the Report.

2.82. We have decided not to grant Korea's request. The key issue in this section of the Report is price comparability, rather than price overselling.

2.37 Paragraph 7.274

2.83. Korea requests that the Panel add, in a new subparagraph 7.274(e), another counter-argument raised by Korea to Japan's allegation that the prices of the dumped imports and the domestic like product diverged over the period of trend analysis. Japan does not comment on this request.

2.84. In light of Korea's request and the lack of objection from Japan, we have modified paragraph 7.274 to more completely reflect Korea's arguments.

2.38 Footnote 382 to paragraph 7.275

2.85. Japan requests the Panel to modify the text of footnote 382. Japan argues that it has never acknowledged that different models are like products. Korea opposes Japan's request. According to Korea, the Panel is merely explaining the term "models" it uses for the general observation at paragraph 7.275, which has nothing to do with whether Japan accepts the KTC's like product definition or not.

2.86. We have decided not to grant Japan's request. The sentence as originally drafted expresses the Panel's intended meaning for the term "models" as used in paragraph 7.275 to which the footnote pertains.

2.39 Paragraph 7.276

2.87. Japan requests the Panel to modify paragraph 7.276, which in its view does not correctly reflect its arguments. Korea opposes Japan's request. In Korea's view, the statement in question is taken directly from Japan's own arguments.

2.88. We have decided not to grant Japan's request. The text contains an accurate summary of Japan's arguments.

2.40 Paragraph 7.277

2.89. Korea requests that the text in footnotes 373 and 374 of the Interim Report be moved into the body of paragraph 7.277. In Korea's view, those footnotes contain references to important analyses and findings made by the KTC on the basis of the price fluctuation index. Japan does not comment on this request.

2.90. In light of Korea's request and the lack of objection from Japan, we have modified paragraph 7.277 to more completely describe the facts before the Korean Investigating Authorities.

2.41 Paragraph 7.278

2.91. Japan requests the Panel to modify paragraph 7.278. Japan suggests alternative language which in its view is more neutral and better reflects the evidence before the Panel. Korea opposes Japan's request. In Korea's view, Japan is rearguing its case which is not in line with the scope of the interim review stage.

2.92. We have decided not to grant Japan's request. The paragraph in question accurately reflects the Panel's understanding of the facts.

2.42 Paragraph 7.280

2.93. Korea requests the Panel to delete a sentence from paragraph 7.280, which in its view is misleading because it limits the basis of the KTC's price suppression and depression findings to three specific price comparisons. Korea argues that the KTC's price effect analysis was based on a comprehensive assessment of various considerations. Japan opposes Korea's request. Japan argues that Korea is essentially trying to rewrite the KTC's Final Resolution to include some unspecified elements and thereby to improve the position it has already taken in the proceedings.

2.94. We have decided not to grant Korea's request. The sentence in question merely states the fact, which Korea does not dispute, that the KTC found "fierce competition" based on the three inquiries referred to, and relied on that "fierce competition" in finding price suppression and depression. It does not imply that the KTC's findings regarding price suppression or depression were based only on the three inquiries in question.

2.43 New paragraph between paragraphs 7.282 and 7.283

2.95. Japan requests the Panel to insert a new paragraph to add Japan's counter-arguments concerning the representative model analysis "to show that Korea's allegation is not an undisputed fact". Korea opposes Japan's request. In Korea's view, nothing in the Report posits that "the KTC undisputedly considered trends in the prices of 'representative models' of the dumped imports and the domestic like products".

2.96. We have decided not to grant Japan's request. In our view, it is unnecessary to insert a new paragraph "to show that Korea's allegation is not an undisputed fact". As noted by Korea, the Panel considered this issue and found that there is insufficient evidence to conclude that the Korean Investigating Authorities actually considered the price trends on the basis of representative models or resale price trends.

2.44 Paragraph 7.284

2.97. Japan requests the Panel to modify paragraph 7.284. In Japan's view, neither the KTC nor the Panel found competition between the percentages of dumped imports and domestic like product stated therein. Korea opposes Japan's request. Korea argues that the KTC's Final Resolution and the OTI's Final Report concluded, based on analyses of the representative model and the 28 series of dumped imports, that the dumped and domestic products are, as a whole, in a competitive relationship with each other.

2.98. We have decided not to grant Japan's request. The paragraph in question accurately reflects the Panel's understanding of the facts.

2.45 New paragraph between paragraphs 7.292 and 7.293

2.99. Japan requests the Panel to insert a new paragraph to make it clear that it has contested the probative value of exhibits submitted by Korea. Korea opposes Japan's request. Korea argues that the evidentiary value of customer statements is not diminished simply because some of them are not accompanied by price offers for both the dumped imports and the domestic like products.

2.100. In light of Japan's request, we have modified paragraph 7.292 to more completely reflect Japan's arguments.

2.46 Paragraphs 7.294 and 7.295(c)

2.101. Japan requests the Panel to modify paragraphs 7.294 and 7.295(c). In Japan's view, the KTC's Final Resolution does not connect its finding of fierce competition to any evidence. Japan asks the Panel to reconsider its conclusion in this regard. Korea opposes Japan's request. In Korea's view, Japan's proposed changes are an attempt to deny the record evidence and a repetition of the same arguments contained in its submissions.

2.102. We have decided not to grant Japan's request. The paragraphs in question accurately reflect the Panel's understanding of the facts.

2.47 Paragraph 7.295(d)

2.103. Korea requests the Panel to modify paragraph 7.295(d). Korea argues that, while the KTC's examination of the alleged price discrimination among different customers with respect to specific products or product ranges and the strengthened marketing activities of SMC Korea, were a part of the KTC's price effect analysis, there were other important considerations. Korea also requests that the term "alleged" be removed when referring to price discrimination, as there is no dispute as to the "existence" of price discrimination. Japan opposes Korea's request. In Japan's view, the focus of review is the KTC's Final Resolution as it was written.

2.104. We have decided not to grant Korea's request. Paragraph 7.295 concerns the Panel's conclusions on Japan's arguments with respect to the lack of parallelism in the price trends of the dumped imports and the domestic like product. There is no need to set out in this paragraph a detailed description of the findings underlying the Korean Investigating Authorities' conclusion on price effects of the dumped imports.

2.48 Paragraphs 7.297, 7.299, 7.301, 7.319, 7.320, and 7.321

2.105. Korea requests the Panel to modify paragraphs 7.297, 7.299, 7.301, 7.319, 7.320, and 7.321, which refer to price overselling in the context of the KTC's price effects analysis. Japan partially opposes Korea's request on paragraphs 7.297, 7.301, 7.319, 7.320, and 7.321, and does not comment on paragraph 7.299.

2.106. In light of Korea's request and Japan's comments, we have modified paragraphs 7.297, 7.301, 7.319, 7.320, and 7.321, to more completely reflect Japan's arguments and the Panel's understanding of the facts. We have decided not to grant Korea's request with respect to paragraph 7.299, which accurately reflects the Panel's reasoning.

2.49 Paragraph 7.300

2.107. Korea requests the Panel to modify the introductory section of paragraph 7.300, to provide a more complete description of the KTC's price depression and suppression analyses concerning the use of a "reasonable sales price". Japan opposes Korea's request and suggested edits. Japan adds that the Panel should address whether the KTC's reasonable sales price analysis supports its finding of price suppression.

2.108. In light of Korea's request and Japan's comments, we have modified paragraph 7.300 to more completely reflect the Panel's understanding of the facts.

2.50 Paragraph 7.302

2.109. Japan requests the Panel to modify paragraph 7.302. In Japan's view, this paragraph contradicts paragraph 7.290 of the Report, which finds that neither the KTC nor the OTI considered the trends in the dumped import resale prices. Korea opposes Japan's request. According to Korea, Japan seeks to delete a section which is an accurate reflection of the record of the examinations conducted by the Korean authorities in the underlying investigation.

2.110. We have decided not to grant Japan's request. The paragraph in question accurately reflects the Panel's understanding of the facts and we do not consider there to be any contradiction between paragraph 7.302 and paragraph 7.290.

2.51 Paragraphs 7.302, 7.305, and 7.310

2.111. Korea requests the Panel to modify paragraphs 7.302, 7.305, and 7.310, and to note that, as the basis of the its price depression and price suppression findings, the KTC in addition to comparing the average prices of domestic like product to the individual resale prices of dumped imports, also compared those average prices to the "target" reasonable sales prices. Korea also notes that, when considering individual resale prices of dumped imports, the KTC considered

individual prices for some models that were lower than average domestic prices for comparable models, but also considered individual prices that were lower than the "high-end prices" of the comparable domestic models. Japan opposes Korea's request. Japan notes that Korea has not requested the Panel to review its finding that there was no reference in the KTC's Final Resolution or in the OTI's Final Report to Exhibit KOR-57 and that Exhibit KOR-57 does not show whether and if so how the OTI examined the extent to which domestic like product prices were affected by the individual instances of lower dumped import prices.

2.112. We have decided not to grant Korea's requests concerning the comparison with the "reasonable sales prices". The paragraphs in question accurately reflect the Panel's understanding of the facts. However, we have modified these paragraphs to better reflect that fact that Exhibit KOR-57 contains comparisons between the transaction prices of the dumped imports and not only the average prices of the domestic like product but also the high-end prices.

2.52 Paragraph 7.311

2.113. Japan requests the Panel to modify paragraph 7.311 to more accurately reflect the facts described in the OTI's Final Report. Korea opposes Japan's request, which is considers an attempt of Japan to relitigate this matter.

2.114. In light of Japan's request, we have modified paragraph 7.311 to more accurately reflect the facts as described in the OTI's Final Report.

2.53 Paragraphs 7.317 and 7.318

2.115. Japan requests the Panel to modify paragraphs 7.317 and 7.318. In Japan's view, none of the customer statements referred to by Korea satisfies the standard in assessing the probative value expressed by the Panel in paragraph 7.315. Korea opposes Japan's request. In Korea's view, the Panel did not develop a standard in paragraph 7.315 and never sought to measure the customer statements against this "standard". Korea contends that the Panel found that these customer statements reveal a competitive relationship and objects to Japan's attempt to use the interim review process as an appeal process.

2.116. We have decided not to grant Japan's request. The Panel did not develop and adopt a standard for the evaluation of evidence of the existence of a competitive relationship in paragraph 7.315. Rather, the Panel was discussing how evidence of price discrimination or the ability to price discriminate may be relevant and probative in considering the price effects of imports. Paragraphs 7.317 and 7.318 accurately reflect the Panel's understanding of the facts.

2.54 Paragraph 7.320

2.117. Japan requests the Panel to modify paragraph 7.320. In Japan's view, this paragraph contradicts paragraphs 7.310 and 7.313 of the Report, which find that the Korean Investigating Authorities did not consider Exhibit KOR-57 in considering the price effects. Korea opposes Japan's request. In Korea's view, the Panel's finding in paragraph 7.320 does not contradict its earlier findings in paragraph 7.310 and 7.313.

2.118. We have decided not to grant Japan's request. The Panel's findings in paragraphs 7.310 and 7.313 concern whether Exhibit KOR-57 supports Korea's allegation that the OTI conducted numerous simulations and analyses on the basis of certain resale price data and Korea's arguments. The Panel does not question the fact that the OTI requested and obtained the underlying resale price data. There is no inconsistency between the Panel's finding in paragraph 7.320 and its earlier findings in paragraphs 7.310 and 7.313.

2.55 Paragraph 7.321

2.119. Japan requests the Panel to modify paragraph 7.321. In Japan's view, there is no evidence which demonstrates that representative models compete with each other substantially or conspicuously. Korea opposes Japan's request. In Korea's view, Japan repeats, without any supporting evidence or argument, its assertion that the Korean authorities never explained how

they determined what they call representative models or demonstrated that representative models compete with each other.

2.120. We have decided not to grant Japan's request. The paragraph in question accurately reflects the Panel's understanding of the facts.

2.56 Paragraph 7.323

2.121. Korea requests the Panel to modify paragraph 7.323. Korea argues that the statement that it was undisputed that the prices of the dumped imports were higher than those of the domestic like product in the comparison of both the average prices for the product as a whole, and the average prices of the representative models, is not entirely accurate. Japan opposes Korea's request. Japan argues that it is undisputed that the prices of the dumped imports were always higher than the domestic prices on the basis of the average prices for the product as a whole and the average prices of the so-called "representative models".

2.122. We have decided not to grant Korea's request. The paragraph in question accurately reflects the Panel's understanding of the facts.

2.57 Paragraph 7.335

2.123. Japan requests the Panel to modify paragraph 7.335 to clarify its arguments. Korea objects to the proposed modifications. According to Korea, the proposed modification does not clarify but reconstructs Japan's arguments made during the proceedings.

2.124. We have decided not to grant Japan's request. The paragraph accurately expresses the Panel's understanding of Japan's arguments.

2.58 Paragraphs 7.336 and 7.337

2.125. Japan requests the Panel to modify paragraphs 7.336 and 7.337 and to reconsider its findings. In Japan's view, the Panel misunderstood the point of Japan's argument and failed to address Japan's real concern. Korea opposes Japan's request, which in its view is an attempt to reconstruct its arguments.

2.126. We have decided not to grant Japan's request. The paragraphs accurately express the Panel's understanding of Japan's arguments.

2.59 Paragraph 7.375

2.127. Korea requests the Panel to modify paragraph 7.375. In Korea's view, the key issue is not a lack of correlation, but a clear confirmation that a decline in consumption was not a cause of injury in 2010-2012 and that in 2013 consumption increased, making it an even less likely cause of injury. Japan opposes Korea's request. In Japan's view, Korea's comment is internally inconsistent and the proposed edit does little more than rephrase the absence of any correlation. Japan argues that Korea has not pointed to any analysis in the KTC's Final Resolution that goes beyond mere correlation.

2.128. We have decided not to grant Korea's request. The paragraph in question accurately reflects the Panel's conclusions in light of its understanding of the facts.

2.60 Paragraph 7.429

2.129. Korea requests the Panel to modify paragraph 7.429. Korea disagrees with the characterization that the facts in question were undisputed by the parties. Korea argues that parties were never asked to express their agreement on these facts and that some of these facts were "contextualized" by Korea. Japan opposes Korea's request. In Japan's view, Korea failed to submit any specific reasons why the Panel's factual findings are not undisputed.

2.130. We have decided not to grant Korea's request. Korea's arguments do not challenge the accuracy of the facts as described. While the Panel did not ask the parties whether they agreed on

these facts, neither party challenged their accuracy. The fact that Korea "contextualized" the facts does not establish that there was any dispute as to the facts themselves.

2.61 Paragraph 7.449

2.131. Korea requests the Panel to modify paragraph 7.449. Korea identifies sections of its submissions in which it argued that narrative summaries were included in the applicants' submissions in question. Japan opposes Korea's request and considers that the statement contained in the paragraph in question is accurate.

2.132. We have decided not to grant Korea's request. The paragraph in question accurately reflects the Panel's understanding of the facts.

2.62 Paragraph 7.453

2.133. Japan requests the Panel to modify paragraph 7.453 to clarify its arguments on the legal obligation under Article 6.9. Korea does not comment on this request.

2.134. In light of Japan's request and the lack of objection from Korea, we have modified paragraph 7.453 to more completely reflect Japan's arguments.

2.63 New paragraph between paragraphs 7.453 and 7.455

2.135. Japan requests the Panel to insert a new paragraph reflecting Korea's and Japan's arguments on the authority of the KTC and the MOSF, concerning the meaning of "final determination" under Article 6.9 of the Anti-Dumping Agreement. Korea does not support Japan's request. Korea requests that the Panel either reject Japan's request to insert the new paragraph summarising Japan's Article 6.9 arguments or strike a balance by also reflecting Korea's Article 6.9 arguments raised in its second written submission.

2.136. In light of Japan's request and the lack of objection from Korea, we included two new paragraphs to more completely reflect the parties' respective arguments concerning the meaning of "final determination" under Article 6.9.

2.64 New paragraph between paragraphs 7.464 and 7.466

2.137. Japan requests the Panel to insert a new paragraph summarizing certain provisions of Korean law concerning the MOSF's authority to determine anti-dumping measures. Korea does not support Japan's request. Korea argues that it does not oppose inclusion of a correct summary of the relevant statutes and a finding that accurately reflects the relevant statutes. In Korea's view, however, the modifications proposed by Japan mischaracterize the implication of the relevant statutes from the perspectives of an anti-dumping investigation in Korea.

2.138. In light of Japan's request, we have included a new paragraph to describe the relevant provisions of Korean law.

2.65 Paragraph 7.473

2.139. Japan requests the Panel to modify this paragraph to differentiate what was stated in the OTI's Preliminary Report, the KTC's Preliminary Resolution, and the OTI's Interim Report, as well as in the OTI's Final Report and KTC's Final Resolution, with respect to the alleged aggressive marketing practices of the importing companies. Korea opposes Japan's request. In Korea's view, the text proposed by Japan is factually incorrect.

2.140. We have decided not to grant Japan's request. The paragraph in question accurately reflects the Panel's understanding of the facts.

2.66 New paragraph between paragraphs 7.480 and 7.481

2.141. Japan requests the Panel to insert a new paragraph to clarify that the OTI's Preliminary Report, the KTC's Preliminary Resolution, and the OTI's Interim Report did not refer to the concept of system sales. Korea does not comment on this request.

2.142. In light of Japan's request and the lack of objection from Korea, we have modified paragraph 7.480.

2.67 Paragraphs 7.490 and 7.494

2.143. Japan requests the Panel to modify paragraphs 7.490 and 7.494 to clarify that nothing about the level of imports and about the actual capacity and production of the domestic industry was disclosed to the interested parties throughout the entire investigation process. Korea opposes Japan's requests and the emphasis on the entire investigation process. In Korea's view, Japan never raised this argument during the dispute.

2.144. We have decided not to grant Japan's requests. We do not consider it necessary for the Panel to make the proposed modifications. The paragraphs in question accurately reflect the Panel's understanding of the facts. The emphasis proposed by Japan that nothing about the level of imports was disclosed to the interested parties *throughout the entire investigation process* was not something that Japan argued during the proceedings.

_____

ANNEX B

ARGUMENTS OF JAPAN

ANNEX B-1

FIRST INTEGRATED EXECUTIVE SUMMARY
OF THE ARGUMENTS OF JAPAN

A. Introduction

1. Through its first written submission, opening and closing statements at the first panel meeting as well as responses to the Panel's questions thereafter, Japan has established that Korea's anti-dumping measures – particularly those taken by Korea's investigating authority, the Korea Trade Commission ("KTC") – violated a number of substantive and procedural obligations under the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement").

2. Japan notes that in this panel proceeding thus far, Korea has adduced a considerable portion of evidence that was not included in the KTC's Final Determination or disclosed to the interested parties in any manner, and has developed new arguments based on the undisclosed information. Such attempts at *post hoc* rationalization of the KTC's flawed analyses should be rejected. In any case, none of the newly disclosed information supports the WTO consistency of these anti-dumping measures.

B. The Overarching Legal Framework for the Obligations under Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement

3. Article 3 of the Anti-Dumping Agreement requires an objective examination based on positive evidence, and calls for a "logical progression" of inquiry. The overarching obligation of Article 3.1 and the more specific obligations of Articles 3.2, 3.4, and 3.5 are intertwined and inform each other. A proper finding regarding each of the specific obligations set forth in each paragraph of Article 3 must therefore take into account the underlying facts and relevant factual conclusions about the other obligations.

4. Article 3.1 outlines the focus of a proper injury and causation investigation, which consists of "three essential components": (i) the volume of dumped imports; (ii) the effect of such imports on the prices of like domestic products; and (iii) the consequent impact of such imports on the domestic producers of the like products. These components "are closely interrelated for purposes of the injury determination".

5. Articles 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement stipulate an investigating authority's obligations when determining the injury to the domestic industry caused by dumped imports. None of the obligations set out in those paragraphs can be read independently from the "overarching" obligation contained in Article 3.1.

6. As explained by the Appellate Body in *China – GOES*, the paragraphs of Article 3 "contemplate a *logical progression of inquiry* leading to an investigating authority's ultimate injury and causation determination". The Appellate Body in *China – HP-SSST (Japan)/ China – HP-SSST (EU)* emphasized that the analyses pursuant to the various provisions of Article 3 are "closely interrelated". The findings about significant price effects and significant volume increase must enable the investigating authority to provide a "meaningful basis" for its determination as to whether dumped imports, through such significant effects on the price and/or changes in the volume of domestic like products, are in fact causing injury to the domestic industry. The findings under Article 3.2 are thus a key part of the subsequent findings under Article 3.4 regarding the condition of the domestic industry and the findings under Article 3.5 regarding the relative role of dumped imports and different factors in explaining the condition of the domestic industry.

7. In order for the volume and price effects analyses under Article 3.2 to provide a "*meaningful* basis", the investigating authority must consider how any such volume increase and/or any such effects on price would relate to the subsequent injury determination. If an investigating authority is to find injury to the domestic industry based on the price effects of those imports and the

volume of dumped imports (as the KTC did here), the authority must logically include in its analyses of price and volume an assessment of whether domestic prices are actually lowered or prevented from rising to reflect cost increases as a result of the dumped imports, and/or whether domestic sales volume is actually reduced as a result of the volumes of dumped imports. This concept of "logical progression" informs the interpretation of specific requirements of each paragraph in Article 3.

C. The KTC's Price Effects Analysis Was Inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement

8. Under Articles 3.1 and 3.2 of the Anti-Dumping Agreement as interpreted in the context of the logical progression of inquiry discussed, an investigating authority must, in addition to its assessment and definition of the "like product" under Article 2.6 of the Anti-Dumping Agreement, objectively examine any positive evidence pertaining to the *interaction in the market* between the prices of the dumped imports and the like domestic products. This interaction can be examined based upon the consideration of the degree of *competitive relationship* between the dumped imports and the like domestic products in conjunction with the dumping margin of dumped imports. The Appellate Body in *China – GOES* said that the necessary explanatory force does not exist if dumped imports and domestic prices were not comparable. Thus, the failure to ensure price comparability is inconsistent with the requirement under Articles 3.1 and 3.2. Moreover, the text of Article 3.2 explicitly provides that an investigating authority must consider whether the effect of dumped imports is to depress or suppress the domestic price "to a significant degree".

1. The KTC's Analysis of Price Depression Was Analytically and Factually Flawed

9. In light of the relevant legal standard discussed above, the KTC's discussion of alleged price depression was flawed because it did not adequately address the overwhelming evidence before it that suggested the lack of any *interaction in the market*, i.e., the lack of any price effects. In particular, the KTC's price effects analysis was deficient in the following key respects.

10. The KTC did not address the diverging price trends of the dumped imports and the domestic like products. The simple average price trends of dumped imports and domestic like products diverged sharply over the period of investigation. This disconnect increased over time.

11. The KTC also considered the price trends based on what is called the "price fluctuation index". The price fluctuation index method similarly showed divergent price trends. The price fluctuation index method – like the simple average method – showed that dumped imports and domestic products were in different and distinct market segments, reacting to changing market conditions very differently. Yet the KTC never seriously addressed these divergent trends in prices.

12. The KTC did not provide the necessary dynamic assessment of the relationship between the dumped import prices and those of domestic like products over the full period of investigation, and it failed to assess whether the dumped imports had any explanatory force for any depression of the domestic prices.

13. Moreover, another crucial fact largely overlooked by the KTC in its analysis of price depression was the existence and magnitude of overselling – dumped import prices were much higher than domestic prices. This overselling exists based on both all products, but also for the representative products identified by the KTC. The overselling exists even for most of the comparisons of specific product identified by the Korean authorities.

14. The consistent and significant overselling shown by the data before the KTC fundamentally undermined the KTC findings. The panel in *China – Autos (US)* noted that overselling generally "undermines" any findings of price depression and suppression under Article 3.2. The domestic products and dumped imports were not interacting in the market to any meaningful degree – the overall price differences were simply too great.

15. The persistent overselling – that is, the complete absence of price undercutting – seriously undermined the KTC's finding of price depression. The absence of price undercutting means that KTC would have to have a particularly convincing explanation as to how the dumped imports could have depressed or suppressed domestic prices. Yet the KTC provided no such convincing explanation.

2. The KTC's Analysis of Price Suppression Was Analytically and Factually Flawed

16. The KTC similarly overlooked the consistent and significant overselling by dumped imports in its finding of price suppression. The KTC failed to explain how dumped imports that were sold at much higher prices than domestic products could have had any explanatory power for the alleged suppression of the domestic prices. The KTC also overlooked the diverging price trends that undermined any conclusion about price suppression from dumped imports.

17. These analytical defects could not be fixed by the KTC addressing a few models in isolation. The authority must consider the price effects of dumped imports on the domestic like products as a whole, to measure how much of the domestic product has experienced any "effect of" dumped imports. The KTC purported to find price effects for the domestic like product as a whole, but only did so for a tiny portion of the like products. Without explaining how the isolated examples can represent the entirety of domestic products, the KTC's explanation cannot provide positive evidence for its finding of the price effect on the domestic products as a whole.

18. Although the references were brief and cryptic in the public version of the final determination report, the KTC appears to have adopted the analysis of what is called the "reasonable selling price" as the basis of its finding of price suppression. However, the KTC failed to explain how this reasonable selling price was calculated. More fundamentally, it never examined whether the domestic price would have increased if the dumped imports had been priced at normal value. Thus, the KTC never tried to find a link between the dumped imports and the alleged price suppression of the domestic price.

3. The KTC Failed to Ensure Price Comparability

19. The KTC made no attempt to ensure price comparability between specific products or product segments within the broad overall baskets of dumped imports and domestic products for pneumatic valves as a whole. Instead, by relying primarily on the likeness determination that it (and the OTI in its findings) had made between the broad groups of dumped imports and domestic products, the KTC asserted that both products were somehow in a competitive relationship. This approach failed to ensure price comparability before finding adverse prices effects under Articles 3.1 and 3.2.

20. The KTC also did not objectively examine the physical characteristics of the dumped imports and the domestic products. Japanese respondents submitted explanations that most of their exports were of high quality products designed for very specific applications. These physical and quality differences explained the significant price overselling – with the Japanese products selling at much higher prices than the domestic alternatives. Yet the KTC and OTI simply ignored those differences.

21. The KTC's assessment of the consumer evaluations was also severely biased. Although a significant number of end-users of pneumatic valves submitted statements to the KTC that the imported valves and domestic valves are not substitutable due to their significant difference in physical characteristics, quality and other respects, the KTC selectively relied on six interested parties who testified otherwise. Such isolate examples cannot explain away the other evidence of significant differences.

22. The KTC also did not properly evaluate the differences in the end-uses of the imported and domestic products. The KTC failed to meaningfully address the particular nature of the products and their market situation, and simply assumed without any basis that both products could be used interchangeably if they were supplied to the same sector. This approach does not represent an objective assessment based on positive evidence.

D. The KTC's Volume Analysis Was Inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement

23. The Final Determination also provided a limited and inadequate discussion of any volume increase by dumped imports. The KTC did not consider whether there was a "significant increase" as required by Article 3.2. The KTC did not examine (i) *interactions* in the market between the volume of the dumped imports and that of the like domestic products, or (ii) any additional

positive evidence pertaining to the degree of the competitive relationship between the dumped imports and the domestic like products.

24. The KTC's limited and flawed volume determination did not constitute an objective examination of positive evidence as required by Articles 3.1 and 3.2 of the Anti-Dumping Agreement. More specifically, the Final Determination made the following fundamental errors: (i) it improperly found a "significant increase" in dumped imports even though dumped 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 down on a relative basis; (ii) it improperly assumed a competitive relationship between domestic products and dumped imports that simply did not exist; (iii) it never considered whether any apparent increase in dumped imports was significant in conjunction with the margin of dumping; (iv) it improperly considered the effect of dumped imports that were still in inventory, and were not competing at all with the domestic producers; and (v) it improperly found displacement by dumped imports, even though domestic shipments were actually increasing.

25. Article 3.2 explicitly requires an investigating authority to consider whether there has been not just any increase, but a "significant" increase. The Appellate Body has said, in the context of Article 2.4.2 of the Anti-Dumping Agreement, that the term "significant" incorporates both quantitative and qualitative dimensions, and circumstances pertaining to the nature of the product or the markets may be relevant for the assessment of whether differences are "significant" in the circumstances of a particular case.

26. Accordingly, the investigating authority's examination of whether there has been a "significant increase" must also include a qualitative assessment of circumstances pertaining to the nature of the products and the market at issue. A mere finding of a numerical increase in the dumped imports, without finding that users chose dumped imports in place of domestic like products, would not provide a "meaningful basis" to find injury and causation. The qualitative assessment of increasing dumped imports is crucial, especially when the domestic like products are also increasing.

27. Further, the Appellate Body has explained, in the context of "significant price undercutting" under Article 3.2, that what is "significant" depends on the circumstances of each case and must involve a dynamic assessment of the relationship between the prices of the dumped imports and those of the like domestic products. This same interpretation of "significant" applies when considering volume under Article 3.2.

28. On an absolute basis, dumped imports increased for the period of investigation as a whole. But the KTC never stated how much dumped imports increased over the full period, or explained why that level of increase should be considered a "significant increase", when the increase in absolute terms over the entire period was in fact quite modest.

29. On a relative basis, the KTC never explained why it found a "significant increase" in dumped imports relative to consumption or production. The KTC seems to have found the increase in market share in 2013 alone to be "significant", yet the market share of dumped imports actually decreased over the period of investigation and in 2013 the shipments of the domestic like product increased.

30. The KTC improperly found a competitive relationship between domestic products and dumped imports. Yet the consistent and significant overselling, the diverging price trends, the differing magnitudes of price changes were all inconsistent with any meaningful competitive relationship, as were the diverging volume and market share trends. The KTC never examined the extent to which dumped imports would have replaced any volume of the domestic like product had the imports been priced at or above normal value.

31. Given that dumped imports were actually decreasing for most of the period, the KTC relied entirely on the increase in 2013 to find a significant volume increase. Yet the Japanese respondents had explained that this increase in 2013 occurred only because of a change in inventory policy, such that most of the volume in fact was still in inventory and had not been competing with domestic producers. The KTC never examined the extent to which imports held in inventory could have had any impact in displacing domestic sales. This failure made it impossible for the KTC to assess whether the increase in import volume in 2013 was "significant".

32. Finally, the KTC tried to turn the dumped import market share change into something "significant" by pointing to the decline in domestic industry market share in 2013. The KTC noted that the domestic market share increased in 2011 and 2012, but "decreased" in 2013 to a level "which is near the figure for 2010". While the loss of market share in one year might be significant in some cases, the KTC never explained how the loss of market share in one year alone could be significant in light of the overall market shares remaining virtually the same over the period as a whole.

E. The KTC's Examination of the Adverse Impact of Dumped Imports on the Domestic Industry Was Inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement

33. The KTC's Final Determination provided a superficial and inadequate discussion of adverse impact. The KTC did not provide the meaningful "evaluation of all relevant economic factors" required by Article 3.4.

34. The Appellate Body in *China – HP-SSST (Japan)/ China – HP-SSST (EU)* stated that the volume, price effects, and impact inquiries are "*closely interrelated*"; and that the various paragraphs of Article 3 "contemplate a *logical progression of inquiry*". The logical progression that begins with Article 3.2 continues with Article 3.4, and the authority must show "the explanatory force of dumped imports for the state of the domestic industry". The impact analysis under Article 3.4 must then provide a meaningful basis for the ultimate injury determination.

35. The KTC disregarded the "closely interrelated" nature of the inquiries. The KTC failed to consider the "explanatory force" of dumped imports when it failed to consider the impact of the volume of dumped imports on the domestic industry. A proper impact analysis must show that the sales amount of domestic like products would have increased if the dumped imports had been imported at their normal value, but the KTC did not even examine whether end-users replaced domestic like products with the dumped imports because of the dumping. Similarly, the KTC failed to address the role that imports from other countries may have had on the condition of the domestic industry, with such non-dumped imports also gaining significant market share over the full period of investigation. It further ignored the evidence showing that the declines in domestic production and sales were overwhelmingly linked to declining consumption in the market, and not to dumped imports.

36. The KTC also failed to consider the explanatory force of dumped imports when it completely ignored the fact that the prices of dumped imports were consistently higher than the prices of domestic products, and hence, no price effect analysis was properly conducted. Although Korea has adduced a few isolated examples of alleged underselling, the logical progression of inquiry would not stand, if the price effects are found only within a small fraction of the domestic products while the impact finding is linked to the entire domestic products.

37. The KTC also failed to consider at all two specifically enumerated factors: (i) the ability to raise capital, and (ii) the magnitude of the margin of dumping. Of particular importance to Article 3.4 is whether and to what extent the economic indicators would have changed if the dumped imports had been priced at their normal value, in order to identify the impact of the dumped imports on the domestic industry. It is for this purpose that the consideration of the magnitude of the margin of dumping is required for the analysis under Article 3.4. Yet the KTC did not do so.

F. The KTC's Examination of the Causal Relationship between Dumped Imports and the Injury to the Domestic Industry Was Inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement

38. The Final Determination provided a limited and inadequate discussion of causation. The KTC did not provide any explicit "demonstration of a causal relationship" as required by Article 3.5. Moreover, the KTC ignored other known factors that it should have addressed.

39. The Appellate Body has confirmed that the inquiries into any causal link under Article 3.5 depend on the results of the prior analyses of price and volume under Article 3.2 and impact under Article 3.4. The logical progression, which begins with Article 3.2 and continues with Article 3.4,

must then continue further under Article 3.5. The outcomes of the earlier stages "form the basis for the overall causation analysis" under Article 3.5.

40. The KTC never provided any actual "demonstration" of the causal relationship as required by the first and second sentences of Article 3.5. The KTC apparently did not even try to "demonstrate" the necessary causal relationship because it could not do so. The underlying facts in this proceeding showed the absence of a sufficient causal relationship. The KTC may have thought its discussion of price effects and volume were enough, but as discussed earlier these findings were flawed and did not even establish any explanatory force from the dumped imports, let alone establish the causal relationship as required by Article 3.5.

41. Article 3.5 also requires the authority to "examine any known factors other than the dumped imports" that might also be affecting the domestic industry, and any injuries from these other factors "must not be attributed to dumped imports". The KTC considered some factors but ignored others. For those factors considered, the KTC simply dismissed them rather than make any serious effort to examine them objectively and then to separate and distinguish the effects of subject imports from the effects of these other factors. The KTC inadequately considered the (i) the effect of imports from countries other than Japan, (ii) the effect of changing levels of consumption, and (iii) the effect of changing exports by the Korean industry.

42. For those factors not considered, the KTC even more egregiously ignored its obligation under Article 3.5 not to blame subject imports for the problems caused wholly or partially by other factors. The KTC ignored (i) the extent to which other Korean producers were gaining shipments and market share from the two applicants, (ii) the extent to which other Korean producers were affecting domestic prices, and (iii) the possible competition between the two applicants themselves.

43. The KTC considered some of these factors, but considered them only in isolation; the KTC should have considered all of these factors both individually and then collectively. The "objective examination" required by Article 3.1 and the need to consider "all relevant evidence" required by Article 3.5 require that the authority understand the complete picture, and consider the possible interaction of different factors.

44. If the Panel finds that the impact analysis of either the volume or the price effects of subject imports is flawed, then this flaw would automatically lead to a finding that the KTC failed to demonstrate that the dumped imports are causing injury through the effects of dumping, as required by Article 3.5. However, even if the KTC's analysis of volume and price effects were deemed to be not inconsistent with Article 3.2, a causal relationship would not exist whenever the volume or price effects affected only a small portion of domestic products.

45. In addition, the KTC's analysis of a causal relationship under Article 3.5 is deficient to the extent it did not consider all other "known" factors and evaluate the extent to which those other factors might be contributing to injury. The phrase "any known factors" refers to <u>any</u> factor that is within the agency's knowledge (on the record), and is not limited to factors specifically raised by the parties.

G. The KTC's Definition of Domestic Industry Was Inconsistent with Articles 3.1 and 4.1 of the Anti-Dumping Agreement

46. The KTC failed to ensure that the definition of the domestic industry did not give rise to a material risk of distortion. The term "major proportion" in Article 4.1 requires both quantitative and qualitative assessment. Thus, it is not sufficient for the investigating authority merely to include domestic producers of the like products accounting for a quantitatively large proportion of the total domestic production in the definition of the domestic industry. In order for the investigation authority to ensure that the producers also qualitatively represent the total domestic production, the authority must do more than just measure the percentage of the total domestic production covered. When those domestic producers that voluntarily come forward to the authority are not sufficient qualitatively – when they are different than the rest of the industry – the authority must include other producers in the domestic industry definition.

47. The KTC defined the "domestic industry" for its analysis as consisting of just the two petitioning firms representing only half of the total domestic production. Without any explanation as to how the two petitioning firms may represent the total domestic production, the KTC did not include the other seven producers that made up the other half of the Korean production as a whole. It did not even include two domestic producers that provided sales and production quantities.

48. The KTC did not acknowledge the additional risk of distortion inherent in limiting the domestic industry only to those firms applying for the anti-dumping duties. The KTC also ignored the fact that the OTI Final Report noted ways in which one of the petitioning firms was different than the remainder of the domestic industry. In this case, there was a material risk of distortion since the domestic industry had been defined to include only the applicants that sought the anti-dumping duties.

H. The KTC's Treatment of Confidential Information Was Inconsistent with Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement

49. The KTC's treatment of confidential information submitted by the applicants violated Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement in several key respects. The KTC did not require any specific justification for confidential treatment. Moreover, the KTC did not require a proper non-confidential summary of the application and many other submissions by the applicants. Key information was simply deleted and left blank, without adequate public summaries and without any explanation why such summaries could not be provided.

50. This lack of appropriate non-confidential summaries adversely affected the ability of the Japanese respondents to fully defend their interests. The existence of good cause for confidential treatment must be "shown" by the submitting parties. The authority may not simply presume the existence of good cause on the basis of a municipal law that classifies broad categories of information as confidential. Furthermore, the investigating authority "must objectively assess the 'good cause' alleged for confidential treatment, and scrutinize the party's showing in order to determine whether the submitting party has sufficiently substantiated its request".

51. When interested parties submit confidential information, due to transparency and due process concerns, Article 6.5.1 requires interested parties to submit sufficient non-confidential summaries of the information. In "exceptional circumstances", if the information at issue is not "susceptible to summary", the party submitting the information may indicate it is unable to provide a non-confidential summary. In such circumstances, however, the party must provide "a statement of the reasons why summarization is not possible".

52. Finally, "the investigating authority must scrutinize such statements to determine whether they establish exceptional circumstances, and whether the reasons given appropriately explain why, under the circumstances, no summary that permits a reasonable understanding of the information's substance is possible".

53. In the present case, applicants did not show "good cause" for confidential treatment. Applicants did not provide sufficient non-confidential summaries or any statements as to why such summaries were not possible, and KTC's failure to require such summaries or statements violated Article 6.5.1 of the Anti-Dumping Agreement.

I. The KTC Violated Article 6.9 of the Anti-Dumping Agreement by Failing to Disclose Essential Facts before its Final Determination.

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. The "final determination" within the meaning of Article 6.9 was the KTC Final Determination dated 20 January 2015, which was circulated to the Japanese respondents only on 17 March 2015.

55. Since the disclosure had to take place before the KTC Final Determination, there were only three documents issued by the Korean authorities which could possibly constitute disclosure of "essential facts" within the meaning of Article 6.9: (i) the OTI Preliminary Investigation Report, released on 26 June 2014; (ii) the KTC Preliminary Determination, released on 26 June 2014; and (iii) the OTI Interim Investigation Report, released on 23 October 2014.

56. The KTC violated Article 6.9 because of the inadequate manner in which it disclosed certain information to the Japanese respondents. In particular, the KTC never adequately disclosed the following essential facts regarding: (i) price effects under Article 3.2, including facts about alleged aggressive marketing; (ii) the so-called "reasonable selling price", system sales, and interchangeability; (iii) volume of dumped imports under Article 3.2, including the actual level of dumped imports and market shares; (iv) the impact on the domestic industry under Article 3.4, including capacity utilization, market shares, and domestic industry profitability; and (v) causation under Article 3.5, including facts relating to any "causal relationship", and facts relating to alternative causes.

57. These failures to disclose "essential facts" permeated the KTC's injury analysis, with defects in all of the key issues under Article 3 of the Anti-Dumping Agreement.

J. The KTC Violated Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement

58. The KTC failed to meet the requirements under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement. The date of "public notice" under Article 12.2 and 12.2.2 is "19 August 2015," the date on which the official gazette to impose the definitive measures was published. The KTC did not provide a report stating "all relevant information" supporting the imposition of definitive anti-dumping duties against dumped imports. In particular, the KTC did not explain and provide all relevant information for its findings: (i) that dumped imports and domestic producers were interchangeable, failing both to explain adequately its rationale and to address the contrary evidence; (ii) that price depression and suppression occurred because of dumped imports, failing to explain adequately its rationale and to address the contrary evidence; (iii) that imports from countries other than Japan were having no negative influence; (iv) that total consumption was having no effect on the domestic industry; (v) that changing domestic exports were having no effect on the domestic industry; (vi) that expanded domestic industry capacity and intra-industry competition were having no effect on the domestic industry; and (vii) that even the collective effect of these other factors could be ignored in the causation analysis.

59. The KTC findings of price depression and suppression: (i) omitted the key facts relating to price comparability between dumped imports and domestic like products, and (ii) did not provide the factual information that the effect of dumped imports is otherwise to depress "to a significant degree" or prevent price increases, which would otherwise have occurred to "a significant degree".

60. Confidentiality concerns cannot excuse the KTC from its obligation to have provided a report containing "all relevant information" material to its injury determination. For these reasons, the KTC failed to satisfy its obligations under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement.

K. Korea's Anti-Dumping Measures on Valves for Pneumatic Transmissions From Japan Are Inconsistent with Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994

61. As a consequence of the inconsistencies with the Anti-Dumping Agreement described above, Korea's anti-dumping measures on valves for pneumatic transmission from Japan are also inconsistent with Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994. No specific part of Article VI of the GATT 1994 will be violated, but Article VI as a whole will be violated.

ANNEX B-2

SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. STANDARD OF REVIEW AND POST HOC JUSTIFICATIONS

1. Korea has incorrectly accused Japan of seeking *de novo* review. As clearly shown in each of Japan's arguments, Japan is pointing out "logical inconsistencies" or failures to provide "explanations of the data" in the Korean authorities' examination that were not "objective" or "reasonable", lacked "reasoned explanation", and were not based upon "positive evidence". Japan is pointing to alternative explanations that the authorities either ignored, or did not address objectively. None of this seeks *de novo* review by the Panel, only that the Panel engage in the searching review that Article 11 of the DSU requires.

2. Korea must justify the KTC Final Determination based on findings, reasoning, and conclusions contained in that determination. Korea cannot now present *post hoc* rationales to defend the WTO consistency of the KTC Final Determination. Under Article 11 of the DSU, panels are to review only what the authority found, not what the authority might have found. As the Appellate Body in *China – HP-SSST(Japan)/China – HP-SSST(EU)* noted, a panel is not to "develop an explanation of the basis for the investigating authority's conclusions" and must instead focus on what the authority itself explained.

II. LEGAL ARGUMENTS

A. The KTC's Price Effects Analysis Was Inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement

1. The KTC had an Obligation to Objectively Examine Both Significant Price Depression and Suppression

3. Korea's argument that the Panel should consider price depression and price suppression together fails because that is not what the KTC did in its Final Determination. The Panel must review the KTC determination as written, and review whether the KTC objectively examined significant price depression and significant price suppression and based each conclusion about these separate and distinct price effects on positive evidence. To do otherwise would be to rewrite the KTC determination.

2. The KTC Failed to Address the Necessary Counterfactual Question for its Price Depression and Price Suppression Findings

4. The core of the obligation under Article 3.2 is to address the counterfactual question of whether domestic prices would have been higher if the dumped imports had been sold at their normal value. The Appellate Body in *China – GOES*, *US – Upland Cotton (21.5 – Brazil)* and *EC and certain member States – Large Civil Aircraft* concluded that when seeking to show the effect of something, it is inevitable to address the counterfactual question of what would have been the situation but for that thing.

5. Contrary to Korea's argument, the obligation of the investigating authority under Article 2.6 regarding like product is fundamentally different from the obligation under Article 3.2. Korea continues to miss the key distinction: like product is about defining a broad category (usually a single broad category) that may include different products not even competing at all with each other, while price comparability and competitive overlap for Article 3.2 focuses on more direct competition (if any) between specific segments or product models of (1) the subject imports and (2) the domestic like products.

6. The KTC did not address any part of this core question to consider what would have happened to domestic prices in the absence of dumping, i.e., if the dumped imports had been sold at their normal value.

7. Korea refers to the circumstantial evidence of "fierce competition" and "increase in the manufacturing cost of the like product" to explain the price depression in 2012 and 2013. But the KTC did not adequately link these statements to the actual facts about the subject imports.

8. The KTC did not provide any discussion even addressing – let alone showing – whether and to what extent the domestic like products would not have declined (or would have been higher) if the subject imports had been imported at a normal value in relation to this price/cost analysis. Rather, the KTC referred to the "strengthened marketing activities of SMC Korea". The KTC did not examine the competitive relationship, if any, between the subject imports and domestic like products, *in conjunction* with the dumping margins at issue; it rather referred only to other factors such as "the expansion of sales organizations".

9. The only additional reasoning provided solely for price suppression was what the KTC/OTI called "reasonable sales price" analysis. However, the KTC Final Determination and the OTI Final Report provide no explanation of how this analysis was conducted. The analysis used a certain profit ratio (designated as BCI by Korea) as a benchmark, a decision left unexplained in the determination, with no effort to provide any justification for why this ratio of operating profits was in fact "reasonable" in this context.

3. The KTC Did Not Ensure the Price Comparability

10. Contrary to Korea's argument, ensuring price comparability is required for price effects analysis under Article 3.2. The key question when analyzing price depression and suppression is to address the question of whether and to what extent in product scope the domestic prices would have been higher or would not have been lower if the subject imports had been imported at their normal value. This analysis necessarily involves the comparison of the prices of the dumped imports and the domestic products to understand their relationship. Price comparability is key to all aspects of price effects under Article 3.2.

11. Here, even the "series-to-series" comparisons and the "model-to-model" comparisons, allegedly conducted by the KTC/OTI, do not ensure, but rather disprove, the price comparability between the two broad baskets of subject imports as a whole and domestic products as a whole.

4. Korea's Additional Arguments Should be Rejected

12. Korea now presents arguments about "representative models" and resale prices, and selected examples of lower prices. All of these arguments are *post hoc* explanations that should be disregarded. Moreover, these facts and arguments just underscore the inadequacy of the KTC Final Determination discussion of price effects.

13. The so-called "representative models" represented only a small part of the overall domestic industry and subject imports being considered, and there is no explanation about why the "representative models" represent the domestic like products as a whole. According to the confidential parts – which had been completely redacted in the published version – of the OTI Final Report that Korea refers to, the "representative models" allegedly used for the price effects analysis are only a comparison between some of the products of SMC and TPC. TPC alone, however, represented only a certain percentage (designated as BCI by Korea) of the production by the domestic industry as a whole. Moreover, the "representative products" discussed in the price effects analysis were less than a certain percentage (designated as BCI by Korea) of TPC total shipments. Nor is there any explanation that the examination of this limited portion of domestic like products is representative of the entire domestic industry. Thus, when using the "representative model" analysis, the KTC necessarily ignored the remaining part of the "domestic industry", and therefore distorted the analysis of price effects. This analysis was therefore biased and not based on positive evidence.

14. Korea has tried to create the impression that the Korean authorities engaged in a careful comparison of subject import pneumatic valves and substitutable domestic products, but this impression is wrong. This discussion of how the Korean authorities defined the like product (and decided what product exclusions to grant) cannot replace the analysis of price effects, because it does not examine market interactions between the subject imports and domestic like products by examining their competitive relationship in conjunction with the dumping margin at issue.

15. Another of Japan's main arguments was that the consistent and substantial margins of price overselling demonstrated the lack of any significant price effects. Korea's response does not address the fundamental inconsistency between the alleged price effects and the substantial margins of overselling. Korea now tries to significantly rewrite the KTC Final Determination. The KTC stated only that the subject import prices were "much lower" for "certain products and customers". There is no elaboration in the KTC Final Determination. The OTI Final Report provides some limited data, but this data actually contradicts the assertion by the KTC.

16. Korea goes even further, citing data not even discussed in the OTI Final Report. Korea refers to verification documents that were not discussed by KTC or OTI, but this data actually shows more overselling than underselling. Korea cites isolated statements by some customer, but this testimony, not accompanied by verifiable evidentiary documents, represents a tiny portion of the overall domestic market being examined at best.

17. Ironically, Korea's efforts to undermine the probative weight of the price overselling data actually highlight that the overall overselling was in fact typical of the vast majority of product and transactions. The KTC tried to dismiss the overselling data with a passing reference to "certain products and customers", but that brief, vague, and largely incorrect statement does not justify disregarding the price overselling.

B. The KTC's Volume Analysis Was Inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement

1. Legal Obligation under Articles 3.1 and 3.2 Concerning Volume Analysis

18. The Appellate Body has made clear that there is a "logical progression" between the obligations in Articles 3.2, 3.4 and 3.5. In order for an authority's finding under Article 3.2 to have "explanatory force", therefore, the authority must show that an increase in import volume is "significant" in light of both the "impact" on the domestic industry, as specified in Article 3.4, and the "causal link" between dumped imports and injury to the domestic industry, as specified in Article 3.5. Korea appears to agree with this conclusion.

19. Korea has also admitted that whether a volume increase is "significant" requires a "contextual consideration" of the volume increase. That is, Korea itself recognizes that determining whether an increase is significant must be more than a "quantitative exercise", and must consider "the relevant facts and circumstances of the case to come to a conclusion whether the magnitude or degree of increased dumped imports can be considered significant".

20. Contrary to Korea's argument, Japan is not asking for a full-fledged causation analysis. Japan is merely asking whether the KTC made an objective examination of whether subject imports replaced domestic like products, so as to support its finding that the increase in import volume could objectively be described as "significant". The impact analysis required under Article 3.4 depends upon an affirmative finding of a "significant" volume increase, and the injury determination required under Article 3.5 rests on the results of the impact analysis that depends upon the volume analysis. Therefore, Article 3.5 will not at all be rendered *inutile*.

2. The KTC's Examination of the Volume Increase of Subject Imports Was Deficient in Several Respects

a. Korea Has Failed to Show that the KTC Made Any Finding of Displacement of Domestic Sales by Subject Imports

21. The KTC's analysis of the "significance" of volume increases in dumped imports is flawed for many of the same reasons plaguing its analysis of price effects. The KTC never examined the issue of whether there was any displacement of domestic sales by subject imports. Its examination of subject imports' and domestic products' market shares included no consideration of the extent to which imports and domestic products interacted with each other. It failed, for example, to examine the extent to which those subject imports that went into inventory could have had any interaction with domestic products in the market. In light of all these flaws, it is apparent that the KTC did not undertake an objective examination of the evidence before it.

22. While simultaneously denying that any examination of displacement is required, Korea maintains that "OTI actually made findings on the displacement of the domestic like product by the dumped imports". But the "findings" OTI made on the issue of displacement are vague, elliptical, and anecdotal. These findings also merely compared the price levels of the subject imports and domestic like products, without taking into consideration the margins of dumping at issue viewed in light of the competitive relationship (or lack thereof) between subject imports and domestic products. Korea quotes OTI as saying that "SMC Korea supplied *products* at prices *as low as* those of the like products to *customers* in competition, such as new projects or large customers etc., and thereby encroached on the market of domestic companies …". This statement is stunning in its vagueness. What does it mean to sell at a price "as low as" domestic products – does it mean at almost the same price, or at exactly the same price; how close are the prices, and which product, domestic or imported, is priced lower? What are the "products" that SMC is supposed to have sold, and what domestic products are they being compared to? What are "customers in competition"? Are they the same customers or are they merely customers in the same general category? OTI's report provides no concrete information, even in non-confidential form, that would answer any of these questions.

23. The mere fact that some imports were sold at prices "as low as" those of the domestic products, even if true, does not mean that subject imports took any sales away from domestic producers due to the dumping. Without any evidence that the low prices caused by the dumping of subject imports actually resulted in significant sales lost by domestic producers, in other words, that domestic like products would have been sold in greater quantities if the subject imports had been sold at their normal value, OTI's allegations of market "encroachment" are mere supposition.

b. The KTC's Examination of Market Shares Failed to Show Any Market Interaction Between Imports and the Domestic Products.

24. Korea also contends that it has conducted a market share analysis of the dumped imports and the domestic products. The Korean authorities, however, presented only a numerical comparison of the volume, without examining market interactions by considering the competitive relationship between the dumped imports and domestic like products in conjunction with the margins of dumping.

C. The KTC's Analysis of Adverse Impact Was Inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

1. The KTC's Legal Obligation under Articles 3.1 and 3.4 is to Address the Counterfactual Question by Examining All Indices

25. Article 3.4 requires the authority to examine "the impact of dumped imports" on the domestic industry, and includes a specific list of those factors through which that "impact" is to be evaluated. Like other subsections of Article 3, this provision requires an investigating authority to address the counterfactual question of how these factors would have reacted if there had been no dumping.

2. The KTC's Impact Analysis Did Not Follow Logically from its Analysis of Volume and Price Effects under Article 3.2

26. As explained above and as confirmed by the Appellate Body, there is a logical progression between Articles 3.2 and 3.4. The authority's findings about prices and volume of subject imports must have explanatory force in determining the "impact of the dumped imports" under Article 3.4.

27. It is noteworthy that Article 3.4 requires an examination of the impact of the dumped imports on the "domestic industry" as a whole. Consequently, if the authority found price depression or suppression, or volume replacement by subject imports with respect to only a limited fragment of domestic like products, it should proceed with the analysis under Article 3.4 on the premise that the remaining portion of the domestic industry had not experienced any impact from the dumping. The KTC's analysis of volume and price effects, if it were correct for a small portion of the dumped imports, must be used accordingly as the basis for the analysis of the impact of the subject imports on the domestic industry as a whole. Since the KTC's impact analysis did actually examine the impact of the dumped products on the domestic industry as a whole,

without regard to the fact that the KTC cannot find the price effect of the subject imports on the domestic like products as a whole, it is necessarily inconsistent with Article 3.4.

3. The KTC Failed to Examine Whether the Subject Imports Provided Explanatory Force Regarding the Condition of the Domestic Industry

28. The increase in subject imports' market share in 2013 could not have come at the expense of the domestic industry and the KTC never explains how they could. Subject imports were priced higher than domestic products in both 2012 and 2013, which makes it highly unlikely that subject imports took any sales away from domestic products in 2013 based on price (with or without the margin of dumping added to subject import prices). Moreover, the evidence before the KTC showed that subject imports sold in different market segments from those served by domestic products, and there was no evidentiary basis for concluding that subject imports displaced domestic products to any significant degree.

29. The significant growth in the size of domestic consumption in 2013 largely represented domestic consumption's return to levels that existed at the outset of the period of investigation. While domestic consumption increased by 52.8 percent in 2013 as compared to 2012, it increased by only 14 percent when compared to 2010. The KTC focus on 2013 in isolation, without considering the trends in consumption over the entire period, did not constitute an objective analysis, and did not considering alternative explanations for the data.

30. The effects of subject import prices and the increase in import volume, as properly considered pursuant to Article 3.2, must have explanatory force for the determination of the impact of dumped products under Article 3.4. The KTC's impact examination under Article 3.4, however, did not consider the extent to which either price or volume competition had explanatory force. The KTC merely examined the relative changes in market share in one year (2013), without considering any of the other evidence that vitiated the explanatory force of the interaction of subject import and domestic products in the market, either in terms of price or volume.

4. The KTC Failed to Examine Two of the Specifically Required Factors Listed in Article 3.4

31. Article 3.4 includes a list of several specific "economic factors and indices" that must be "evaluated" as part of the authority's "examination" of the impact of dumped imports. Although Article 3.4 states that the list of such factors is "not exhaustive," there is no doubt that the authority must undertake the evaluation of every one of the listed factors. The text is quite specific that the authority's examination "shall include" an evaluation of all listed factors. Although Article 3.4 does not specify how the authority is to undertake that evaluation, an examination that does not include an evaluation of any one or more of the listed factors does not conform to the requirements of Article 3.4.

32. Japan submits that there are two factors among those listed in Article 3.4 that the KTC did not examine at all in this case – namely, the "magnitude of the margin of dumping", and the "actual and potential negative effects on … ability to raise capital or investments".

D. The KTC's Causation Analysis was Inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement

1. Legal Obligations under Articles 3.1 and 3.5

33. In order to show the requisite logical progression from Article 3.5, an authority's findings with respect to Articles 3.2 and 3.4 must also qualify as being based on positive evidence and an objective examination of that evidence. Flaws or failures in the preceding two Articles would necessarily affect the determination of a causal relationship under Article 3.5. Even Korea appears to accept this proposition. In this case, the flaws in the KTC's analysis of volume and price effects under Article 3.2 and its impact analysis under Article 3.4 are so substantial as necessarily to render its determination of a causal relationship under Article 3.5 completely unsustainable.

34. The determination of causal relationship under Article 3.5, however, encompasses more than the underlying findings under Article 3.2 and Article 3.4. First, the authority must consider whether the changes in the economic indicators of the domestic industry due to the dumping,

which it identifies under Article 3.4, comprehensively amount to "material injury" to the domestic industry. Second, the authority must still consider "all relevant evidence" that establishes or negates a causal relationship, over and above the information on price effects, volume and impact. Moreover, Article 3.5 requires the authority to "examine any known factors other than the dumped imports".

2. The KTC's Causation Determination Lacked a Proper Foundation in a WTO-consistent Analysis of Volume, Price Effects, and Impact of Subject Imports

35. In its First Written Submission, Korea accepts Japan's argument that a determination of causal relationship under Article 3.5 depends upon the underlying findings under Articles 3.2 and 3.4. Korea's reliance on market share and domestic prices depends upon determinations that the KTC made under both Articles 3.2 and 3.4, and the reliance on the condition of the domestic industry depends upon findings the KTC made under Article 3.4.

36. An examination of the flawed analyses the KTC made under Articles 3.2 and 3.4 makes clear, however, that the determination of causation made by the KTC under Article 3.5 was itself fatally flawed as a result of the flaws in the preceding analyses.

3. The KTC Failed to Establish the Requisite Causal Relationship between the Subject Imports and the Condition of the Domestic Industry

37. Korea has not even attempted to rebut Japan's claims, saying only that "Japan basically repeats the same arguments it raised under Article 3.2". That is not a rebuttal. Although the facts examined under Article 3.2 may be the same as they are under Article 3.5, the "consideration" required of the authority by Article 3.2 is different from the "demonstration" of a causal relationship required by Article 3.5. The facts on pricing examined by the KTC fail to demonstrate the causal relationship required by Article 3.5. Korea's failure to rebut Japan's analysis of pricing trends in the context of Article 3.5 may be taken as a virtual concession of that conclusion.

38. The trends in subject import volume and import prices, when compared to the trends in domestic industry volume, prices and profitability, all show no relationship between subject imports and the condition of the domestic industry. Under the circumstances, the KTC's finding of a causal relationship between subject imports and injury was not based on an objective examination of the evidence before it.

4. The KTC Failed to Separate and Distinguish Injurious Effects of Other Known Factors from Injurious Effects of Subject Imports

39. Korea's defense of the KTC's causation determination relies "primarily" on findings the KTC made under Article 3.2 and 3.4. Its response to Japan's argument that the KTC failed to separate and distinguish other known factors is sparse. Korea notes that the KTC examined non-subject imports, domestic consumption, export volume and the cost of raw materials. Korea fails to show, however, how the KTC separated and distinguished these factors from the injurious effects of subject imports. Equally significant, Korea fails to rebut Japan's arguments about other factors that the KTC appears not to have considered at all.

E. The KTC's Definition of Domestic Industry Was Inconsistent with Articles 3.1 and 4.1 of the Anti-Dumping Agreement

1. Legal Obligation Under Articles 3.1 and 4.1

40. The Appellate Body has confirmed that the term "major proportion" in Article 4.1 requires both quantitative and qualitative assessments. Thus, it is not sufficient for the investigating authority merely to include domestic producers of the like products accounting for a *quantitatively* large proportion of the total domestic production in the definition of the domestic industry. When those domestic producers that voluntarily come forward to the authority are not *qualitatively* sufficient – when they are different from the rest of the industry – the authority must include other producers in the domestic industry definition.

41. What is required to satisfy the qualitative aspect of the "major proportion" definition should be analysed on a case-by-case basis, depending on the industry situation in each case. In an

industry where the number of domestic producers of like products is limited and the businesses of the domestic producers are not homogenous, a domestic industry definition that includes only a small number of companies is more susceptible to a material risk of distortion. Thus, the investigating authority would have to provide a particularly convincing explanation as to why the subset of the total domestic production could be considered to substantially reflect the total domestic production as a whole.

42. Korea argues that "facts available" are not appropriate for the injury analysis. In contrast to this position before the Panel, Japan notes that Korea itself mentioned in its notice for the initiation of the investigation that "facts available" may be used for the injury analysis. There is nothing "unrealistic" about the use of "facts available". The point is simply that when faced with a gap in the record, the authorities can try to fill that gap as best they can with the available information. Ignoring the gap, and pretending it does not exist, is not preferable and in fact creates the situation of distorted results when the gap reflects a distinct domestic industry from the one that has voluntarily responded.

2. Korea Has Failed to Rebut Japan's Argument That the KTC's Definition of the Domestic Industry Did Not "Substantially Reflect the Total Domestic Production"

43. 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. It appears that once the Korean authorities secured participation of domestic producers that account for over 50%, they did not think it necessary to do anything else.

44. Regarding the quantitative aspect, the KTC did not consider the available evidence objectively. The OTI never confirmed and updated, or verified, this information with subsequently submitted information for the two partially cooperative firms, Yonwoo and Shin Yeong. Also, the evidence before the Korean authorities presented inconsistent information about the levels of production for the next largest of the domestic producers.

F. The KTC Violated Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement by Failing to Require Providers of Information to Show "Good Cause" or to Provide Adequate Non-Confidential Summaries

1. The KTC Failed to Establish that "Good Cause" Was Shown as Required by Article 6.5

45. Contrary to Korea's allegation, the petitioners' "implicit assertion" of good cause by deleting allegedly confidential information in the public version of their submissions in the underlying investigation does not satisfy the requirements of Article 6.5. As confirmed by the panel in *Korea – Certain Paper,* good cause must be shown for all categories of information, and cannot be assumed regardless of the nature of the information at issue. Moreover, absent some showing of "good cause", a panel has no way to review what the authority has done and whether that action complies with Article 6.5. Also, information that is truly confidential in one case may not be confidential in another case. That is why a generic approach set forth in a law is not enough.

2. The KTC Failed to Require Non-Confidential Summaries in "Sufficient Detail" to Convey the "Substance" of the Information as Required by Article 6.5.1

46. Article 6.5.1 allows for non-confidential summaries of confidential information, but those summaries must be in "sufficient detail to permit a reasonable understanding of the substance of the information". Simply redacting numerical information, while leaving some general narrative, does not comply with Article 6.5.1. To redact numerical information from tables and replace it with nothing at all cannot permit a "reasonable understanding" of the "substance" of the information, even if the parties still can discern the category of information being withheld.

47. Korea argues that the "substance" means the "essence" of the information, but reads this concept too narrowly. The "substance" of the information will vary case-by-case, but depends on how the information will be used. Since the point is to allow parties to understand enough to

defend their interests, the focus should be on how the authorities will use that information being summarized.

48. Article 6.5.1 contemplates exceptional situations when no summary can be provided, but Korea has not invoked this provision, and the KTC never made any efforts to qualify for this exception. Korea notes this theoretical possibility, but does not link this possibility to the facts of this particular dispute.

49. Korea notes that the KTC sometimes provided its own non-confidential summaries, and argues Japan's claim is a "purely formalistic argument of harmless error". However, the text of Article 6.5.1 requires the party to submit the non-confidential summary, and does not provide for an exception if the authority later provides its own summary.

G. The KTC Violated Article 6.9 of the Anti-Dumping Agreement by Failing to Disclose the "Essential Facts" Before its "Final Determination"

50. Essentially admitting the inadequacy of the disclosure prior to the KTC Final Determination (and the OTI Final Report on which the KTC based its final determination), Korea shifts the time line to the Minister of Strategy and Finance's ("MOSF") decision to impose duties. But, this argument fails both legally and factually.

1. The MOSF Decision Was Not a "Final Determination" For Purposes of Article 6.9

51. Korea argues that "a final determination" means a decision to impose duties, but this interpretation of Article 6.9 is wrong. The text of Article 6.9 expressly distinguishes between "a final determination" and "the decision" to impose definitive measures. The remainder of Article 6 supports this distinction between "final determination" on various issues and the "decision" to impose duties. Also, an anti-dumping "duty is imposed" under Article 9.2 only if the imports have been "found to be dumped and causing injury", a clear reference back to Articles 2 and 3 albeit without the specific word "determination". Thus, the Anti-Dumping Agreement as a whole reflects this distinction between "determinations" and the "decision" set forth in Article 6.9.

52. In the communication of 12 December 2014 sent from the KTC to the legal counsel of the interested parties, the KTC made a notification of the second meeting of the interested parties, where the KTC would "explain essential facts under consideration which form the basis of determining the final dumping margin". This communication expressly refers to Article 6.9 of the Anti-Dumping Agreement (as well as the relevant provision in the municipal law), and states that the meeting would be held in accordance with this provision. It is thus evident that the KTC itself was aware that its "Resolution of Final Determination" does constitute "a final determination" within the meaning of Article 6.9, and accordingly, the disclosure of essential facts needed to be done before the issuance of the KTC's "Resolution of Final Determination".

2. The Korean Authorities Did Not Disclose the "Essential Facts" as Required by Article 6.9 to Allow the Japanese Respondents to Defend Their Interests

53. Japan's claim under Article 6.9 does not call for the disclosure of "raw data" but rather for the disclosure of the compilation of the raw data into the "essential facts". Korea repeatedly refers to Japan demanding the "raw data", but these statements are simply wrong.

54. Korea refers to Japan demanding the "minor, intermediate" findings, but this argument misunderstands the structure and nature of a final determination of injury under Article 3. Japan's 14 specific items were grouped into four categories, each one related to one of the key issues the authority must consider under Articles 3.1, 3.2, 3.4, and 3.5 in order for the authority to make the final determination of injury. These four categories may be "intermediate" findings in the sense that they all build up to an overall finding of injury, but they are in no way "minor" findings.

55. Korea invokes Article 6.5 and the need to protect confidentiality, but the need to protect confidentiality does not excuse an authority's failure to disclose the "essential facts" in some way that still protects the confidentiality.

56. Japan has presented arguments about 14 specific items, and Korea has not responded to each of those specific items. The Korean arguments do not turn these "essential facts" into something that need not have been disclosed, and do not establish that the Korean authorities provided the necessary disclosure.

57. For all of these reasons, Korea has failed to rebut Japan's showing that the KTC acted inconsistently with Article 6.9 by not disclosing the "essential facts" regarding these 14 specific issues that were such an important part of the injury determination in this case.

H. The KTC Violated Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement by Not Providing Adequate Disclosure in a Public Notice

58. Korea erroneously believes that because the KTC and OTI documents were "lengthy and detailed" and the investigation was "extensive and in-depth", the Korean authorities must have complied with their obligations. But Korea admits that "not every detailed aspect of the factual discussion and intermediate findings" was included. That is the crux of the dispute. Japan does not believe the seven issues can be dismissed as mere "detailed aspects" and "intermediate findings". Rather, Japan believes that these issues are "material" within the meaning of Article 12.2 and "led to the imposition of final measures" within the meaning of Article 12.2.2.

59. Korea has engaged in *post hoc* explanations to explain its injury analysis under Article 3. Japan is of the view that those explanations were not actually considered by the KTC, and thus cannot save the defective determination. However, even if the Panel were to conclude that the KTC considered those facts, and found those facts to qualify as "material" such that they "led to the imposition of final measures" within the meaning of Article 12.2, they are not reviewable in the published document. The Appellate Body has noted this obligation to explain the basis for decisions under Article 12, and stressed that the reviewing panel must examine the rationale or explanation provided by the investigating authority in its determinations. Thus, in any case, the KTC's *post hoc* explanations are inconsistent with Articles 12.2 and 12.2.2.

I. Korea Failed to Rebut the Consequential Claim

60. Korea has not presented any argument against Japan's consequential claims, other than the substantive arguments presented above that have already been addressed by Japan. The consequential claims thus stand.

_____

ANNEX C

ARGUMENTS OF KOREA

ANNEX C-1

FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF KOREA

I. INTRODUCTION

1. This dispute concerns Korea's imposition of definitive anti-dumping duties on pneumatic valves from Japan (the "dumped imports"), as implemented by the "Decision to Apply Anti-Dumping Duties on the Pneumatic Transmission Valves from Japan" and the "Rules on Imposition of Anti-Dumping Duties on Pneumatic Valves from Japan" of the Ministry of Strategy and Finance ("MOSF"). These measures were based on the dumping and injury determinations made by the Korea Trade Commission ("KTC"), as set forth in the "Resolution of Final Determination on Dumping and Injury to Domestic Industry of Valves for Pneumatic Transmissions from Japan" dated 20 January 2015. The relevant factual findings and recommendations made by KTC in its Final Resolution were, in turn, substantially based on the Final Investigation Report of the Office of Trade Investigation ("OTI").

2. Japan brings nine claims relating to Korea's anti-dumping measure on pneumatic valves. These claims can be grouped into five substantive claims, three procedural claims and one consequential claim under Article 1 of the Anti-Dumping Agreement and Article VI of the General Agreement on Tariffs and Trade of 1994.

3. The relevant question before the Panel is not whether it would have reached the same conclusions as the Korean authorities did, but rather whether the facts were properly established, whether these facts were objectively examined, and whether a reasonable and reasoned explanation was provided as to how these facts supported the findings made. The Korean authorities' examination was critical and searching, and they reflected on all of the counter-arguments and alternative readings of the facts presented by the Japanese exporters, the large majority of which are simply repeated by Japan in the current dispute.

II. FACTUAL BACKGROUND

4. The underlying investigation involved an extensive discovery and examination of the facts collected by the Korean investigating authorities over many months and through a constant dialogue with the interested parties. Under Korean law, OTI is a subdivision of KTC specialized in anti-dumping investigations. OTI carries out the anti-dumping investigation and reports to KTC (i.e. nine commissioners: one standing and eight non-standing members) that adopts a resolution based on OTI's findings. KTC is only vested with the authority to conduct anti-dumping investigations. KTC's resolution is then communicated to MOSF, which has the authority to hear the parties, conduct additional investigative steps, and make the final determination, including the decision whether or not to impose anti-dumping measures.

A. HISTORY OF THE KOREAN PNEUMATIC VALVE MARKET & JAPANESE EXPORTERS' MARKET SHARE EXPANSION POLICY

5. Japan has historically been the main supplier of pneumatic valves to the Korean market, and SMC Corporation, a respondent in the underlying investigation has been the largest producer of pneumatic valves in the world for decades. TPC, one of the applicants in the underlying investigation, was SMC's distribution agent in Korea until 1997. In 1995, however, SMC established its Korean subsidiary, SMC Korea, and started to sell its pneumatic products in the Korean market directly through SMC Korea. TPC naturally had to switch from a distributor to a producer, and began producing its own pneumatic products in 1997. Therefore, it was not until 1997 that Japanese exporters faced competition from domestic producers in Korea. To date, SMC maintains a dominant position in the Korean market and is by far the largest exporter from Japan. In 2013, the year of the dumping, SMC supplied [[***]]% of the total dumped imports from Japan. Its market share in Korea was in the range of [[***]]% to [[***]]%, which represented a rapid increase. There are nine domestic producers of the like product in Korea, but they are all relatively small companies.

6. Throughout the underlying investigation, the applicants repeatedly asserted that [[***]] was engaging in low-pricing and aggressive marketing strategies with a view to expanding its market share in Korea. KTC verified such complaints, and included the results of its verification in the Final Resolution and the Final Report. The facts made clear that the Japanese exporters had a genuine motivation to implement an injurious dumping campaign that transpired in the form of the alleged "aggressive marketing" or "strategic low pricing" in the Korean valves market. For example, SMC set a target to expand its global market share from 32% in 2012 to 50%. It is telling that the Japanese respondents' dumping, accompanied by aggressive marketing or strategic low pricing, took place in Korea during the period of 2012-2013, and that their market share, which had been declining in 2012 to [[***]]%, picked up dramatically to [[***]]% in 2013.

B. COMPARABILITY AND COMPETITION BETWEEN THE DUMPED IMPORTS AND THE LIKE DOMESTIC PRODUCTS

7. The product subject to the underlying investigation is characterized by a limited number of key features and functions. It is not a complex product that consists of thousands of completely different types that cannot be compared and that are not in competition with one another, as Japan suggests. Pneumatic valves are one of the three key components of the larger "pneumatic system". The other two key components are air units and cylinders (i.e. the actuators). Pneumatic systems constitute an essential component of production lines and other forms of automated manufacturing facilities in a wide-range of industries. It is the pneumatic valve that controls and directs the flow of compressed air in order to operate cylinders. A wide variety of different pneumatic valve models can be used interchangeably within a pneumatic system so long as they can actuate the required cylinder.

8. Pneumatic valves are all classified under HS heading 8481.20. In the underlying investigation, the product scope was limited to those pneumatic valves that control the flow of the compressed air with less than 10 bar pressure to operate the cylinders with an inside diameter of not more than 320mm.

9. Both the dumped imports and the like domestic products covered a variety of product "models". During the period 2010 to 2013, [[***]] product models of the Japanese dumped imports were imported into Korea, while [[***]] product models of the like domestic products were sold in the Korean market. In 2013, the year of the dumping, the Japanese respondents sold [[***]] product models while the domestic industry sold [[***]] product models.

10. Despite such apparent diversity, KTC found that the constituent product models of the dumped imports shared the same or similar physical characteristics, end-uses, manufacturing processes, and distribution channels. KTC also found that the like domestic products, as a whole, presented the same or similar physical characteristics, constituent parts, end-uses, manufacturing processes, distribution channels, quality, and consumer preferences as the dumped imports. In examining the comparability, OTI did not simply rely upon its "like product" definition, as Japan asserts. Instead, it examined the comparability between specific product models or between specific product segments within the broad baskets of the dumped imports and the like domestic products.

11. First, based on the products sold in 2013, OTI specifically identified corresponding "representative models" of the dumped imports and the like domestic products which shared the same basic physical characteristics and which were sold in large volumes. The representative models shared six key physical characteristics based on (i) operating method; (ii) number of ports; (iii) valve size; (iv) switching method; (v) voltage; and (vi) wiring method. Thus, the representative models from one product group were deemed directly substitutable and competitive with the corresponding representative models from the other product group. OTI found that there were [[***]] representative models of the dumped imports which had the same physical characteristics as [[***]] representative models of the like domestic products.

12. Next, OTI calculated the proportion of these representative models in relation to the total amount of valve sales. OTI found that, as of 2013, the [[***]] representative models of the dumped imports accounted for [[***]] of the total sales of the dumped imports in Korea, while the [[***]] representative models of the like products accounted for [[***]] of their total sales.

13. OTI then expanded its analysis by comparing the valve sales on the basis of the "series" of products. A series of products, in OTI's analysis, is a group of the product models which share the same or similar physical characteristics. Thus, the dumped imports and the like domestic products that fell within the same series were deemed substitutable with each other and therefore in competition. OTI found that there were [[***]] corresponding series in which the representative models and their variations of the dumped and domestic products were included and that these [[***]] corresponding series accounted for [[***]]% of total sales of the dumped imports and [[***]]% of total sales of the like domestic products in 2013.

14. This does not mean that the products not belonging to the above [[***]] corresponding series were not substitutable or competitive with each other. As observed by OTI, the models that fell outside the scope of the [[***]] corresponding series (less than [[***]]% of the total sales) were those models which were simply customized to particular specifications required by specific customers. As such, these models were still substitutable with the products in the other product group, depending on the preference of the specific customer, or could be developed by the domestic industry once demand for such products arose.

15. In addition to objectively verifying the comparability based on product characteristics, KTC examined how the dumped and domestic products *actually* competed with each other in the market based on other positive evidence, such as customer evaluations and the result of on-site verifications by OTI. Customers confirmed that they were using, or could use, the dumped and the like domestic products interchangeably and that they were competing fiercely in the market. Moreover, the competition between the dumped and the like domestic products was demonstrated by the respective development of market shares over the course of the POI. Tellingly, when the market share of the dumped imports decreased in 2011 and 2012, the market share of the like domestic products increased. In 2013, when the market share of the dumped imports sharply increased, the market share of the like domestic products fell by more than [[***]]%. This market share development demonstrated the existence of close market interaction and competition between the dumped and the like domestic products.

16. Thus, on the basis of the above-described analysis of objective characteristics and market interaction, KTC concluded there was competition between these products that supported the explanatory force of the dumping for purposes of examining its effects on prices and the impact on the domestic producers.

III. JAPAN'S SUBSTANTIVE CLAIMS ARE FLAWED

17. Korea considers Japan's legal claims to be without merit. Japan's legal claims under Article 3 of the Anti-Dumping Agreement are mainly premised on the groundless argument that there was no competition between the products, and that the investigating authorities thus erred in their analyses of the explanatory force of the dumped imports for purposes of objectively examining the volume, price, and other injury factors. In addition to lacking a factual or legal basis for these assertions, Japan fails to demonstrate that KTC's analyses under Article 3 were not objective or not based on positive evidence.

18. Specifically, MOSF's decision to impose anti-dumping duties on imports of pneumatic valves from Japan was the result of KTC's objective examination based on positive evidence of dumping, injury and causation. KTC considered the required elements that together, in a logical progression, formed the injury and causation determination, and it conducted a critical and searching examination of the record evidence in conformity with the basic principles of good faith and fundamental fairness. It conducted the examination in an unbiased manner, without favoring any interested party or group of interested parties. In a reasoned and reasonable manner, KTC made a number of intermediate factual findings that supported its determination of material injury to the domestic industry in Korea as a result of the dumped imports.

19. Japan disagrees with the findings of KTC but fails to point to any legal errors. Japan's submission is an attempt at re-litigating before the Panel the issues that were raised before the investigating authorities, hoping that the Panel will conduct a *de novo* review and reach different conclusions on the facts. That, however, is not the task of the Panel, which is not the trier of fact in the context of WTO disputes involving anti-dumping measures. The Panel should be mindful of the standard of review as articulated in Article 17.6 of the Anti-Dumping Agreement and Article 11 of the DSU. Under the applicable standard of review, the question is not whether the Panel would

have reached the same conclusion as the investigating authority did. The task of the Panel is to determine whether the investigating authority was biased in its examination of the evidence or failed to properly establish the facts. Japan fails to present a *prima facie* case of such lack of an objective examination or failure to properly establish the facts by KTC.

A. JAPAN'S CLAIMS RELATING TO THE PRICE EFFECTS OF THE DUMPED IMPORTS UNDER ARTICLES 3.1 AND 3.2 OF THE ANTI-DUMPING AGREEMENT ARE FLAWED

20. In relation to the price effect findings under Article 3.2, KTC properly considered this element by dynamically analyzing the relevant price trends, based on import prices as well as on so-called "actual" sales prices, that is, the price at which the products were re-sold to the first independent buyer in the Korean market. The price developments and trends were examined over the entire POI, as well as making an end-point to end-point comparison. KTC made several observations, all supporting its finding that the prices of the dumped imports had explanatory force for the price suppression and depression of domestic prices at the end of the POI:

> "[The] suppression of the price increase as well as the decrease in the price appears to have been caused by the fierce competition with the dumped products that had strong dominance in the domestic market. In particular, in 2013, the drastic decrease in the price of the dumped products apparently depressed the price of the like product despite strong factors warranting an increase of sales price, such as the increase in the manufacturing cost of the like product. As such, the dumped products suppressed the increase in the price of the like product throughout the entire period of investigation, and caused the price decrease of the like product in 2013 during which the prices of dumped imports drastically decreased.
>
> ...
>
> [KTC] finds that the dumped products suppressed price increases of the like product and caused decreases thereof, although the average sales price of the dumped products was higher than that of the like product.
>
> The average sales price of the dumped products was higher due to their price differential in accordance with models, option details or customers, but it was found that the sales price of the dumped products was much lower than the average sales price in the case of certain products or customers for which the degree of competition with the domestic industry was fierce, which had the effect of suppressing increases in the price of the like product or causing decreases thereof. It was investigated that [[***]] caused the domestic industry to decrease the sales price or refrain from increasing it in order to respond to strengthened marketing activity of [[***]], which consistently expanded its sales organizations and used its dominant position to attract distribution agents or discourage defections of its distribution agents, and thus the domestic industry had to respond to such strengthened marketing activities of [[***]] and became forced to decrease the sales price or refrain from increasing prices".

21. KTC observed that, overall, prices of the dumped products and the like domestic products moved in the same downward direction throughout the entire POI. In particular, it noted that prices of the dumped imports decreased significantly in 2013, when dumping took place in Korea. During the same period, prices of the like domestic products also decreased, although costs increased and demand surged, and prices were thus expected to rise. In addition, KTC observed that, despite the fact that the average import price of the dumped imports were higher than prices of the like domestic products, the Japanese respondents resold the dumped imports in the Korean market at prices similar to or even below the sales prices of the like domestic products when there was direct competition with the like domestic products.

22. Based on these observations, KTC concluded that the dumped imports had the effect of depressing and suppressing the prices in the domestic market.

23. Japan's argument of alleged divergence in price trends between domestic and dumped products is without merit. KTC found that the slight increase in the "average" import price of the dumped products in 2012 was not a significant factor that undermined the effect of the dumped imports on prices of the like domestic product as the prices moved overall in the same downward

direction throughout the entire POI. Further, KTC's finding was supported by a dynamic assessment of the import price trends of the competitive "representative models" and the trends of the actual sales prices in the Korean market, which all showed a downward trend even in 2012. Also, although Japan alleges that there was a divergence in prices in 2013 because prices of the like domestic products fell modestly while the price of the dumped imports fell drastically, KTC objectively confirmed that prices of the like domestic products fell slightly because they were already too low to fall to the same extent as the dumped imports. In any case, despite any of these alleged divergent trends, KTC confirmed a consistent and prevalent practice of Japanese exporters selling the dumped products at low prices to compete with domestic products, and such finding negated any allegation of lack of interaction or competition. The strategic low pricing of the dumped imports did not take place only with respect to a limited number of products but it was consistently implemented in respect of a broad range of the products and customers – thereby depressing the prices or preventing the prices of the domestic like product from increasing.

24. Next, KTC found that, although there was overselling when based on the "average" of import prices, its significance was disproved by the fact that the Japanese respondents implemented low pricing strategy specifically targeting the customer bases of the domestic producers in the Korean market and were selling dumped products at prices similar to or even lower than the domestic prices. KTC considered sufficient evidences that the Japanese respondents were engaged in targeted aggressive market activities and the strategically low pricing, which confirmed that the dumped products had explanatory force for the price suppression during the POI and price depression at the end of the POI.

25. In addition, KTC corroborated its observation that prices did not increase and even decreased as a result of the dumped imports by confirming that the prices of the domestic like products stayed significantly below the "reasonable sales price", a reasonably constructed price that would allow the domestic industry to realize a reasonable level of profit. The comparison with the reasonable "target" price showed that the lack of increase in domestic prices to the level of the target price was an effect of the dumped imports.

26. Based on this objective assessment of positive evidence, KTC observed that the dumped imports were suppressing the price of the like domestic products throughout the entire POI and were also found to be depressing prices in 2013 in particular.

B. JAPAN'S CLAIMS RELATING TO DUMPED IMPORTS' VOLUME DEVELOPMENT UNDER ARTICLES 3.1 AND 3.2 OF THE ANTI-DUMPING AGREEMENT ARE FLAWED

27. KTC found that the volume of dumped imports had significantly increased both in absolute and relative terms over the POI. Dumped imports increased from [[***]] units in 2012 to [[***]] units in 2013, an increase of 78.9% compared to the previous year, and this import volume represented an increase of [[***]]% from that of 2010. This finding was corroborated by the fact that the dumped imports significantly increased their market share in the Korean market from [[***]]% in 2012 to [[***]]% in 2013, at the expense of the domestic industry whose market share dropped from [[***]]% to [[***]]% in the same period.

28. So, after two years of increasing market share for the like domestic products, the situation completely reversed in 2013, the year that greatly overlaps with the dumping POI. In particular, in 2013, the market share of the dumped products increased by [[***]]% from the previous year, while the market share of the like domestic products decreased by [[***]]% from the previous year due to a dramatic increase in the import volume of the dumped imports. In relation to this analysis, 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, was implementing its aggressive policy to expand its global market share from 32% to 50%.

29. All of these findings disprove Japan's allegation that there was no market interaction or competition between the dumped imports and the domestic like products. Also, there is no legal or factual basis for Japan's assertion that certain dumped imports should have been excluded from the total volume of dumped imports for purposes of this analysis, simply because they were allegedly destined for increasing inventory. In any event, the inventory increase reported by SMC was simply reflective of increased sales in a growing Korean market.

30. Thus, KTC carried out its examination of the volume of dumped imports in an objective manner and found that, on the basis of uncontested positive evidence, the volume of imports increased sharply during the POI, both in absolute and relative terms. Japan has failed to demonstrate otherwise.

31. Japan is wrong to require the authorities to examine the effects of the increase in the volume of imports. Article 3.2 does not require a "displacement" analysis similar to what is required for example under Article 6.3 of the SCM Agreement. Article 3.2 only requires the authorities to consider whether the volume of dumped imports increased in absolute or relative terms. Japan fails to point to any bias in the authorities' examination of the volume developments.

C. KTC'S EXAMINATION OF THE IMPACT OF THE DUMPED IMPORTS ON THE DOMESTIC INDUSTRY WAS OBJECTIVE AND BASED ON POSITIVE EVIDENCE AS REQUIRED BY ARTICLES 3.1 AND 3.4 OF THE ANTI-DUMPING AGREEMENT

32. In relation to the examination of the impact on the domestic industry, KTC examined and adequately explained the relationship between the dumped imports and the state of the domestic industry. KTC examined in a dynamic manner all of the required injury factors in Article 3.4 and found a negative development in at least twelve factors, namely (i) reduced production volume, (ii) reduced capacity utilization, (iii) increased inventory, (iv) reduced sales volume, (v) reduced market share, (vi) price reduction, (vii) reduced profits, (viii) reduced return on investments, (ix) reduced employment, (x) reduced wages, (xi) difficulty in raising capital, and (xii) reduced investments.

33. The correlation that was found to exist between the period of time in which the dumping occurred and the negative development of a significant number of injury factors formed an appropriate basis for KTC's intermediate finding of an injurious impact of the dumped imports on the state of the domestic industry. Japan's argument is merely that KTC allegedly failed to evaluate two injury factors listed in Article 3.4, relating to the ability of the industry to raise capital and the magnitude of dumping. However, the facts on the record disprove Japan's allegation as they clearly show that KTC appropriately examined and explained the results of these factors as well.

34. Thus, KTC objectively examined all injury factors and reached the reasonable and reasoned conclusions about the impact of the dumped imports on the overall state of the industry. While Japan may disagree with these conclusions and with the way in which KTC weighed the different factors and developments, it fails to present a *prima facie* violation of the requirements of Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

35. Japan is wrong to require that the authorities *establish* that the injurious impact is caused by the price effects and volume developments of the dumped imports. The Article 3.4 injury examination requires authorities to take a snapshot of the state of the domestic industry and to examine all relevant factors in a dynamic and objective manner in order to determine if the dumped imports had explanatory force for the developments in the injury factors. Whereas Article 3.5 requires the examination of the effects of dumping, as set forth in both 3.2 and 3.4, no separate link needs to be established between the volume and price effects and each of the injury factors of Article 3.4. Certain considerations that are relevant for examining the explanatory force of the volume and price developments may therefore also need to be examined in the context of the Article 3.4 analysis, but this does not mean that investigating authorities are required to establish a link or demonstrate that the injury factor developments of Article 3.4 were caused by the effect of the volume and price developments. No fully-fledged causation and non-attribution analysis is required under Article 3.4.

36. Japan is also wrong to seek to isolate certain injury factors or certain years during the POI. The authorities' analysis of the relevant factors was dynamic in nature and examined all such factors over the entire POI, both by looking at the trends and by comparing the evolution from the beginning to the end of the POI, thus placing these factors in the context of the dumping found to exist. In so doing, the authorities confirmed that the dumped imports had explanatory force for the developments in these factors.

D. KTC Conducted an Objective Examination of the Causal Relationship and Appropriately Separated and Distinguished the Injury Caused by Other Known Factors as Required by Articles 3.1 and 3.5 of the Anti-Dumping Agreement

37. KTC's causation and non-attribution determination under Article 3.5 followed the customary practice, as upheld by the Appellate Body, of examining in a dynamic way the trends in the injury factors and their coincidence in time with the dumping found to exist so as to find that there existed a causal link between the two. Thus, a causal link was found to exist between the dumped imports and the injury to the domestic industry. Specifically, KTC identified at least fourteen factors supporting its injury and causation determination. Japan's argument that KTC's determination violated Articles 3.1 and 3.5 is entirely without merit. KTC demonstrated the causal relationship not only on the basis of each relevant injury factor, but also on the basis of a holistic evaluation of all injury factors.

38. Following this integrated analysis that dumped imports were causing injury, through the effects of dumping as set forth in Articles 3.2 and 3.4, KTC examined whether that link was severed by other factors that were known to be causing injury to the domestic industry at the same time as the dumped imports. This analysis consisted of a careful and in-depth scrutiny of other known factors such as imports from countries other than Japan, the evolution of domestic consumption, the domestic industry's export performance and the cost of raw materials. For example, KTC distinguished the volume effect of third-country imports from the volume effect of the dumped imports. It was found that the third country volumes were very small and their market share equally small at about [[***]]%. KTC also distinguished the price effect of such third-country imports by finding that prices of the third-country imports were much higher than the prices of both the dumped imports and the like domestic products. Therefore, these third-country imports, which were minimal in terms of volume, were found to have had, at most, a minimal impact on the domestic industry. On the basis of this examination, it was established that there existed a causal link between the injury suffered by the domestic industry and the Japanese dumped imports.

39. Japan makes a number of flawed arguments, often repeating its previously addressed points about diverging price trends or developments in certain injury factors in isolation. For example, Japan complains that KTC's causation analysis was based on the events that occurred in 2013, in isolation, without due regard of the same indices in the context of the entire POI. However, the coincidence in trends is between the dumping and the injury found to exist, and does not necessarily concern a continued trend within each of the injury factors over the POI. The question that was answered affirmatively by KTC was whether there existed a causal link between the dumping in 2012-2013 and the injury found to exist. That is the correlation in trends which is most relevant.

40. In sum, and based on a logical progression and a holistic approach to the injury and causation determination, KTC reached a reasonable and reasoned conclusion in light of the facts and arguments before the authorities that the dumped imports caused injury to the domestic industry.

41. Japan's argument that certain "other factors" should have been examined because they could have been known to the authorities is legally flawed. It is well established that authorities will be required to examine "other factors known to be causing injury" only when these other factors are clearly raised and when it is substantiated by evidence that these factors are causing injury. Japan fails to establish that the other factors it argues should have been examined were even raised by the interested parties, let alone substantiated with evidence. In addition, Japan fails to establish any bias in the authorities' examination of the other factors that were examined.

E. KTC's Definition of the Domestic Industry was Proper and Introduced No Risk of Material Distortion as Required by Articles 3.1 and 4.1 of the Anti-Dumping Agreement

42. KTC's definition of the domestic industry under Article 4.1 was based on an objective examination of questionnaire responses received from domestic producers representing [[***]]% of total domestic production. Quantitatively, these producers constituted not simply "a" major proportion of total domestic production but even "the" major proportion of the domestic production. In addition, qualitatively, KTC's definition was based on an objective process that did not involve any risk of material distortion.

43. In the underlying investigation, KTC sent questionnaires to all eleven producers of the pneumatic valves, to which only two producers, TPC and KCC, submitted responses. Both were included in the definition of the domestic industry. Two other domestic producers, Shin Yeong and Yonwoo, responded that they were unable to respond to the questionnaire because of insufficient resources. It was also examined and concluded that there was no other credible source to obtain industry-wide data or data on the domestic producers not participating in the investigation. On that basis, KTC defined the domestic industry based on TPC and KCC, i.e. the two producers that came forward and provided the requested information. At the public hearing, the respondents insisted that other domestic producers should also be examined because they were allegedly performing well. In response, additional effort was undertaken by KTC to obtain data from the other domestic producers. In the end, Yonwoo and Shin Yeong were persuaded and submitted some limited and incomplete information on sales volume and operating profit, which were reviewed in order to respond to such arguments by the respondents. Ultimately, this limited and incomplete data confirmed that these two producers were similarly suffering injury and thereby corroborating KTC's findings.

44. Japan's speculative assertions about the reasons why certain producers did not come forward or did not respond to the questionnaire do not establish a *prima facie* case of an improper definition of the domestic industry and are in any case contradicted by the facts on the record which show that even the producers that did not participate for resource-related reasons claimed to be injured by the dumped imports. Nothing in the process of defining the domestic industry was capable of skewing the definition.

45. Japan fails to explain what more the authorities should have done to seek greater participation of producers and is incapable of pointing to any legal obligation to do so.

IV. JAPAN'S PROCEDURAL CLAIMS ARE MISGUIDED

46. Japan's procedural claims under Articles 6.5, 6.5.1, 6.9, 12.2 and 12.2.2 are undeveloped, unsubstantiated and without merit. Japan has failed to satisfy its obligation to make a *prima facie* case of violation.

A. JAPAN'S CLAIM THAT KTC'S TREATMENT OF CONFIDENTIAL INFORMATION WAS INCONSISTENT WITH ARTICLES 6.5 AND 6.5.1 OF THE ANTI-DUMPING AGREEMENT IS WITHOUT MERIT

47. In relation to the obligations under Articles 6.5 and 6.5.1, Japan merely lists a number of items from the domestic producers' submissions that were kept confidential and simply asserts that confidentiality was granted without "good cause" and that no non-confidential summaries were provided "at all". These are mere assertions which are demonstrably inaccurate. In Korea, every interested party in anti-dumping investigations submits non-confidential summaries by designating what information is to be treated confidential. It does this by deleting the relevant information. By doing so, the provider of the information asserts that such deleted information falls within the categories of "confidential information" specifically set forth in the relevant laws in Korea (in particular, the Enforcement Decree and Enforcement Rule of the Customs Act of Korea). It goes without saying that every participant in the underlying investigation, including KTC, the applicants, the respondents, and the other interested parties, were all well aware of this common practice in Korea.

48. KTC proceeded to objectively assess whether there was "good cause", i.e. whether the deleted information indeed fell within a category of confidential information enumerated in the relevant Korean laws. In applying the relevant provisions of Korean law on confidential treatment of information, KTC also considered that the requested confidential information was by its nature "commercially-sensitive information (such as profit or cost data or proprietary customer information) that is not typically disclosed in the normal course of business and which would likely be regularly treated as confidential in anti-dumping investigations". There was therefore a "good cause" assessment based on a presumption of good cause reflected in Korean law. KTC did not require the applicants to link each piece of information that was redacted to one of the categories of confidential information set out in Article 15 of the Enforcement Rule of the Customs Act, because the nature of the redacted information obviously pointed to the relevant category of confidential information under the law.

49. Moreover, it is the established practice in Korea that all interested parties to anti-dumping investigations provide the "non-confidential summary" of their confidential information by way of providing a public version of the document that contains the confidential information. In the underlying investigation, the applicants provided non-confidential summaries for all confidential information that they submitted. Such non-confidential summaries were in sufficient detail to permit reasonable understanding of the substance of the confidential information.

50. In fact, many comments were made by the Japanese interested parties in defense of their interests throughout the underlying investigation. Interestingly, Japan has not included a claim under Articles 6.2 or 6.4 of the Anti-Dumping Agreement, thus confirming that its claim under Article 6.5.1 is purely formalistic.

B. JAPAN'S CLAIM THAT KTC VIOLATED ARTICLE 6.9 OF THE ANTI-DUMPING AGREEMENT BY FAILING TO DISCLOSE ESSENTIAL FACTS BEFORE THE FINAL RESOLUTION IS WITHOUT MERIT

51. In relation to its claims under Article 6.9, Japan fails to understand that the disclosure of "essential facts" was made in KTC's Final Resolution and OTI's Final Report, which constitute valid disclosure documents within the meaning of Article 6.9. Instead, Japan improperly proffers that the disclosure of "essential facts" was made only in KTC's investigation documents that preceded the issuance of the Final Resolution and the Final Report. However, these documents undoubtedly disclosed all essential facts that formed the basis for MOSF's final determination which included the decision to apply definitive measures. These documents properly disclosed the essential facts while respecting the confidentiality of certain information.

52. The Japanese respondents had full opportunities to review these disclosure documents and defend their interests, as it took seven months from the date of KTC's Final Resolution for MOSF to officially render its Final Decision. Alternatively, even the preliminary reports and resolutions of KTC and OTI provided relevant information on essential facts and provided an opportunity for interested parties to defend their interests.

53. Furthermore, Japan fails to identify the "essential" facts that allegedly were not disclosed. Instead, it focuses on relatively minor intermediate findings. In addition, rather than suggesting that the essential facts should have been disclosed, it is arguing that the raw data and evidence supporting each of these factual findings should have been disclosed. That is not what is required under Article 6.9. The disclosure obligation under Article 6.9 is to give the interested parties a proper indication which of the many, and often contradictory, facts and arguments have been retained by the investigating authorities on their path to the final determination and decision of whether to apply definitive measures. For example, in the context of an injury determination, it is important to allow interested parties to understand whether price effects were found, which price effects were considered and on the basis of which facts and considerations such price effects were found to exist. That is what KTC did and Japan has failed to even attempt to argue otherwise. Japan's decision not to include claims under Article 6.2 and 6.4 confirms that it does not consider that the rights of interested parties to defend their interests and to see all relevant information were violated in this investigation.

C. JAPAN'S CLAIM THAT KTC VIOLATED ARTICLES 12.2 AND 12.2.2 OF THE ANTI-DUMPING AGREEMENT IS WITHOUT MERIT

54. In respect of the obligations under Articles 12.2 and 12.2.2, the public notice by the MOSF provided in a separate report the lengthy and detailed KTC Final Resolution and OTI Final Report which set forth in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by KTC. These documents contain all relevant information on the matters of fact and law that led to the imposition of final measures. Japan fails to establish a *prima facie* case that a public notice of these KTC determinations and reports would not suffice in light of the requirements under Articles 12.2 and 12.2.2. Instead, Japan simply repeats the flawed arguments it has developed in the context of its claims under Articles 3 and 6.9 of the Anti-Dumping Agreement.

V. JAPAN'S CLAIM UNDER ARTICLE 1 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI OF GATT 1994 IS ENTIRELY CONSEQUENTIAL AND MUST FAIL

55. Japan includes a claim under Article 1 of the Anti-Dumping Agreement and Article VI of GATT 1994 which is entirely consequential of its substantive and procedural claims under Articles 3.1, 3.2, 3.4, 3.5, 4.1, 6.5, 6.5.1, 6.9, 12.2 and 12.2.2 of the Anti-Dumping Agreement. Korea has addressed and rebutted each of these claims in this submission. As a result, Japan's consequential claim must necessarily fail.

VI. CONCLUSION

56. Japan's dispute with Korea is not a legal dispute and it does not raise any questions of law. Rather, it is a mere factual disagreement over the weight to be ascribed to certain facts. Japan fails to point to any bias in the analysis of the investigating authorities and simply invites the Panel to examine the facts and reach conclusions different from those that were reasonably reached by the Korean investigating authorities. The Panel is not, however, the trier of fact in the context of trade remedy-related disputes and is not to conduct a *de novo* review. Japan's claims must therefore be rejected.

57. In sum, and for the reasons stated in its submissions, Korea respectfully requests the Panel to reject all aspects of Japan's claim that Korea's anti-dumping measure on pneumatic valves from Japan is inconsistent with the Anti-Dumping Agreement.

ANNEX C-2

SECOND INTEGRATED EXECUTIVE SUMMARY
OF THE ARGUMENTS OF KOREA

I. INTRODUCTION

1. As an initial matter, Korea refutes Japan's groundless argument that the Panel can only examine information that was disclosed to the parties in the underlying investigation and that any other evidence, even if contemporaneous and genuine, cannot be relied on by Korea in the present dispute. Japan's argument is contradicted by the relevant WTO jurisprudence which has clearly established that the panel may and in fact must rely on the record evidence, including evidence not previously disclosed to the interested parties. Furthermore, there is nothing "post hoc" about presenting data that was collected by the investigating authorities during the investigation and presenting analysis that was conducted by the authorities in the underlying investigation. These data and analyses are undoubtedly part of the contemporaneous record evidence that the Panel is to base its review on. There is no basis for Japan's argument that these data and analyses are "post hoc" simply because they were not disclosed to the interested parties.

2. Korea also refutes Japan's repeated assertions that the authorities should have conducted a so-called "counterfactual analysis" as a required element of an injury determination. Japan alleges that such a counterfactual analysis is required as part of the "logical progression of enquiry" into injury and causation, but again fails to point to WTO jurisprudence that would support its argument. As clarified by the Appellate Body, the meaning of "logical progression" is simply that the inquiries under Articles 3.2 and 3.4 must be meaningful in advancing towards a causation determination under Article 3.5 and may be connected in a way that leads to the conclusion of injury caused by dumped imports. For Japan, it seems that the concept of "logical progression" requires a counterfactual analysis under each part of the analysis under Articles 3.2, 3.4, and 3.5, requiring authorities to examine among others what the price levels would have been but for the dumping. However, that is not what the AD Agreement requires investigating authorities to do. Importantly, relevant WTO jurisprudence confirms that a counterfactual determination comparing the situation with a hypothetical situation of products sold at normal value is not required in order to determine if the price effects, and other injury developments, were the effect "of the dumping". It suffices to establish a genuine cause and effect between the dumped imports and the injury found to exist, without in addition having to examine the effects of the dumping through some counterfactual analysis.

II. JAPAN'S SUBSTANTIVE CLAIMS ARE FLAWED

3. Japan's legal claims are all groundless and thus without legal merit. Japan disagrees with certain findings of KTC but fails to point to any legal errors. Japan's arguments are merely an attempt to re-litigate certain issues of the underlying investigation, hoping that the Panel will conduct a *de novo* review and reach different conclusions than the Korean investigating authorities. That, however, is not the task of the Panel in WTO disputes concerning anti-dumping measures. Japan fails to present a *prima facie* case that KTC failed to conduct such an objective examination or to properly establish the facts.

A. JAPAN'S CLAIMS RELATING TO THE PRICE EFFECTS OF THE DUMPED IMPORTS UNDER ARTICLES 3.1 AND 3.2 OF THE AD AGREEMENT ARE FLAWED

4. In relation to the price effects of the dumped imports under Article 3.2, KTC properly considered price suppression and depression as well as the explanatory force of the dumped imports in respect of these effects by dynamically analyzing the relevant price trends based on import and re-sale prices (i.e. the price of the dumped imports to the first independent buyer in Korea). These prices were examined over the entire POI and through an end-point to end-point comparison. KTC made several observations, all supporting its finding that the prices of the dumped imports had explanatory force for the price suppression and depression of domestic prices at the end of the POI.

5. KTC observed that, overall, prices of the dumped products and the like domestic products moved in the same downward direction throughout the entire POI. In particular, it noted that prices of the dumped imports decreased significantly in 2013, when dumping took place in Korea. During the same period, prices of the like domestic products also decreased, although costs increased and demand surged, and prices were thus expected to rise. In addition, KTC observed that, despite the fact that the average import price of the dumped imports were higher than prices of the like domestic products, the Japanese respondents re-sold the dumped imports in the Korean market at prices similar to or even below the sales prices of the like domestic products when there was direct competition with the like domestic products.

6. Contrary to Japan's naked assertion, KTC did not ignore the fact that the average price of the dumped imports was generally higher than the average domestic price. KTC explained, in a reasonable and reasoned manner, that the dumped imports imposed competitive price pressure on the prices of the domestic like products so as to depress and suppress prices even though their average price was higher.

i. Prices moved in the same direction over the entire POI, especially in 2013

7. Japan's argument of "diverging price trends" is based on very limited price developments in 2012 only. However, it is difficult to consider that a slight increase of the dumped products' import prices in 2012 constituted a widely diverging trend from the even slighter decrease of the like products' domestic prices in 2012. In fact, both sets of prices appear to have stagnated in 2012. As such, there was no significant difference in price trends in 2012 that would strongly suggest the lack of competition and thus comparability between the two sets of products.

8. Nevertheless, when KTC compared average *resale* prices of the dumped imports with the prices of the domestic like product, there was no "divergence" to speak of even in 2012. Likewise, when KTC compared average import prices of the "representative models" of the dumped imports with the corresponding "representative models" of the domestic like product, no such "divergence" could be found. Furthermore, the average import prices of the five flagship series of dumped imports and the prices of the corresponding series of domestic products moved in exactly the same direction. Therefore, Japan's "diverging price trends" argument is factually incorrect and legally irrelevant.

ii. The higher average import price does not undermine the explanatory force of the dumped imports

9. KTC explained in a reasonable and reasoned manner that, although the average import price of the dumped imports was higher than the average domestic price, the dumped imports exhorted competitive price pressure on the domestic like products. In particular, KTC found that, for those products or customers for which the competition with the domestic industry was particularly fierce, the prices of the dumped products were much lower and thus much closer to or sometimes even below the domestic prices of the like product, which further supported its conclusion of price suppression. KTC confirmed that Japanese respondents' strategic low pricing was a prevalent practice in the Korean market. This strategic low pricing did not take place only occasionally but was in fact implemented consistently in respect of a broad range of products and customers. As a result, domestic producers were forced to react to the competition by lowering their prices to match such underselling.

10. The evidence demonstrating the strategic low pricing was extensive, probative and reliable. In the course of the underlying investigation, domestic producers, distributors, and end users constantly testified to such strategic low pricing of the Japanese respondents. However, KTC did not simply rely on such statements. KTC requested for actual transaction documents evidencing the Japanese respondents' aggressive marketing and strategic low pricing from the customers who testified to the Japanese respondents' aggressive marketing and strategic low pricing. Despite the extremely sensitive nature of such transaction documents, [[***]] transaction documents vividly demonstrating the aggressive marketing and strategic low pricing of the Japanese respondents were procured and submitted. The customers who provided such [[***]] transaction documents as evidence of the strategic low pricing collectively purchased approximately [[***]]% of TPC's total domestic sales in 2013 and [[***]]% of the total domestic shipment in 2013.

11. KTC also confirmed, through its comprehensive analysis of the Japanese respondents' sales data, that (i) the dumped imports were frequently being sold at prices much lower than its average prices, across all 28 "series" of the dumped imports, and the price differential of the identical product models varied by up to [[***]]%, (ii) the dumped imports' "representative models" sold in 2013 undercut the average sales prices of [[***]]% of the corresponding "representative models" of the domestic like products, (iii) the dumped imports' "representative models" sold in 2013 undercut the high-end sales prices of [[***]]% of the corresponding "representative models" of the domestic like products, and (iv) the dumped imports' price undercutting when compared to the average price of the corresponding domestic models took place with respect to [[***]] out of [[***]] (i.e., [[***]]%) corresponding representative models of the domestic products sold in 2013.

12. Moreover, KTC objectively confirmed the strategic low pricing behavior by comparing prices of the "main" or "flagship series" of the dumped imports with selling prices of corresponding domestic "main" or "flagship series". Through this exercise, KTC again observed that the Japanese respondents substantially lowered their re-sale prices to the domestic producers' customers, thereby exhorting competitive pressure on domestic prices. KTC further verified the nature and degree of the strategic low pricing by comparing "user-to-user" sales prices to the two largest common customers for the Japanese respondents and domestic industry. This comparison also revealed that the average resale price of the dumped imports was similar or even lower than the prices of the competing domestic products.

iii. Japan fails to rebut KTC's reasonable and reasoned finding of price comparability and competition between the dumped imports and domestic like products

13. Korea has explained at length the basis for KTC's finding that the dumped imports and the domestic products were in a competitive relationship, and how the dumped imports could provide explanatory force for the price effects on the domestic products. Japan's argument that no competition existed between the dumped and domestic products squarely run counter to the historical and transactional competitive relationship between the dumped and domestic products in the Korean market.

14. Also, the underlying investigation did not present a situation in which the dumped imports and the domestic like products consisted of very different product types without overlap. Quite the contrary is true given that there was a great degree of overlap between the dumped imports and the domestic products, and domestic prices decreased when demand surged and costs increased, right at the time when the dumped imports drastically increased in volume and their prices sharply decrease. In such a situation, and when the likeness of the two products is not at issue, there is no need to conduct an additional and rather unspecified "competitive relationship" analysis in finding that the dumped imports had explanatory force for the price effects in accordance with the requirement of Article 3.2.

15. In any event, KTC objectively examined and confirmed the competitive relationship between the dumped and domestic products by analyzing the detailed extent of the substitutability between the two products and how the two products actually competed with each other in the Korean market, based on its "model-to-model" and "segment-to-segment" comparisons.

iv. A comparison of the "reasonable sales price" with the actual domestic prices provides a reasonable basis for considering significant price suppression

16. KTC compared developments in domestic prices to a "reasonable sales price", which is an expected sales price reflecting the actual cost of production and sales, and a reasonable operating profit. WTO jurisprudence confirms the reasonable and objective basis of using a "reasonable sales price" as the "target price" when considering price suppression under Article 3.2. In complete denial of this jurisprudence, however, Japan asserts that more is required to consider whether there is price suppression. The relevant WTO jurisprudence confirms that Japan's argument is misguided.

17. In any event, KTC did not only rely on the "target price" analysis when reaching its conclusion on price suppression. The fact that prices did not increase during the POI, and even decreased in 2013, while costs increased and demand surged formed the equally reasonable basis for KTC's consideration of significant price suppression.

v. Japan fails to rebut KTC's price depression analysis

18. Other than by proffering its misplaced argument on the so-called "divergence" in price trends and "overselling", Japan completely fails to point to any flaw in KTC's price depression consideration. KTC observed that the price of the like product decreased in both 2012 and 2013 due to "the fierce competition with the dumped products". The price depression effect of the dumped imports became more conspicuous in 2013, notably because in 2013, the average price difference between the dumped imports and the domestic like product, which was approximately KRW [[***]] in 2012, rapidly narrowed to the level of KRW [[***]]. At the same time, the manufacturing cost of the like product increased by [[***]]%. In addition, KTC considered that the sharp increase in the import volume of the dumped imports, which took place in 2013, was another contributing factor for the price depression.

19. On a related topic, Korea notes that Articles 3.1 and 3.2 of the AD Agreement do not require separate findings or even considerations of each possible price effect, and as such, there is no requirement for the Panel to consider each possible price effect separately either. That said, however, even if the Panel is to examine KTC's analyses of the price depression and price suppression separately and finds that either one of such analyses was improper, pursuant to the plain language of Article 3.2, KTC's price effect consideration as a whole should still be deemed proper as long as the remaining analysis was proper.

B. JAPAN'S CLAIMS RELATING TO DUMPED IMPORTS' VOLUME DEVELOPMENT UNDER ARTICLES 3.1 AND 3.2 OF THE AD AGREEMENT ARE FLAWED

20. In relation to the impact of the volume of dumped imports under Article 3.2, KTC properly considered this element by relying on positive evidence showing absolute and relative increases in dumped imports.

21. Specifically, the volume of dumped imports increased in absolute terms by 78.9% in 2013 compared to 2012 and over the entire POI by a significant percentage as well. This finding was corroborated by the fact that the dumped imports significantly increased their market share in the Korean market between 2012 and 2013 at the expense of the domestic industry which lost almost identical market share in the same period. KTC also noted that the dumped imports' drastic price reduction and market share increase took place between 2012 and 2013 when the dominant Japanese exporter implemented an aggressive policy to expand its global market share from 32% to 50%.

22. Importantly, established WTO jurisprudence confirms that the consideration of the "significance" of an increase in imports calls for an assessment of whether the increase is "important, notable or consequential" which "may be assessed on the basis of the magnitude of the increase". Thus, Japan is incorrect to read a lot into the term "significant" as if that word opens the door to a whole host of additional requirements and considerations, when it simply refers to the magnitude of the increase in absolute terms or relative to production or consumption in the context of the market in question. In the context of the present dispute, a volume increase of 78% in absolute terms, of more than [[***]]% relative to consumption (i.e., market share), and of more than [[***]]% relative to production is "significant" under any understanding of this term.

23. Moreover, Japan is mistaken to argue that Article 3.2 requires investigating authorities to carry out a displacement analysis in the sense that any increase in imports must be "as a result" of domestic users "switching" from domestic products to dumped imports. This is not supported by the text of the AD Agreement and the Appellate Body has already rejected such a notion. In any case, KTC examined the loss of market share of the domestic like product and thus, in fact, established that during the dumping POI, domestic products lost to the dumped imports the market share they had previously gained.

24. Lastly, there is no legal or factual basis for Japan's assertion that KTC should have excluded from the total volume of dumped imports certain imports supposedly destined for increasing inventory. There is no legal obligation in the AD Agreement that would require an investigating authority to exclude from its import volume analysis dumped imports that went into inventory before being sold. The term "dumped imports" referred to in Article 3.2 of the AD Agreement is interpreted as including all of the products which have been "imported' whether sold or in inventory. Indeed, Article 3.4 of the AD Agreement calls for the examination of both the actual and

potential impacts of the dumped imports on various injury indices, such as potential decline in sales of the domestic industry, which has a close bearing on the post-importation inventory volume of the dumped imports. In this light, investigating authorities, if anything, *should* include dumped imports held in inventory in considering the volume of the dumped imports.

25. In sum, the investigating authorities carried out their examination of the volume of dumped imports in an objective manner and found on the basis of uncontested positive evidence that the volume of imports increased sharply during the POI, both in absolute and relative terms. Japan has failed to demonstrate otherwise.

C. KTC'S EXAMINATION OF THE IMPACT OF THE DUMPED IMPORTS ON THE DOMESTIC INDUSTRY WAS OBJECTIVE AND BASED ON POSITIVE EVIDENCE AS REQUIRED BY ARTICLES 3.1 AND 3.4 OF THE AD AGREEMENT

26. In relation to the examination of the impact on the domestic industry, KTC duly examined and adequately explained the explanatory force of the dumped imports when analyzing the state of the domestic industry. KTC examined in a dynamic manner all of the required injury factors in Article 3.4 and found a negative development in a significant number of injury factors, including (i) reduced production volume; (ii) reduced capacity utilization; (iii) increased inventory; (iv) reduced sales volume; (v) reduced market share; (vi) price reduction; (vii) reduced profits; (viii) reduced return on investments; (ix) reduced employment; (x) reduced wages; (xi) difficulty in raising capital; and (xii) reduced investments. This formed an appropriate basis for KTC's intermediate finding of an injurious impact on the state of the domestic industry.

27. Japan's claim focuses almost entirely on a consequential argument that Article 3.4 must necessarily have been violated because KTC's consideration of price effects under Article 3.2 was faulty, that KTC allegedly failed to consider the magnitude of the margin, and that KTC allegedly failed to consider the ability to raise capital or investment. First, Korea explained that whereas Article 3.5 requires the examination of the effects of dumping, as set forth in Articles 3.2 and 3.4, no separate causal link needs to be established between the volume and price effects and each of the injury factors of Article 3.4. There is simply no legal basis for Japan's alleged "necessary" causal link between Articles 3.2 and 3.4 given that Article 3.4 requires the "examination of the impact of the dumped imports" and not the impact of the "price effects" or "volume developments" of Article 3.2 on the domestic industry.

28. Second, in relation to the factor "margin of dumping", the record clearly shows that KTC examined this factor and explained the basis for finding that the magnitude of the dumping detrimentally affected the domestic industry. While there is no methodological guidance on how the magnitude of dumping shall be assessed or how the examination shall be presented by investigating authorities in Articles 3.1 and 3.4, relevant WTO jurisprudence explains that what is required is to evaluate the magnitude of the margin of dumping on the domestic industry as one of the factors that gives an indication of the state of the domestic industry. In light of the dumping margins ranging between 11.66% and 31.61%, KTC found that "the size of dumping margin [was] not insignificant" and that "such dumping appears to have had significant impact on the sales price" of the domestic products. In so doing, it complied with the requirement to evaluate this factor under Article 3.4.

29. Third, in relation to the factor "ability to raise capital or investment", the record also clearly shows that KTC examined this factor and explained that the domestic industry's ability to raise capital or investment was detrimentally affected by the continued operating loss, which was attributed to the effect of the dumped imports.

30. Moreover, Japan argues that Article 3.4 requires a finding that the impact on the domestic industry "was caused" by the dumped imports. However, as explained by Korea, Article 3.4 requires an examination of the impact of the dumped imports on the domestic industry. Thus, the focus of the inquiry is on the state of the domestic industry, not whether the dumped imports are causing injury to the domestic industry, which is an analysis specifically mandated by Article 3.5.

31. In sum, KTC concluded that the domestic industry lost most of the market share it had gained up to 2012 and also suffered material injury across the overall business indicators as a result of the sharp increase in volume of dumped products and large drop in their prices, and the aggressive marketing by the importers of the dumped products. The outcome of this Article 3.4

inquiry formed the basis for the overall causation analysis contemplated in Article 3.5. Japan's claim of violation of Articles 3.1 and 3.4 must therefore fail.

D. KTC CONDUCTED AN OBJECTIVE EXAMINATION OF THE CAUSAL RELATIONSHIP AND APPROPRIATELY SEPARATED AND DISTINGUISHED THE INJURY CAUSED BY OTHER KNOWN FACTORS IN ACCORDANCE WITH ARTICLES 3.1 AND 3.5 OF THE AD AGREEMENT

32. In respect of the causation and non-attribution determination under Article 3.5, KTC followed WTO customary practice by examining "all relevant evidence" before it in finding the existence of a causal link between the dumped imports and the injury to the domestic industry.

33. In the "Overall Evaluation" section of its Final Resolution, KTC summarized the outcome of its inquiries under Articles 3.2 and 3.4 finding, based on a holistic and comprehensive review of these elements, that the domestic industry had suffered material injury due to the dumped imports. Following the affirmative causation analysis, KTC examined whether the causal link was severed by other factors known to be causing injury to the domestic industry at the same time as the dumped imports. It was established that these factors did not contribute to the injury, or that the injury caused by these factors was negligible – both individually and in combination. Thus, based on a logical progression and holistic approach to the causation determination, KTC reached the reasonable and reasoned conclusion that the dumped imports caused injury to the domestic industry.

i. KTC properly established a causal relationship between the dumped imports and the injury to the domestic industry

34. Japan makes a fundamental mistake in its reasoning that KTC violated Article 3.5 because it allegedly found a causal link based on 2013 alone when it must be based on the POI in its entirety. In addition to the fact that it is incorrect to state that KTC focused exclusively on 2013 for its injury and causation finding, the coincidence in trends that is required under Article 3.5 is between the effects of the dumped imports and the injury suffered by the domestic industry. It does not concern a continued trend within each of the injury factors over the entire POI. Given that the "dumping" was examined in the period April 2012 - March 2013, 2013 was also one of the most relevant periods for assessing the causal link. Accordingly, KTC examined the trends in prices, volumes and other relevant factors and concluded that the trends turned negative in 2012 and were aggravated in 2013 in particular.

ii. KTC properly separated and distinguished other known factors

35. KTC examined whether the causal link found to exist was severed by other factors known to be causing injury to the domestic industry at the same time. Carefully scrutinizing such factors, including imports from countries other than Japan, the evolution of domestic consumption, the domestic industry's export performance and the cost of raw materials, KTC established that no "other factor" severed the link with the dumped imports.

36. For example, KTC explicitly distinguished the volume effects of third-country imports and the dumped imports. It was found that the volume of third country imports was very small and their market share equally *de minimis.* This was compared to the dumped imports, which had very significant share of the Korean market in 2013.

37. Japan argues that KTC ignored the significant increase in third-country imports because the volume increase in percentage points was very high when subject imports increased by much less in percentage point over the same period. This argument is telling of the weakness of Japan's claim. The virtually non-existent level of third-country imports at the start of the POI makes such a percentage presentation of the increase negligible. Even after this increase, the volume of third-country imports was still very low and completely insignificant when compared with the level of sales of dumped imports and domestic sales.

38. Moreover, KTC distinguished the price effects of third-country imports by finding that these prices were higher than the prices of both the dumped imports and the domestic like product. Japan seeks to misconstrue the facts by arguing that the price gap of the third-country imports was "analogous" to the price gap between the dumped and the domestic products. That is, however, a misrepresentation of the record evidence. Third-country import prices were more

than 44% higher than those of the dumped imports. Furthermore, there was no allegation or evidence that importers of such third-country products were exploiting a low pricing strategy aimed at undercutting the prices of domestic products.

39. Finally, Japan argues that KTC was under an obligation to examine certain factors allegedly "known" to it, irrespective of whether they were raised by any interested party in the underlying investigation. However, this argument clearly has no legal basis in Article 3.5 or relevant WTO jurisprudence which confirms that only factors that are "clearly raised" before an investigating authority and that are properly substantiated with evidence of their injury to the domestic industry must be examined by investigating authorities as part of the non-attribution analysis. As the factors highlighted by Japan were not raised, let alone substantiated, by the respondents in the underlying investigation, they were not "clearly raised" and thus not "known" to be causing injury. KTC was therefore not under an obligation to separate and distinguish, or otherwise examine, their potential injurious effect on the domestic industry.

40. For all of the above reasons, Japan's claim of violation of Articles 3.1 and 3.5 of the AD Agreement must fail.

E. KTC'S DEFINITION OF THE DOMESTIC INDUSTRY WAS PROPER AND INTRODUCED NO RISK OF MATERIAL DISTORTION IN ACCORDANCE WITH ARTICLES 3.1 AND 4.1 OF THE AD AGREEMENT

41. In respect of the definition of the domestic industry, KTC included all domestic producers coming forward following the neutral invitation by the authorities to do so. Together these producers represented 55.4% of total domestic production. No producers were excluded and no conditions were attached to their inclusion in the domestic industry definition. These producers therefore 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. Japan fails to point to any aspect of the process of soliciting the participation of domestic producers that would have skewed the definition and could have created a material risk of distortion.

42. First, the Appellate Body has explained that the qualitative assessment under Article 4.1 relates to *the process* by which the domestic industry is defined and that it must not introduce a material risk of distortion. The factual record shows that no material risk of distortion arose in the neutral way in which KTC defined the domestic industry. All domestic producers were invited to participate and they received questionnaires, and no producer was excluded as the process was open to all. Japan has failed to point to anything in the process that was capable of skewing the industry definition.

43. Second, Japan's argument that OTI was "too passive" is irrelevant and lacks any legal basis. WTO jurisprudence confirms that the two methods for defining the domestic industry in Article 4.1 are equally valid, and that there is no obligation on investigating authorities to actively seek to gather as many domestic producers as reasonably possible. Japan's late suggestion that the authorities could have applied the use of facts available to obtain additional information is not helpful. There is no requirement to actively seek out additional information if the producers already constitute a major proportion of domestic production. In addition, this approach makes sense in a dumping context to force cooperation but it does not make sense in the context of defining the domestic industry since the effects would be unduly felt by the participating domestic producers and not by the uncooperative domestic producer. In any case, it would not lead to a more comprehensive basis for making an injury determination.

44. Third, Japan's argument that KTC's definition was defective because it was not genuinely representative of other smaller producers is without merit and lacks support in Article 4.1 or relevant WTO jurisprudence. The "major proportion" requirement is not a sampling situation but rather concerns, quantitatively, whether the producers included produce a significant, notable, important proportion of total production, and qualitatively whether the process by which the industry was defined was objective and not biased. There is no basis to argue that a domestic industry definition is consistent with Article 4.1 only when the producers constituting the "major proportion" are qualitatively similar to the other producers which are not part of the definition. In other words, the fact that smaller producers, not part of the definition, may not be selling the complete range of products is irrelevant.

45. Nonetheless, even if Article 4.1 would require that the domestic industry qualitatively reflect all domestic producers as a whole (*quod non*), it is clear that KTC's domestic industry definition represented the industry as a whole as it (i) produced a wide range of the models included in the product definition; (ii) sold valves both individually and as a part of the pneumatic system; (iii) sold pneumatic valves for equipment in the diverse range of major industries identified; and (iv) sold in the domestic Korean market through the main distributing channels. Again, Japan has failed to point to any contrary facts on the record.

46. Finally, in a belated attempt to cast doubt on the quantitative significance of the proportion of domestic production represented by the included domestic producers, Japan attempts to allege that the quantities of production of certain domestic producers were not correctly calculated or verified. This argument is entirely groundless and based on a misrepresentation of the available information on the record.

47. In sum, KTC's definition of the domestic industry, as consisting of those producers accounting for more than 55% of total domestic production, satisfied the "major proportion" requirement by both covering a relatively high proportion, substantially reflecting the totality of domestic production and by being defined on the basis of an objective process that did not involve any risk of material distortion. Japan has failed to point to any act by KTC capable of skewing the industry definition, and its speculation about the impact of dumped imports on other producers is factually baseless. Accordingly, Japan's claim of violation of Articles 3.1 and 4.1 of the AD Agreement must fail.

III. JAPAN'S PROCEDURAL CLAIMS ARE GROUNDLESS

A. JAPAN'S CLAIM THAT KTC'S TREATMENT OF CONFIDENTIAL INFORMATION WAS INCONSISTENT WITH ARTICLES 6.5 AND 6.5.1 OF THE AD AGREEMENT IS WITHOUT MERIT

48. In relation to the obligations under Articles 6.5 and 6.5.1, KTC specifically examined whether there was "good cause" for treating the redacted information as confidential, by reviewing whether the information, if disclosed, would infringe the interests of interested parties, given the type and nature of the information for which the applicants requested a confidential treatment.

49. Article 6.5 of the AD Agreement requires that "good cause" be shown but it does not specify how and by whom the good cause must be shown. In fact, nothing in the AD Agreement provides that a good cause can be shown only by the submitting party. Therefore, the "good cause" requirement is satisfied as long as an investigating authority properly satisfies itself that there is a good cause for treating the information in question as confidential.

50. In the present case, KTC followed established practice in Korea where every interested party in anti-dumping investigations submits non-confidential summaries by designating what information is to be treated as confidential. By doing so, the provider of the information asserts that such deleted information falls within the categories of "confidential information" specifically set forth in the relevant laws in Korea. In turn, KTC objectively assesses whether there is "good cause" for such deleted information. KTC does not require interested parties to link each piece of redacted information to one of the categories of confidential information in Article 15 of the Enforcement Rule of the Customs Act, because the nature of the redacted information obviously pointed to the relevant category of confidential information under the law.

51. Moreover, it is the established practice in Korea that all interested parties to anti-dumping investigations provide the "non-confidential summary" of their confidential information by way of providing a public version of the document that contains the confidential information. In the underlying investigation, the applicants provided non-confidential summaries for all confidential information that they submitted. Such non-confidential summaries were in sufficient detail to permit reasonable understanding of the substance of the confidential information. Japan's argument relating to the alleged lack of sufficiency of the non-confidential summaries is undeveloped and in error. The "substance" of the information submitted in confidence refers to the "essence" of the information for purposes of the anti-dumping investigation. So, if sales prices of the domestic producer are treated as confidential, a summary that permits a reasonable understanding of the essence of the information does not need to provide ranges but can consist of a summary of the upward or downward development of such prices. That is the "essence" or "substance" of the information in the context of an injury analysis, for example. Japan reveals a

fundamental misunderstanding of the meaning of the term "substance" in the context of Article 6.5.1 as it states that "[t]he summary must reflect the "substance" of the information – in other words, the "substance" of how the information will be used by the authority". Yet, given that this summary is to be provided by the interested parties, they do not know "how the information will be used" and Japan thus seeks to impose an impossible burden on interested parties. All that they need to do is to make available a public version or non-confidential summary that through its narrative or other type of summarization provides information on the essence of the information that is submitted. Japan has failed to present a *prima facie* case that the non-confidential versions of the submissions failed to inform interested parties of the essence of the information submitted.

52. Korea also notes that Japan has not included a claim under Articles 6.2 or 6.4 of the AD Agreement, thus confirming that its claim under Article 6.5.1 is purely formalistic.

B. JAPAN'S CLAIM THAT KTC VIOLATED ARTICLE 6.9 OF THE AD AGREEMENT BY FAILING TO DISCLOSE ESSENTIAL FACTS BEFORE THE FINAL RESOLUTION IS WITHOUT MERIT

53. In relation to the disclosure of essential facts, KTC satisfied this requirement by releasing KTC's Final Resolution and OTI's Final Report to interested parties, which constitute the valid disclosure documents within the meaning of Article 6.9.

54. An anti-dumping investigation in Korea is only concluded when the Ministry of Strategy and Finance ("MOSF") makes its final determination, deciding whether to impose definitive measures. MOSF has the power to conduct its own investigation by requiring interested parties and KTC to provide comments and make submissions to MOSF with respect to the findings of OTI and KTC, and by holding a hearing at which interested parties can state their opinions. Once a final resolution is issued by KTC, interested parties to the relevant investigation have the statutory right to provide comments to MOSF on the final resolution, and MOSF has the statutory obligation to consider such comments. Following these procedures, MOSF takes the decision not only on whether to apply definitive measures, but also on whether to endorse or revise the findings and determinations made by KTC, and the investigation remains active until it does so, meaning that no final determination is made before MOSF renders such decision. This confirms that the reports released by the KTC before MOSF made its final determination whether to impose duties constituted the relevant disclosure of essential facts in accordance with Article 6.9.

55. KTC acted consistently with Article 6.9 by disclosing the "essential facts" in the underlying investigation, i.e. information that is "absolutely necessary, extremely important", while ensuring the adequate protection of confidential information. Japan fails to identify the "essential" facts that allegedly were not disclosed. Instead, it focuses on relatively minor intermediate findings. In addition, rather than suggesting that the essential facts should have been disclosed, it in fact argues that the raw data and evidence supporting each of these factual findings should have been disclosed. That is not, however, what is required under Article 6.9.

56. Again, Japan's decision not to include claims under Article 6.2 and 6.4 confirms that it does not consider that the rights of interested parties to defend their interests and to see all relevant information were violated in this investigation.

C. JAPAN'S CLAIM THAT KTC VIOLATED ARTICLES 12.2 AND 12.2.2 OF THE AD AGREEMENT IS WITHOUT MERIT

57. In respect of the obligations under Articles 12.2 and 12.2.2, the public notice by MOSF provided, in a separate report, the lengthy and detailed KTC Final Resolution and OTI Final Report setting forth in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by KTC. These documents contain all relevant information on the matters of fact and law that led to the imposition of final measures.

58. Japan's claims focus on detailed facts and arguments and seek to require disclosure of any information and all of the underlying data that was considered. It fails to distinguish between the more nuanced transparency obligation of Article 12.2 and the due process obligations of Article 6 or the substantive obligation of Article 3. Articles 12.2 and 12.2.2 require KTC to provide sufficient information to allow the public to understand the findings and conclusions reached on all issues of fact and law considered material. KTC clearly satisfied this obligation by providing reports that set forth its findings and elaborated on the determinations and findings made. The public notice

requirement does not require the authorities to disclose all factual information raised by interested parties in the underlying investigation. The purpose of Article 12.2 is for the public to understand the reasoning of KTC on the relevant and material parts of the determination, not to test the accuracy of each and every intermediate finding. Japan has not presented any arguments that would establish a *prima facie* case that these lengthy and elaborate reports of KTC and OTI were insufficient to inform the public of the essential determinations of fact and law made by MOSF.

59. Japan fails to establish a *prima facie* case that a public notice of these KTC determinations and reports would not suffice in light of the requirements under Articles 12.2 and 12.2.2. Instead, Japan simply repeats the flawed arguments it has developed in the context of its claims under Articles 3 and 6.9 of the AD Agreement.

IV. CONCLUSION

60. Japan's dispute with Korea is not a legal dispute and it does not raise any questions of law. Instead, it is a mere factual disagreement over the weight to be ascribed to certain evidence. Japan fails to point to any bias in the Korean authorities' analyses and assessment of the facts on the record. It simply invites the Panel to examine the facts and reach different conclusions than those reasonably reached by the Korean authorities. Since the Panel is not the trier of fact in this trade remedy-related dispute, it is not to conduct a *de novo* review of the record evidence. Japan's claims must therefore fail.

61. For the reasons stated, Korea respectfully requests the Panel to reject all aspects of Japan's claim that Korea's anti-dumping measure on pneumatic valves from Japan is inconsistent with the AD Agreement.

_____

ANNEX D

ARGUMENTS OF THE THIRD PARTIES

ANNEX D-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

(I) Price effect analysis (Arts. 3.1 and 3.2 ADA)

1. Firstly, Brazil understands that price depression or suppression inquiries must provide the authority with a meaningful understanding of whether subject imports have "explanatory force". To this end, an authority is required to examine domestic prices in conjunction with subject imports. The explanatory force stems from the relevant aspects of such imports, including price and/or volume, vis-à-vis domestic production. Therefore, it is not sufficient under Article 3.2 to consider the existence of price depression or suppression *per se*. This analysis is a preceding step before the comprehensive causation analysis regarding injury contemplated in Article 3.5.

2. Furthermore, in the occurrence of price overselling and the consequential effects of subject imports on domestic prices, Brazil understands that in cases where there is no finding of price undercutting the investigating authority should present a thorough analysis, with a compelling reason to explain how the prices of the dumped products could have affected the prices of the domestic like product. Otherwise, it would be difficult to understand how a conclusion of price depression was reached in a situation where prices of imports were, for most parts, higher than those of the domestic like product whose prices were purportedly being depressed.

3. Moreover, in Brazil's view, whether two products compete is not determined simply by assessing whether they share particular physical characteristics or have the same general uses. It is also relevant to consider other factors, such as consumer preferences. The objective of this analysis is to determine whether products form part of the same market. In this respect, it is important to notice, *inter alia*, if products are in actual or potential competition with each other and if the relevant products are substitutable.

4. In conclusion, under the incidence of constant price overselling and the existence of heterogeneity of products, investigating authorities should delve deeply into the analysis of price calculation and any differences among products, since those particular features would point to a higher standard for the determination of material injury.

(II) State of the industry analysis (Art. 3.4 ADA)

5. Regarding the examination of the state of the industry and the evaluation of the relevant economic factors therein required by Article 3.4 of the ADA, Brazil is of the view that each of the factors listed in the cited Article must be considered during the investigation of the impact of dumped imports. It is also clear from the plain reading of Article 3.4 that those factors are not exhaustive and still would not necessarily give decisive guidance.

6. While the authorities may determine that some factors are not relevant or do not weigh significantly in the decision, they may not simply disregard such factors, even though this consideration may lead the investigating authority to conclude that a particular factor is not probative in the circumstances. Rather, the analysis and conclusions must consider each factor, determine its relevance for the investigation, or lack thereof and consider the relevant factors together, in the context of the particular industry.

(III) Definition of "domestic industry" (Art. 4.1 ADA)

7. Brazil understands that in defining the domestic industry the investigating authority does not make an "exclusion" of domestic producers if it does not considers data it was unable to collect. Brazil understands that all known producers should be consulted in order that the data coverage is as broad as possible, as not to give rise to a material risk of distortion. However, the investigating authority does not exert control on the willingness of producers to respond to questionnaires and actively participate in investigations.

8. Furthermore, the investigating authority should always consider data it collects from domestic producers for the purpose of the investigation, but not necessarily must it include those producers in the definition of domestic industry. Such decision will depend on the existence of a major proportion of domestic producers on the records and the particularities of the case. If the IA is convinced, after receiving data from other producers, that non-inclusion of this information for injury analysis will not create material distortion and thus will not invalidate its previous determination of major proportion, it is not obliged to do so.

9. Moreover, Brazil does not contest that the larger the number of producers included in the definition of domestic industry and the ampler the set of economic data available, the higher is the potential of an accurate injury analysis. However, considering the facts of the present case, the definition of domestic industry cannot be considered biased or distorted for the sole reason that investigating authorities have considered only data from the applicants, due to the fact that the other producers did not answer to the questionnaire sent to them.

10. Finally, Brazil contends that the claimant of any alleged inconsistency should present evidence and bear the burden of proof to demonstrate that the domestic industry definition does not meet the standard of a major proportion set out by Article 4.1 of the ADA.

(IV) Treatment of confidential information (Arts. 6.5 and 6.5.1 ADA)

11. Under Article 6.5 of the ADA, if confidential information is submitted by the interested party to the investigating authority with a justification, two situations may arise: (i) the investigating authority rejects the justification (in this case, the provisions of Article 6.5.2 apply, including footnote 18); or (ii) the investigating authority understands that a "good cause" was shown (Article 6.5) and accepts the justification, in which case there is no specific guidance about how it should proceed.

12. In respect of the investigating authority's assessment of whether a "good cause" was effectively demonstrated by the interested party, Brazil does not consider that an explicit reference on the record regarding this analysis is mandatory for each request of confidential treatment, except when the authority rejects the justification. Otherwise, Brazil understands that a tacit acceptance of the "good cause" should suffice.

13. In any event, according to Article 6.5.1 of the ADA, it is the investigating authority responsibility to require a non-confidential summary in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. It also falls upon the investigating authority to demonstrate that its obligation of requesting the non-confidential summary has been dully fulfilled.

(V) Non-attribution analysis (Article 3.5 ADA)

14. In Brazil's understanding, for the purpose of the injury analysis under Article 3.5 of the ADA, a factor other than the dumped imports allegedly causing injury is "known" to the investigating authority when "clearly raised" by the interested party. In order for a factor to be "known", the interested party shall substantiate assertions in this regard by presenting evidence before the investigating authority. Therefore, the investigating authority is only required to address the arguments and elements of evidence raised by the interested party which were clearly presented.

15. However, the investigating authority cannot choose to ignore evidence regarding known factors. It would also be preferable for an investigating authority to expressly mention the lack of evidence not presented by the interested party in the records of the investigation, rather than not mentioning it at all.

ANNEX D-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

1. Mr. Chairman, Members of the Panel, we thank you for this opportunity to present Canada's views regarding the proper interpretation of important provisions of the *Anti-Dumping Agreement* (ADA). Our statement today will focus on the proper interpretation of the first sentence of Article 3.2.

2. In this case, Japan claims that the Korea Trade Commission's examination of the increase in the volume of subject imports was inconsistent with Articles 3.1 and 3.2. Japan contends that the Korea Trade Commission failed to properly examine the significance of the increase in subject imports either in absolute or relative terms.[1] In particular, Japan claims that it improperly found a "significant increase" in subject imports even though subject imports ended the period of investigation up only slightly on an absolute basis and down on a relative basis.[2]

3. In response, Korea maintains that the Korea Trade Commission considered the absolute and relative volumes of the dumped imports. It found that there was a significant increase in the volume of dumped imports.[3]

4. Canada does not take a position on the factual aspects of this dispute. Rather, Canada would like to address the proper interpretation of the first sentence of Article 3.2. This sentence requires an investigating authority to "consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member". In particular, Canada would like to first address the scope of the obligation to "consider" and second, to address the scope of the analysis required by the term "significant".

5. First, Article 3.2 requires an investigating authority to "consider" the increase in imports. The Appellate Body clarified in *China – GOES* that the obligation to "consider" requires an investigating authority to take something into account in reaching a decision but that it does not require a definitive determination.[4] However, in that case, the Appellate Body was careful to remind investigating authorities that the lack of a requirement to make a definitive determination "does not diminish the rigour that is required of the inquiry under Article[ ] 3.2" or "the scope of *what* the investigating authority is required to consider".[5] Furthermore, the Appellate Body specified that an investigating authority's consideration "must be reflected in relevant documentation, such as the authorities' final determination, so as to allow an interested party to verify whether the authority indeed *considered* such factors".[6]

6. Thus, in Canada's view, it is insufficient for a Member to simply assert that its investigating authority considered certain facts, evidence or legal analyses. Rather, a Member must demonstrate from the investigating authority's record that the investigating authority considered those facts, evidence or legal analyses in the course of its investigation.

7. Second, Article 3.2 requires an investigating authority to consider not only whether there is an increase in dumped imports, but also whether that increase is "significant".

8. In Canada's view, consideration of whether an increase is "significant" requires an investigating authority to assess both the quantitative increase and the factual circumstances in which that increase occurred. It is insufficient for an investigating authority to simply consider the quantitative increase and, without further analysis, conclude that it is significant. Only by considering the quantitative increase and its context does an investigating authority have a basis on which to conclude that a particular increase is significant.

---

[1] Japan's first written submission, p. 43.
[2] Japan's first written submission, para. 117.
[3] Korea's first written submission, para. 175.
[4] Appellate Body Report, *China – GOES*, para. 130.
[5] Appellate Body Report, *China – GOES*, paras. 130-131.
[6] Appellate Body Report, *China – GOES*, para. 131.

9. Take, for example, a case where an investigating authority observes that the absolute volume of dumped imports increased by 10% over the period of investigation. Without considering the factual circumstances, on what objective basis will the investigating authority be able to conclude that the 10% increase is significant? There is none. In this case, as in every case, the investigating authority will need to consider the factual circumstances in which that increase occurred. Relevant factors could include the nature of the product, the nature of the market and changes in domestic demand. Specific inquiries that may be relevant include: is the product a commodity or a specialty product? Did demand for the product increase? Is the market for the product highly competitive? Did other segments of the market also increase in volume? Only by assessing the significance of the 10% increase in the light of its context does an investigating authority have an objective basis on which to conclude that it is significant.

10. Panels and the Appellate Body have considered the term "significant" in the context of provisions other than the first sentence of Article 3.2 of the ADA. Despite these different contexts, these panels and the Appellate Body have interpreted the term "significant" in a consistent manner. This interpretation confirms Canada's view: the term "significant" requires an investigating authority to consider both the quantitative increase and the factual circumstances in which the increase occurred. Accordingly, this view should be adopted by the Panel in this case.

11. Most recently, the Appellate Body in *US – Washing Machines* considered the term "significantly" within the context of the requirement in Article 2.4.2 of the ADA to establish a pattern of significant price differences. The Appellate Body found that the term "significantly" requires an investigating authority to consider more than just quantitative dimensions. It also requires an investigating authority to consider qualitative dimensions.[7] These include the nature of the product under consideration, the industry at issue, the market structure and the intensity of competition. The Appellate Body explained that the significance of price differences may be affected by these objective market factors. What may be significant in one instance may not be significant in another. However, the Appellate Body explained that "[u]nless the investigating authority considers such qualitative aspects, it will not know if and how these aspects are relevant to its assessment".[8]

12. The Appellate Body's findings in *US – Washing Machines* confirm its earlier findings in *China – HP-SSST (Japan and EU)*. In this earlier case, the Appellate Body considered the term "significant" in the context of a price undercutting analysis under Article 3.2 of the ADA. The Appellate Body explained that what amounts to significant price undercutting will necessarily depend on the factual circumstances of each case.[9] This explanation is particularly relevant to the interpretation of "significant" in the volume analysis as it relates to the interpretation of "significant" in the same provision and within the same injury analysis.

13. These Appellate Body findings also accord with earlier panel findings in *US – Upland Cotton*. In this case, the panel considered the term "significant" in the context of a price suppression analysis under Article 6.3(c) of the SCM Agreement. The panel found that whether price suppression is significant "may vary from case to case, depending on the factual circumstances, and may not solely depend upon a given level of numeric significance".[10]

14. Moreover, the obligation under Article 3.1 of the ADA to make an injury determination on the basis of an "objective examination" further confirms Canada's view. To conduct an "objective examination", an investigating authority must consider *all* relevant evidence.[11] It must also conduct an investigation in a manner that conforms to the principles of "good faith and fundamental fairness".[12] Accordingly, an investigating authority may not ignore relevant evidence regarding the factual circumstances in which an increase occurs. In particular, it may not ignore evidence tending to indicate that the increase is not significant. Rather, it must take this evidence into account in its analysis.

---

[7] Appellate Body Report, *US – Washing Machines*, para. 5.63.
[8] Appellate Body Report, *US – Washing Machines*, para. 5.63.
[9] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.161.
[10] Panel Report, *US – Upland Cotton*, para. 7.1329. This approach was upheld in Appellate Body Report, *US – Upland Cotton*, para. 427.
[11] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.161.
[12] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, paras. 5.138 and 5.161; *China – GOES*, para. 126; and *US – Hot-Rolled Steel*, para. 193.

15. Thus, in this case, the Panel must determine whether the Korea Trade Commission adequately considered the factual circumstances in its analysis of whether there was a significant increase in the volume of dumped imports.

ANNEX D-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF ECUADOR

1. Regarding the alleged violation by Japan of Article 3.1 of the Anti-Dumping Agreement. On this issue, the requirements for positive tests and the objective examination of the volume of imports and their Price effects constitute absolute obligations that "provide for no exceptions, and they include no qualifications so that they must be met by every investigating authority in every injury determination".[1]

2. About the alleged violation of Article 3.3 of the Anti-Dumping Agreement. It should be mentioned that there is a margin of discretion conferred on the Investigating Authorities to determine what they will regard as a "significant" increase in imports.

3. In concern to the alleged violation of Article 3.4 of the Agreement on Implementation of Article VI of GATT 1994. On this paragraph, the elements mentioned on Article 3.4 should be taken into account in any investigation conducted by the investigating authority. All these factors should be assessed, although there may be additional ones to assist the investigating authorities in determining the impact of dumped imports on a given economy at a particular time.

4. Ecuador would like to refer to the alleged violation of Article 3.5 of the Agreement on Implementation of Article VI of GATT 1994. Regarding the possibility of the authority also examining other factors, "Article 3.5 requires the authority to examine whether any other known factor is causing injury to the domestic industry or not as a prerequisite for separating and distinguishing the injurious effects of the dumped imports from the injurious effects of such other factor".[2]

5. Regarding the alleged violation of Article 6.5 and 6.5.1 of the Agreement on Implementation of Article VI of GATT 1994. In such examination, the relevant national authority should consider what is provided for by Article 6.5, which states, by way of example, that information which is disclosed and which entails a significant advantage to a competitor or which could eventually have an adverse effect on the person that provides the information or to a third party from whom it has been received, will be treated and qualified as confidential, upon justification.

6. In concern to the alleged violation of Articles 12.2 and 12.2.2 of the Agreement on Implementation of Article VI of GATT 1994, the Group should examine Japan's claims, verifying the guarantee of the principle of transparency with respect to public notice of determinations on the case, approved by the independent reports, as well as the allegations of fact and law that gave rise to that determination.

7. Finally, regarding to the alleged violation of Article 1 of the Anti-Dumping Agreement as well as Article VI of GATT 1994, it is indispensable for the Panel to examine whether or not there has been a breach of other rules of the Agreement on Implementation of Article VI of GATT 1994, because the breach of the rules of this Agreement would result in a violation of both Article I and Article VI of the GATT.

---

[1] World Trade Organization. Appellate Body Report, *European Communities – Anti-dumping duties on imports of cotton-type bed linen from India* (WT/DS141/AB/RW), para. 109.

[2] World Trade Organization. Report of the Panel, *European Communities — Anti-Dumping Measure on Farmed Salmon from Norway* (WT/DS337/R), para. 5.94.

8. Ecuador believes that it is of the utmost importance that the review the Panel makes about the case in question, in the context of this analysis, which involves the intent to preserve the legal structure of the Agreement on Article VI of GATT 1994, the predictability in the investigations and that the rules on the determination of damage will be fully respected, without prejudice, in addition, to the fact that in any investigation of dumping, there are particular aspects, that is to say, dynamic variables, which are the ones that ultimately lead the authorities to determine the existence or non-existence of injury. As a result, Ecuador restates its view that while it is mandatory to prove the damage and the causal relation, the valuation of such damage corresponds to the investigating authority to assess, in accordance with the conditions and circumstances of each case and in every situation under scrutiny.

ANNEX D-4

INTEGRATED EXECUTIVE SUMMARY OF
THE ARGUMENTS OF THE EUROPEAN UNION

I. ARTICLE 6.2 OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES

1. Japan's request for establishment identifies the measure at issue in accordance with Article 6.2 DSU and Article 17.4 ADA. The issues before the Panel in this dispute is therefore whether Japan's request sets forth claims regarding that measure, and whether it does so with sufficient specificity to present the problem clearly.

2. The Appellate Body has clarified that to satisfy the requirement to present the problem clearly, the panel request should explain succinctly how or why the measure at issue is violating the WTO obligation in question. A panel should examine whether a general reference to a treaty provision meets the requirement under Article 6.2 on a case-by-case basis, taking into account the extent to which such reference sheds light on the nature of the obligation at issue.

A. Japan's claim under Articles 3.1 and 3.2 of the ADA

3. As confirmed by the Appellate Body in *EC- Bed Linen* (Article 21.5 DSU) Article 3.2 contains two distinct obligations: (i) to conduct a volume analysis and (ii) to conduct a price effects analysis. Contrary to what Korea alleges, the plain text of claims 1 and 2 of Japan's request makes it clear that the two obligations under Article 3.2 ADA, read in conjunction with 3.1 ADA, are the subject matter of the request.

B. Japan's claim under Articles 3.1 and 3.4 of the ADA

4. The EU agrees with Japan that, Article 3.4 read in conjunction with Article 3.1, provides for a single obligation to examine "the impact of the dumped imports on the domestic industry" based on "positive evidence" and "an objective examination". Japan's panel request plainly connects the measure at issue to said obligation.

C. Japan's claim under Articles 3.1 and 3.5 of the ADA

5. Article 3.5 requires a demonstration that the dumped imports are, through the effects of dumping, causing injury. The demonstration of this "causal relationship" must be based on an examination of "all relevant evidence". In addition; Article 3.5 provides an obligation for the authorities to examine any known factors other than the dumped imports which also cause injury to the domestic industry. Article 3.5 provides a non-exhaustive list of 5 "other factors" which may be relevant in the analysis.

6. The EU notes that Japan's claim 4 concerns on the one hand the obligation to demonstrate that dumped imports are, through the effects of dumping, causing injury, under the first sentence of Article 3.5 and, on the other hand, the general obligation to conduct an objective examination based on positive evidence under Article 3.1, as echoed and further qualified in the second sentence of Article 3.5, which is also covered by Japan's claim 4.

7. With its claim 5 Japan alleges that Korea violated its non-attribution obligation under Article 3.5, read in conjunction with Article 3.1. Japan does not specify in its claim with respect to which of the "known factors other than the dumped imports" the Korean authorities failed to comply with Article 3.5. The EU does not believe that the various factors listed in the indicative list under Article 3.5 constitute separate and distinct obligations to the obligation to conduct a non-attribution analysis. Similarly, to the list of factors under Article 3.4, they appear to constitute subordinate elements to the core obligation.

8. In its claim 6 Japan alleges a violation of Articles 3.1 and 3.5, which exists irrespectively and independently of whether Korea's analysis would be found to be inconsistent with Articles 3.1

and 3.2 ADA and Articles 3.1 and 3.4 ADA. The EU agrees with Japan that both consequential claims, resulting from the breach of Articles 3.2 and 3.4 ADA, as well as independent claims of breach of Article 3.5 ADA can be raised in WTO proceedings.

D. Japan's claim under Articles 3.1 and 4.1 of the ADA

9. Article 4.1 defines "domestic industry" for the purpose of the ADA. Although a definitional provision, Article 4.1 can be the basis of a finding of a violation under the ADA. As clarified through jurisprudence, Article 4.1 imposes an express obligation on Members to interpret the term "domestic industry" in a specified manner. In light of the fact that Article 4.1 contains one distinct obligation, Japan's claim 7 in its panel request, which alleges a violation of Articles 3.1 and 4.1 ADA, would appear to meet the minimal requirements of Article 6.2 DSU.

II. OBSERVATIONS ON THE INJURY ANALYSIS UNDER ARTICLE 3 OF THE AD AGREEMENT

10. The ordinary meaning of the first sentence of Article 3.2 is not clear on whether an investigating authority is allowed, as a matter of law, to progress to the next step of its analysis once it has considered whether there has been a significant increase in dumped imports either in absolute or relative terms or whether an investigating authority is expected to carry out both analyses before moving to the next step of "its logical progression of inquiry".

11. The context provided by Article 3.1, the second sentence of Article 3.2, and Articles 3.4 and 3.5 strongly suggest that both an absolute and a relative volume analysis should be considered under the first sentence of Article 3.2. An investigating authority is expected to carry out an *objective* analysis under Article 3.1, while the causation analysis under Article 3.5 and the volume analysis under Article 3.2, first sentence, should not be mixed up. Indeed, the causation analysis encompasses "all relevant evidence" before the authority, including the volume of subject imports and their price effects listed under Article 3.2, as well as all relevant economic factors concerning the state of the domestic industry listed in Article 3.4.

12. If the investigating authority would e.g. begin to consider what a significant absolute increase in the volume of dumped imports means for the causation analysis under Article 3.5 without having as a basis a consideration of how such an absolute increase relates to production or consumption, it would, at least in most cases, necessarily have to undertake such a relative analysis to properly understand e.g. the interaction between the increased dumped imports and the relative market shares between dumped and non-dumped imports and the dumped imports and domestic consumption. Such information is often highly relevant to form the basis for the ultimate causation analysis. Allowing or requiring such an analysis only under Article 3.5 would necessarily mix up the respective obligations under Articles 3.2 and 3.5 ADA.

13. Consequently, the European Union is of the view that an investigating authority is, at least in most cases, required to consider whether there has been a significant increase in dumped imports by examining whether such increase is either absolute or relative to production or consumption or both. Before considering the relevance of both angles in a critical manner, the investigating authority may not move to the next step in its objective analysis and logical progression of inquiry. This interpretation is also perfectly in line with the objective of Article 3, which is to ensure that the analysis and the conclusion drawn therefrom are *robust*.

14. The results of the inquiries, pursuant to Article 3.2, relating to the volume of the dumped imports and the effects of the dumped imports on prices are relevant to the impact analysis required under Article 3.4, given that this provision requires the evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including market share and factors affecting domestic prices.

15. The examination under Article 3.5 in turn encompasses "all relevant evidence" before the authority, including the volume of subject imports and their price effects listed under Articles 3.2, as well as all relevant economic factors concerning the state of the domestic industry listed in Article 3.4. The examination under Article 3.5, by definition, covers a broader scope than the scope of the elements considered in relation to price depression and suppression under Article 3.2.

16. The Anti-Dumping Agreement does not expressly state how factors should become "known" to the investigating authority, or if and in what manner they must be raised by interested parties,

in order to qualify as "known". In the view of the European Union an unbiased and objective decision maker may not disregard relevant known information regardless of whether it was raised by interested parties.

III. DEFINITION OF THE DOMESTIC INDUSTRY

17. Pursuant to Articles 3.1 and 4.1 of the AD Agreement, provisions which are inextricably linked, the "domestic industry" should be defined as referring to the domestic producers as a whole of the like products. Some of those producers may be left out from the definition of "domestic industry" in view of the reasons provided for in subparagraphs (i) and (ii) of Article 4.1 of the AD Agreement. Further, as an alternative, an investigating authority may reduce the universe of domestic producers to be caught under the definition of "domestic producers" if they amount to a "major proportion" of the total domestic production. However, this alternative is not unfettered. In so doing, investigating authorities should proceed in an unbiased manner, without favouring the interests of any interested party in the investigation, and thus ensuring that the way in which the domestic industry is defined does not introduce a material risk of skewing the economic data and, consequently, distorting its analysis of the state of the industry.

18. The European Union is concerned with the uncontested fact that the domestic industry was defined to include only the two applicants out of a total of nine domestic producers. Although the collective domestic production of the two applicants consisted of about half of the total domestic production, the fact that all other seven domestic producers were excluded from the definition of the domestic industry may give rise to a material risk of distortion. It is also clear that the domestic industry was not particularly fragmented; rather the contrary seems to be true.

19. The investigating authority bears the obligation to ensure that the way in which it defines the domestic industry does not introduce a material risk of skewing the economic data and, consequently, distorting its analysis of the state of the industry. In the light of the facts and evidence presented so far, the rest of the investigation must demonstrate in a particularly robust manner that despite the domestic industry consisting only of the two applicants to the exclusion of all other seven domestic producers there is no distortion in the analysis of the state of the industry.

ANNEX D-5

INTEGRATED EXECUTIVE SUMMARY OF
THE ARGUMENTS OF THE UNITED STATES

EXECUTIVE SUMMARY OF U.S. THIRD PARTY WRITTEN SUBMISSION

I. ARTICLES 3.1 AND 4.1 OF THE AD AGREEMENT

1. Japan argues that the Korea Trade Commission's ("KTC") definition of the domestic industry is inconsistent with Articles 3.1 and 4.1 of the AD Agreement.

2. Article 3.1 informs the interpretation of Article 4.1. Article 4.1 establishes that the "domestic industry" can be defined as either (1) the "domestic producers as a whole of the like products", *i.e.*, all domestic producers, or (2) a subset of domestic producers "whose collective output of the products constitutes a major proportion of the total domestic production" of the like products. Article 4.1 of the AD Agreement does not require that all domestic producers be included in the domestic industry, nor does it articulate a minimum limit on the percentage of domestic production that must be included to constitute a "major proportion" of the total domestic production of those products.

3. Although undefined in the AD Agreement, the term "major proportion" must be interpreted in the context of Article 3.1 of the AD Agreement. Article 3.1 of the AD Agreement sets forth two overarching obligations that apply to multiple aspects of an authority's injury determination. The first overarching obligation is that the injury determination be based on "positive evidence". The second obligation is that the injury determination involves an "objective examination" of the volume of the dumped imports, their price effects, and their impact on the domestic industry. How an authority chooses to define the domestic industry has repercussions throughout the course of the injury analysis and determination; thus, the overarching obligations of Article 3.1 necessarily extend to an authority's definition of the domestic industry.

4. In this case, the Panel should consider whether the authority, consistent with Article 3.1, defined the domestic industry in a fair and unbiased manner. A flawed definition of the domestic industry can distort an authority's material injury analysis. For a material injury determination to be based on "positive evidence and involve an objective examination", the authority must rely upon a properly defined domestic industry to perform the analysis. The Appellate Body has recognized that a proper definition of the domestic industry is critical to ensuring an accurate and unbiased injury analysis.

5. In evaluating whether an authority's definition of the domestic industry introduces a distortion to the analysis, a Panel should consider the existence of an inverse relationship between the proportion of producers included in the domestic industry and the absence of a risk of material distortion in the assessment of injury.

II. ARTICLES 3.1 AND 3.2 OF THE AD AGREEMENT

6. Japan contends that the KTC's analyses of the volume of subject imports and price effects were inconsistent with Articles 3.1 and 3.2 of the AD agreement.

7. The obligations of Article 3.2 of the AD Agreement must be considered in conjunction with the overarching principles of Article 3.1 of that Agreement.

8. With respect to volume, Article 3.2 of the AD Agreement states that an investigating authority shall "consider whether there has been a significant increase in dumped imports", either in absolute terms or relative to production or consumption of the importing country.

9. Based upon the clear text of the AD Agreement, which uses the disjunctive terms "either" and "or", analysis of the volume of subject imports should include consideration of the absolute volume of subject imports, as well as whether there was a significant increase in the volume of

subject imports in absolute terms, a significant increase in the volume of subject imports relative to production in the importing Member, or a significant increase in the volume of subject imports relative to consumption in the importing Member. The last sentence of Article 3.2 specifies that "no one or several" of the Article 3.2 factors "can necessarily give decisive guidance".

10. The United States recalls that the Appellate Body in *China – GOES* found that Article 3.2 does not require an authority "to make a *definitive determination*" on price effects, recognizing the distinction between use of the verb "consider" in Article 3.2 of the AD Agreement and the verb "demonstrate" in Article 3.5. However, the fact that no definitive determination is required "does not diminish the scope of *what* the investigating authority is required to consider".

11. The text contemplates three inquiries with regard to the effects of dumped imports on prices: price undercutting, price depression and price suppression. As the Appellate Body in *China – GOES* explained, the inquiries set out in Article 3.2 are separated by the words "or" and "otherwise", indicating that the elements relevant to the consideration of significant price undercutting may differ from those relevant to the consideration of significant price depression and suppression. Thus, even if prices of subject imports do not significantly undercut those of the like domestic products, subject imports could still have a price-depressing or price-suppressing effect on domestic prices.

12. The Appellate Body has explained, however, that the investigating authority's inquiry must provide the authority with a "meaningful understanding of whether subject imports have explanatory force" for price depression or suppression, and, as required by Article 3.1, that understanding must be based on positive evidence and an objective examination.

13. In assessing price depression or suppression, the authority may not confine its consideration to an isolated analysis of domestic prices. Rather, the plain text of Article 3.2 envisions an inquiry into the relationship between subject imports and domestic prices. Article 3.2 introduces the obligations on price effects by clarifying that the nature of the inquiry is to understand the "effect of the dumped imports on prices". An authority's analysis of the three delineated price effects – price undercutting, price depression, and price suppression – must necessarily be in reference to the subject imports. The Appellate Body has endorsed this interpretation that it is not enough for an authority to simply observe what is happening to domestic prices.

14. The United States recalls that the Appellate Body in *China – GOES* has explained that (1) Article 3.2 requires an investigating authority in its final determination to provide sufficient reasoning as to what explanatory force parallel pricing trends have for the depression or suppression or domestic prices, and (2) that although price depression and price suppression are not contingent on a finding of price undercutting, the investigating authority must conduct an objective examination of all the evidence in making its determinations with respect to these effects.

15. Regarding price comparability, when there is record evidence indicating that subject imports are not a homogenous product and/or that subject imports differ from the domestically-produced product, an investigating authority should evaluate those differences to determine whether they affected prices and take steps to explain the implications of such price comparability (or lack thereof) between subject imports and the domestic product.

16. The AD Agreement does not prescribe a particular methodology to be used in an investigating authority's volume and price effects analysis.

III. ARTICLES 3.1 AND 3.4 OF THE AD AGREEMENT

17. Japan argues that the KTC's analysis of adverse impact is inconsistent with Articles 3.1 and 3.4.

18. All determinations or findings made in connection with Article 3.4 must be based on "positive evidence" and "involve an objective examination", as required by Article 3.1 of the AD Agreement.

19. Article 3.4 of the AD Agreement sets out an authority's obligation to ascertain the impact of dumped imports on the domestic industry. The United States observes that Article 3.4 imposes an obligation on the authority to conduct an "examination" of the impact of the dumped imports on

the domestic industry. And the text of Article 3.4 expressly requires investigating authorities to examine the "impact" of subject imports on a domestic industry, and not just the state of the industry.

20. As recognized by Articles 3.1 and 3.2 of the AD Agreement, subject imports can influence a domestic industry's performance through volume and price effects. Thus, to examine the impact of subject imports on a domestic industry, an authority would need to consider the relationship between subject imports – including subject import price undercutting, and the price depressing or suppressing effects of subject imports – and the domestic industry's performance during the period of investigation.

21. Thus, in examining "the relationship between subject imports and the state of the domestic industry" pursuant to Article 3.4 of the AD Agreement, an authority must consider whether changes in the state of the industry are the consequences of subject imports and whether subject imports have explanatory force for the industry's performance trends. The "examination" contemplated by Article 3.4 must be based on a "thorough evaluation of the state of the industry" and it must "contain a persuasive explanation as to how the evaluation of relevant factors led to the determination of injury".

22. Article 3.4 does not dictate the methodology that should be employed by the authority, or the manner in which the results of this evaluation are to be set out. The United States observes that the Panel must be able to discern that the authority's examination of the impact on the domestic industry – an examination that necessarily includes an evaluation of relevant economic factors – is based on positive evidence and an objective examination.

IV. ARTICLES 3.1 AND 3.5 OF THE AD AGREEMENT

23. Japan claims that the KTC's causation analysis was inconsistent with Articles 3.1 and 3.5 of the AD Agreement.

24. As with Articles 3.2, 3.4, and 4.1 of the AD Agreement, the Appellate Body has recognized that it is appropriate to read the obligations of Article 3.5 in conjunction with Article 3.1 of the AD Agreement.

25. With respect to the interpretation of Articles 3.2 and 3.5, the United States agrees with Japan's argument that a deficient volume or price effects analysis could compromise a causation analysis where the findings on volume or price effects serve as a key element of the causation analysis. As the Appellate Body explained in *China – GOES*, the provisions in Article 3 "contemplate a logical progression in an authority's examination leading to the ultimate injury and causation determination". Fatal deficiencies in a volume or price effects analysis could compromise the objective nature of the causation analysis.

26. The first sentence of Article 3.5 sets out the general requirement for a demonstration that dumped imports are causing injury under the AD Agreement, and contains an explicit link back to Articles 3.2 (volume and price effects) and 3.4 (impact on domestic industries). If the volume or price effects findings are found to be inconsistent with Articles 3.1 and 3.2, or the impact findings are found to be inconsistent with Articles 3.1 and 3.4, an Article 3.5 causal link analysis relying on such findings would fail. That is, if an authority relies on a price effects finding to support its impact and injury determinations, its decision must be supported by positive evidence on these counts. In such circumstances, a failure to demonstrate price effects or significant impact would constitute a failure to demonstrate that dumped imports are causing injury, as required by the first sentence of Article 3.5 of the AD Agreement.

27. The third sentence of Article 3.5 of the AD Agreement provides that, in addition to examining the effects of the dumped imports, an authority must examine other known factors which at the same time are injuring the domestic industry. Under Article 3.5, the premise of a non-attribution analysis is that there is at least one known factor other than the dumped imports that is at the same time injuring the domestic industry. As the Appellate Body has found, if known factors other than dumped imports are simultaneously causing injury, the third sentence of Article 3.5 requires the authority to engage in a non-attribution analysis to ensure that the effects of those other factors are not attributed to the dumped imports. If there are no known factors

other than the dumped imports that are injuring the domestic industry, Article 3.5 does not require an authority to conduct a non-attribution analysis.

28. The AD Agreement does not specify the particular methods and approaches an authority may use to conduct a causation analysis, including the non-attribution aspect of that analysis.

V. ARTICLE 12 OF THE AD AGREEMENT

29. Japan argues that Korea breached Articles 12.2 and 12.2.2 of the AD Agreement by failing to issue a public notice or report disclosing all relevant information supporting its decision to impose anti-dumping duties against Japanese imports.

30. Article 12.2 requires investigating authorities to provide public notice or a separate report of preliminary or final determinations. The notice or report must provide "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities".

31. Article 12.2.2 is triggered after an investigating authority makes a final determination to impose anti-dumping duties. According to the Appellate Body in *China – GOES,* the notice requirement of Article 12.2.2 "capture[s] the principle that those parties whose interests are affected by the imposition of final anti-dumping … duties are entitled to know, as a matter of fairness and due process, the facts, law and reasons that have led to the imposition of such duties". If the relevant information is confidential, the investigating authorities may provide non-confidential summaries of that information.

32. Article 12.2.2 does not require investigating authorities "to disclose *all* the factual information that is before them, but rather those ["matters of fact"] that allow an understanding of the factual basis that led to the imposition of final measures".

33. The Appellate Body also stated in *China – GOES* that public notice under 12.2.2 must include a discussion of the elements that establish injury under Article 3.

34. Article 12.2.2 further requires that a public notice or report contain "reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers". Because the interests of exporters and importers may be adversely affected by a final dumping determination, it is important that such parties are able to provide input on the evidence and methodology used by investigating authorities during the course of an investigation. If the public notice or report does not contain a detailed explanation as to why an argument was rejected, there is little way of knowing whether the investigating authority considered the comments of an interested party, or whether the final determination was consistent with the provisions of the AD Agreement.

VI. KOREA'S PRELIMINARY RULING REQUEST

35. In its preliminary ruling request, Korea asserts that Japan's panel request breaches Article 6.2 of the DSU by failing to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly" with respect to its claims under Articles 3.1, 3.2, 3.4, 3.5, and 4.1 of the AD Agreement.

36. Article 7.1 of the DSU establishes that a panel's terms of reference are to examine the "the matter referred to the DSB" by the complaining party in the request for the establishment of a panel, in the light of relevant provisions of the covered agreement cited by the parties to the dispute.

37. Article 6.2 of the DSU provides that the panel request shall "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". These two distinct requirements – "(i) the identification of the specific measures at issue; and (ii) the provision of a brief summary of the legal basis of the complaint" – "constitute the 'matter referred to the DSB', which forms the basis of a panel's terms of reference under Article 7.1 of the DSU".

38. The Appellate Body has stated that the "legal basis of the complaint ... [is] 'the specific provision of the covered agreement that contains the obligation alleged to be violated'". The identification of the covered agreement provision claimed to have been breached is thus the "minimum prerequisite" for presenting the legal basis of the complaint. Further, the requirement of a "brief summary" sufficient to "present the problem clearly" entails connecting the challenged measure with the provisions alleged to have been infringed. Consequently, "to the extent that a provision contains not one single distinct obligation, but rather multiple obligations, a panel request might need to specify which of the obligations contained in the provision is being challenged".

39. However, a panel request is required to state the *claim* at issue. It is not required to provide argumentation as to why and precisely how the measure breaches the relevant obligation. Thus, for Korea to demonstrate that a particular claim falls outside the Panel's terms of reference, it must show that the panel request did not clearly identify the obligation or provision alleged to be breached by the challenged measure.

EXECUTIVE SUMMARY OF U.S. RESPONSES TO PANEL QUESTIONS TO THIRD PARTIES

Response to Question 8

40. Japan has requested the Panel to find the measures at issue to be inconsistent with Article VI of the GATT 1994 "as a consequence of the inconsistencies with the Anti-Dumping Agreement" as described in its submission. Japan raised no new arguments specific to Article VI of the GATT 1994. The United States submits that the Panel need not make any findings with respect to Article VI of the GATT 1994 because such findings would not contribute to the resolution of the dispute between the parties.

41. Article 3.4 and Article 3.7 of the DSU provide, respectively, that "[r]ecommendations or rulings of the DSB shall be aimed at achieving a satisfactory settlement of the matter" and that "the aim of the dispute settlement mechanism is to secure a positive solution to a dispute". Pursuant to Articles 7.1 and 11 of the DSU, panels and the Appellate Body are charged with making those findings that may lead to such a recommendation. Given the findings requested by Japan under Article VI of the GATT 1994 are purely consequential, additional findings would not affect the DSB's recommendations and rulings, and the Panel therefore should exercise judicial economy with respect to those claims.

_____