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KOREA – ANTI-DUMPING DUTIES ON PNEUMATIC VALVES FROM JAPAN

REPORT OF THE PANEL

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EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
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EC – Tube or Pipe Fittings	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, p. 2613
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Thailand – H-Beams	Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 2701
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US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, p. 4051
US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, p. 3257

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US – Softwood Lumber VI (Article 21.5 – Canada)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865
US – Steel Safeguards	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, p. 3117
US – Tyres (China)	Appellate Body Report, *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/AB/R, adopted 5 October 2011, DSR 2011:IX, p. 4811
US – Wheat Gluten	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, p. 717
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
US – Zeroing (Japan) (Article 21.5 – Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/AB/RW, adopted 31 August 2009, DSR 2009:VIII, p. 3441

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
BCI	Business confidential information
CKD	CKD Corporation
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
Korean Investigating Authorities	Korea Trade Commission and Office of Trade Investigation
KCC	KCC Co., Ltd.
KRW	South Korean Won
KTC	Korea Trade Commission
KTC's Preliminary Resolution	KTC, Resolution of Preliminary Determination on Dumping and Injury to the Domestic Industry of Valves for Pneumatic Transmissions from Japan (26 June 2014), (Exhibit JPN-1)
KTC's Final Resolution	KTC, Resolution of Final Determination on Dumping and Injury to Domestic Industry of Valves for Pneumatic Transmissions from Japan (20 January 2015), (Exhibits JPN-4 (public version) and KOR-1 (BCI))
MOSF	Minister/Ministry of Strategy and Finance
OTI	Office of Trade Investigation
MOSF's Decree No. 498	MOSF, Decree No. 498, Regulation Concerning the Imposition of Anti-Dumping Duties on Valves for Pneumatic Transmissions originating from Japan (19 August 2015), (Exhibit JPN-6)
MOSF's Public Announcement	MOSF, Public Announcement No. 2015-156, Decision to Apply Anti-Dumping Duties on the Pneumatic Transmissions Valves from Japan (19 August 2015), (Exhibit KOR-3 (BCI))
OTI's Preliminary Report	OTI, Preliminary Report on Dumping and Injury to Domestic Industry of Valves for Pneumatic Transmissions imported from Japan (26 June 2014), (Exhibit JPN-2)
OTI's Interim Report	OTI, Interim Investigation Report on Dumping and Injury to Domestic Industry of Valves for Pneumatic Transmissions from Japan (23 October 2014), (Exhibit JPN-3)
OTI's Final Report	OTI, Final Report on Dumping and Injury to Domestic Industry of Valves for Pneumatic Transmissions Imported from Japan (20 January 2015), (Exhibits JPN-5 (public version) and KOR-2 (BCI))
POI	Period of investigation
R&D	Research and development
SG&A	Selling, general, and administrative (costs)
SMC	SMC Corporation
Toyooki	Toyooki Kogyo Co., Ltd.
TPC	TPC Mechatronics Corporation
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaint by Japan

1.1. On 15 March 2016, Japan requested consultations with Korea pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXIII:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Articles 17.2 and 17.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), with respect to the measures and claims set out below.[1]

1.2. Consultations were held on 28 April 2016. These consultations failed to settle the dispute.[2]

1.2 Panel establishment and composition

1.3. On 9 June 2016, Japan requested the establishment of a panel pursuant to Articles 4.7 and 6 of the DSU, Article XXIII of the GATT 1994, and Article 17.4 of the Anti-Dumping Agreement, with standard terms of reference.[3] At its meeting on 4 July 2016, the Dispute Settlement Body (DSB) established a panel pursuant to the request of Japan in document WT/DS504/2, in accordance with Article 6 of the DSU.[4]

1.4. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Japan in document WT/DS504/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[5]

1.5. On 22 August 2016, Japan requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU. On 29 August 2016, the Director-General accordingly composed the Panel as follows:

Chairperson:	Mr Mateo Diego-Fernández
Members:	Ms Leora Blumberg Mr Dennis Francis

1.6. Brazil, Canada, China, Ecuador, the European Union, Norway, Singapore, Turkey, the United States, and Viet Nam notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel proceedings

1.3.1 General

1.7. After consultation with the parties, on 15 November 2016, the Panel adopted its Working Procedures, as well as additional Working Procedures concerning Business Confidential Information (BCI)[6], and timetable. The Panel revised its timetable, after consulting the parties, on 21 June and 20 July 2017.

1.8. The Panel held a first substantive meeting with the parties on 1 and 2 March 2017. A session with the third parties took place on 2 March 2017.

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[1] Request for Consultations by Japan, WT/DS504/1, G/L/1143, G/ADP/D113/1 (Japan's consultations request).
[2] Request for the Establishment of a Panel by Japan, WT/DS504/2 (Japan's panel request).
[3] Japan's panel request.
[4] Dispute Settlement Body, Minutes of Meeting held in the Centre William Rappard on 4 July 2016, WT/DSB/M/381, p. 1.
[5] Constitution of the Panel Established at the Request of Japan, WT/DS504/3.
[6] See the Panel's Working Procedures in Annex A-1; and Panel's Additional Working Procedures Concerning Business Confidential Information in Annex A-2.

1.9. The Panel held a second substantive meeting with the parties on 30 and 31 May 2017.

1.10. On 20 July 2017, the Panel issued the descriptive part of its report to the parties.

1.11. The Panel issued its Interim Report to the parties on 10 October 2017. The Panel issued its Final Report to the parties on 23 November 2017.

1.3.2 Preliminary ruling request

1.12. On 24 November 2016, Korea filed a request for the Panel to issue a preliminary ruling that Japan's claims under Articles 3.1, 3.2, 3.4, 3.5, and 4.1 of the Anti-Dumping Agreement are outside the Panel's terms of reference for this dispute. Korea asserted that, with respect to these claims, Japan's panel request fails to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly", as required by Article 6.2 of the DSU.[7]

1.13. At the invitation of the Panel, Japan submitted a written response to Korea's request on 16 December 2016. Korea responded to Japan's views in its first written submission filed on 6 January 2017. The European Union and the United States provided their views on Korea's request in their respective third-party submissions filed on 13 January 2017. The Panel posed questions concerning Korea's request to the parties and third parties after the first substantive meeting, to which the parties and certain third parties (Ecuador, the European Union, and the United States) responded in writing. Further, both Japan and Korea filed additional comments regarding the sufficiency of Japan's panel request under Article 6.2 of the DSU in their respective second written submissions. The Panel posed further questions to the parties concerning Korea's request after the second substantive meeting, to which the parties submitted written responses and comments on each other's responses.

1.14. On 7 July 2017, the Panel informed the parties that, in view of the circumstances of the case, and the extraordinary scope of Korea's request, which involved seven of the 13 claims raised by Japan in this dispute, the Panel had decided not to issue a separate ruling on the matter of the sufficiency of Japan's panel request under Article 6.2 of the DSU, indicating that it would instead address the matter in its final report.[8]

1.3.3 Objections to the accuracy of translations

1.15. On 2 March 2017, Japan raised objections concerning the accuracy of 12 specific aspects of the English translation of exhibits submitted by Korea with its first written submission. Having heard the views of both parties, on 28 March 2017 the Panel informed them that: (a) two of the objections raised by Japan were valid and the translation of the original exhibits should be read as corrected by Japan; and (b) four of the objections raised by Japan were rejected as they constituted minor changes in language that did not affect the substance of the translation provided by Korea. With respect to the six remaining objections raised by Japan, the Panel invited the parties to seek to provide mutually acceptable translations. On 18 April 2017, Korea proposed alternative translations for these discrepancies, which Japan accepted in a communication dated 21 April 2017.

1.16. On 6 April 2017, Korea raised objections concerning the accuracy of ten specific aspects of the English translation of exhibits submitted by Japan with its first written submission. Having heard the views of both parties, on 20 April 2017 the Panel rejected Korea's objections as they were submitted outside of the deadline established in paragraph 8 of the Panel's Working Procedures and without any showing of good cause for granting an exception to the deadline.

2 FACTUAL ASPECTS

2.1. This dispute concerns anti-dumping duties imposed by Korea on imports of valves for pneumatic transmissions (pneumatic valves) originating from Japan, as described in the Resolution of Final Determination on Dumping and Injury to Domestic Industry of Valves for Pneumatic

[7] Korea's preliminary ruling request, pp. 1 and 20.
[8] See sections 7.3, 7.4.4, 7.5.4, 7.6.4, 7.7.4, and 7.8.3 of this Report.

Transmissions from Japan adopted by the Korea Trade Commission (KTC) (Final Resolution)[9] and the Report by the KTC's Office of Trade Investigation (OTI) (Final Report)[10], both dated 20 January 2015.

2.2. The investigation was initiated by the KTC based on an application filed on 23 December 2013 by TPC Mechatronics Corporation (TPC) and KCC Co., Ltd. (KCC).[11] The notice of initiation of the investigation was published in the Official Gazette on 21 February 2014.[12] The investigation was conducted by the KTC and its OTI (the Korean Investigating Authorities).[13] The period of investigation (POI) for the examination of dumping was from 1 April 2012 to 31 March 2013, and the POI for the examination of injury was from 1 January 2010 to 31 December 2013.[14]

2.3. On 26 June 2014, the KTC made a preliminary determination that there was sufficient evidence to presume the existence of dumping of pneumatic valves from Japan and of material injury suffered by the domestic industry caused by the dumped imports. The KTC did not recommend the imposition of provisional anti-dumping duties on imports of pneumatic valves from Japan.[15] The Korean Minister of Strategy and Finance (MOSF) did not impose provisional anti-dumping duties. On 23 October 2014, the OTI issued an Interim Investigation Report.[16]

2.4. On 20 January 2015, based on the OTI's Final Report of the same date, the KTC issued its Final Resolution, determining that the Korean domestic industry producing the like product was materially injured by reason of the dumping of pneumatic valves from Japan and recommending the imposition of anti-dumping duties on such imports for five years at the following rates: (a) for SMC Corporation (SMC) and exporters of its products, 11.66%; and (b) for CKD Corporation (CKD) and exporters of its products, Toyooki Kogyo Co., Ltd. (Toyooki) and exporters of its products, and other suppliers of Japan, 22.77%.[17] The OTI's Final Report and the KTC's Final Resolution were notified to domestic producers, importers, and consumers on 17 March 2015.[18]

2.5. On 19 August 2015, based on the KTC's Final Resolution, the MOSF adopted Decree No. 498, which contains the Regulation Concerning the Imposition of Anti-Dumping Duties on Valves for Pneumatic Transmissions originating from Japan. Decree No. 498 imposes anti-dumping duties for five years on the imports of pneumatic valves from Japan at the following rates: (a) for SMC and persons exporting its products at 11.66%; and (b) for CKD and Toyooki and persons exporting its products, and other suppliers, at 22.77%.[19]

[9] KTC, Resolution of Final Determination on Dumping and Injury to Domestic Industry of Valves for Pneumatic Transmissions from Japan (20 January 2015) (KTC's Final Resolution) (Exhibits JPN-4 (public version) and KOR-1 (BCI)). Unless otherwise indicated, the panel will subsequently refer to the translated version of the KTC's Final Resolution in Exhibit KOR-1(b).

[10] OTI, Final Report on Dumping and Injury to Domestic Industry of Valves for Pneumatic Transmissions Imported from Japan (20 January 2015) (OTI's Final Report) (Exhibits JPN-5 (public version) and KOR-2 (BCI)). Unless otherwise indicated, the panel will subsequently refer to the translated version of the OTI's Final Report in Exhibit KOR-2(b).

[11] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 2; OTI's Final Report, (Exhibit KOR-2(b) (BCI)), p. 1. See Investigation Application Required to Impose Anti-Dumping Duties on Pneumatic Transmission Valves from Japan (23 December 2013) (Investigation Application) (Exhibit JPN-7(b)).

[12] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 2.

[13] Japan's first written submission, para. 12; Korea's response to Panel question No. 15(a).

[14] OTI's Final Report, (Exhibit KOR-2(b) (BCI)), pp. 31 and 177.

[15] KTC, Resolution of Preliminary Determination on Dumping and Injury to the Domestic Industry of Valves for Pneumatic Transmissions from Japan (26 June 2014) (KTC's Preliminary Resolution) (Exhibit JPN-1(b)); OTI, Preliminary Report on Dumping and Injury to Domestic Industry of Valves for Pneumatic Transmissions imported from Japan (26 June 2014) (OTI's Preliminary Report) (Exhibit JPN-2(b)).

[16] OTI, Interim Investigation Report on Dumping and Injury to Domestic Industry of Valves for Pneumatic Transmissions from Japan (23 October 2014) (OTI's Interim Report) (Exhibit JPN-3(b)).

[17] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 1.

[18] Notification of final determination on dumping and injury to domestic industry of valves for pneumatic transmissions from Japan, (Exhibit JPN-29(b)).

[19] MOSF, Decree No. 498, Regulation Concerning the Imposition of Anti-Dumping Duties on Valves for Pneumatic Transmissions originating from Japan (19 August 2015) (MOSF's Decree No. 498), (Exhibit JPN-6(b)). See also MOSF, Public Announcement No. 2015-156, Decision to Apply Anti-Dumping Duties on the Pneumatic Transmissions Valves from Japan (19 August 2015) (MOSF's Public Announcement) (Exhibit KOR-3(b) (BCI)).

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. Japan requests that the Panel find that Korea's measures imposing anti-dumping duties on pneumatic valves from Japan are inconsistent with Korea's obligations under the following provisions of the Anti-Dumping Agreement and the GATT 1994:

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

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

c. Articles 3.1 and 3.4 of the Anti-Dumping Agreement, because Korea's analysis of the impact of the imports under investigation on the domestic industry at issue did not involve an objective examination based on positive evidence, including an evaluation of all relevant economic factors and indices having a bearing on the state of the domestic industry at issue;

d. Articles 3.1 and 3.5 of the Anti-Dumping Agreement, because Korea failed to demonstrate that the imports under investigation were, through the effects of dumping, causing injury to the domestic industry based on an objective examination of the alleged causal relationship between the imports under investigation and the alleged injury to the domestic industry, on the basis of all relevant positive evidence before the authorities;

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

f. Articles 3.1 and 3.5 of the Anti-Dumping Agreement, because Korea's demonstration of causation lacks any foundation in its analyses of the volume of the imports under investigation, the effects of the imports under investigation on prices, and/or the impact of the imports under investigation on the domestic industry at issue, irrespective and independent of whether Korea's flawed analysis of the volume and/or flawed analysis of the effects of the imports under investigation on prices, on the one hand, and Korea's flawed analysis of the impact of the imports under investigation on the domestic industry on the other, would be inconsistent with, respectively, Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 3.1 and 3.4 of the Anti-Dumping Agreement;

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

h. Article 6.5 of the Anti-Dumping Agreement, because Korea treated allegedly confidential information provided by the interested parties as confidential without good cause shown;

i. Article 6.5.1 of the Anti-Dumping Agreement, because Korea: (i) failed to require the applicants to furnish non-confidential summaries of their submissions, questionnaire responses, and amendments thereof; and (ii) where such summaries were provided, they were not in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence;

j. Article 6.9 of the Anti-Dumping Agreement, because Korea failed to inform the interested parties of the essential facts under consideration which formed the basis for the decision to impose definitive anti-dumping measures;

k. Article 12.2 of the Anti-Dumping Agreement, because Korea failed to provide in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities;

l. Article 12.2.2 of the Anti-Dumping Agreement, because Korea failed to make available all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures; and

m. Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994, as a consequence of the breaches of the Anti-Dumping Agreement described above.

3.2. Japan further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that Korea bring its measures into conformity with its obligations under the GATT 1994 and the Anti-Dumping Agreement.

3.3. Japan requests that the Panel make findings with respect to each of Japan's claims under Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement without exercising judicial economy, because findings with respect to each claim could influence Korea's implementation measures and therefore be necessary to secure the prompt resolution of the dispute.[20]

3.4. Korea requests that the Panel determine that Japan's claims under Articles 3.1, 3.2, 3.4, 3.5, and 4.1 of the Anti-Dumping Agreement are outside the Panel's terms of reference for this dispute, and reject Japan's remaining claims. Alternatively, Korea requests that the Panel reject the entirety of Japan's claims in this dispute and find that the challenged measures are not inconsistent with Korea's obligations under the GATT 1994 and the Anti-Dumping Agreement.

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 17 of the Working Procedures adopted by the Panel (see Annexes B-1, B-2, C-1, and C-2).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Brazil, Canada, Ecuador, the European Union, and the United States are reflected in their executive summaries, provided in accordance with paragraph 17 of the Working Procedures adopted by the Panel (see annexes D-1, D-2, D-3, D-4, and D-5). China, Norway, Singapore, Turkey, and Viet Nam did not submit written or oral arguments to the Panel.

6 INTERIM REVIEW

6.1. On 10 October 2017, the Panel issued its Interim Report to the parties. On 24 October 2017, Japan and Korea each submitted written requests for the Panel to review aspects of the Interim Report. Neither party requested an interim review meeting. On 31 October 2017, both parties submitted comments on the other party's requests for review.

6.2. The parties' requests made at the interim review stage as well as the Panel's discussion and disposition of those requests are set out in Annex A-3.

7 FINDINGS

7.1 Introduction

7.1. This dispute concerns anti-dumping duties imposed by Korea on imports of pneumatic valves from Japan, as described in the KTC's Final Resolution[21] and in the OTI's Final Report[22], both dated 20 January 2015. On 19 August 2015, based on the recommendations contained in the KTC's Final Resolution, the Korean MOSF adopted Decree No. 498, imposing anti-dumping duties for five years

[20] Japan's opening statement at the first meeting of the Panel, para. 96.
[21] KTC's Final Resolution, (Exhibits JPN-4 (public version) and KOR-1 (BCI)).
[22] OTI's Final Report, (Exhibits JPN-5 (public version) and KOR-2 (BCI)).

on imports of pneumatic valves from Japan at the following rates: (a) for SMC and persons exporting its products, 11.66%; and (b) for CKD and Toyooki and persons exporting its products, and other suppliers, 22.77%.[23]

7.2. Japan claims that Korea's anti-dumping duties on pneumatic valves from Japan are inconsistent with Korea's obligations under Articles 1, 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 and Article VI of the GATT 1994.

7.3. Korea requests that the Panel determine that Japan's claims under Articles 3.1, 3.2, 3.4, 3.5, and 4.1 of the Anti-Dumping Agreement are outside the Panel's terms of reference. Korea also invites the Panel to examine *ex officio* whether Japan's remaining claims (under Articles 1, 6.5, 6.5.1, 6.9, 12.2, and 12.2.2 of the Anti-Dumping Agreement and Article VI of the GATT 1994) are within the Panel's terms of reference. For all claims that the Panel considers to be within its terms of reference, Korea requests the Panel to reject Japan's claims and find that the challenged measures are not inconsistent with Korea's obligations under the GATT 1994 and the Anti-Dumping Agreement.

7.4. In addressing the issues raised in this dispute, the Panel will first set out the relevant principles guiding its review. It will then address the issues related to the Panel's terms of reference. The Panel will subsequently examine, as appropriate, whether the measures challenged by Japan are inconsistent with the cited provisions of the Anti-Dumping Agreement and the GATT 1994. The Panel will finalize by setting forth its conclusions and recommendation.

7.2 Standard of review, treaty interpretation, and burden of proof

7.2.1 Standard of review

7.5. Panels are bound by the standard of review set forth in Article 11 of the DSU, which provides, in relevant part:

> [A] panel should make an *objective assessment of the matter* before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.[24]

7.6. In addition, Article 17.6 of the Anti-Dumping Agreement sets forth a specific standard of review applicable to disputes under the Anti-Dumping Agreement:

> (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
>
> (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

7.7. Thus, Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement together establish the standard of review the Panel will apply with respect to both the factual and the legal aspects of the present dispute.

7.8. It is well understood that:

> [T]he task of a WTO panel is to examine whether the investigating authority has adequately performed its investigative function, and has adequately explained how

[23] MOSF's Decree No. 498, (Exhibit JPN-6(b)). See also MOSF's Public Announcement, (Exhibit KOR-3(b) (BCI)).
[24] Emphasis added.

> the evidence supports its conclusions. It follows from the requirement that the investigating authority provide a "reasoned and adequate" explanation for its conclusions that the entire rationale for the investigating authority's decision must be set out in its report on the determination. This is not to say that the meaning of a determination cannot be explained or buttressed by referring to evidence on the record. Yet, in all instances, it is the explanation provided in the written report of the investigating authorities (and supporting documents) that is to be assessed in order to determine whether the determination was sufficiently explained and reasoned.[25]

7.9. Moreover, a panel reviewing an investigating authority's determination may not conduct a *de novo* review of the evidence or substitute its judgment for that of the investigating authority. A panel must limit its examination to the evidence that was before the agency during the course of the investigation and must take into account all such evidence submitted by the parties to the dispute.[26] At the same time, a panel must not simply defer to the conclusions of the investigating authority. A panel's examination of those conclusions must be "in-depth" and "critical and searching".[27]

7.10. A panel must limit its examination to the evidence that was before the investigating authority during the course of the investigation[28] and must take into account all such evidence submitted by the parties to the dispute.[29] A panel's examination in that regard is not necessarily limited to the pieces of evidence *expressly* relied upon by an investigating authority in its establishment and evaluation of the facts in arriving at a particular conclusion.[30] Rather, a panel may also take into consideration other pieces of evidence that were on the record and that are connected to the explanation provided by the investigating authority in its determination. This flows from the principle that investigating authorities are not required to cite or discuss *every* piece of supporting record evidence for each fact in the final determination.[31] That notwithstanding, since a panel's review is not *de novo*, *ex post* rationalizations unconnected to the investigating authority's explanation – even when founded on record evidence – cannot form the basis of a panel's conclusion.[32]

7.2.2 Treaty interpretation

7.11. Article 3.2 of the DSU provides that the dispute settlement system serves to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". As noted above, Article 17.6(ii) of the Anti-Dumping Agreement similarly requires panels to interpret that Agreement's provisions in accordance with the customary rules of interpretation of public international law. It is generally accepted that the principles codified in Articles 31 and 32 of the Vienna Convention are such customary rules.[33]

7.2.3 Burden of proof

7.12. The general rule in WTO dispute settlement is that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.[34] Following this principle, the Appellate Body has explained that the complaining party in any given dispute should establish a *prima facie* case of inconsistency of a measure with a provision of the WTO covered agreements, before the burden of showing consistency with that provision or

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[25] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.255.
[26] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 187.
[27] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.
[28] Article 17.5 of the Anti-Dumping Agreement is clear in this regard: "The DSB shall, at the request of the complaining party, establish a panel to examine the matter based upon: … (ii) the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member."
[29] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 187-188.
[30] Appellate Body Report, *Thailand – H-Beams*, paras. 117-119.
[31] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 164.
[32] Appellate Body Report, *US – Lamb*, paras. 153-161. See also Appellate Body Reports, *US – Steel Safeguards*, para. 326; and *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97; and Panel Reports, *Argentina – Ceramic Tiles*, para. 6.27; and *Argentina – Poultry Anti-Dumping Duties*, para. 7.48.
[33] Appellate Body Report, *Japan – Alcoholic Beverages II*, section D, pp. 10-12, DSR 1996:I, p. 97, pp. 104-106.
[34] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, p. 323, p. 335.

defending it under an exception must be assumed by the defending party.[35] In other words, "a party claiming a violation of a provision of the *WTO Agreement* by another Member must assert and prove its claim".[36]

7.13. Therefore, as the complaining party, Japan bears the burden of demonstrating that the measures at issue are inconsistent with the provisions of the covered agreements that Japan has invoked. If the Panel finds that Japan has made out its *prima facie* case, it is for Korea to provide rebuttal arguments and evidence that is needed to support that rebuttal.

7.3 Panel's terms of reference

7.3.1 Introduction

7.14. On 24 November 2016, Korea filed a request for the Panel to issue a preliminary ruling that Japan's claims under Articles 3.1, 3.2, 3.4, 3.5, and 4.1 of the Anti-Dumping Agreement are outside the Panel's terms of reference for this dispute. Korea asserted that, with respect to these claims, Japan's panel request fails to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly", as required by Article 6.2 of the DSU.[37] Korea subsequently invited the Panel, in addition, to examine *ex officio* whether the remaining claims (under Articles 1, 6.5, 6.5.1, 6.9, 12.2, and 12.2.2 of the Anti-Dumping Agreement and Article VI of the GATT 1994) are within the Panel's terms of reference.[38]

7.15. Korea's challenge thus extends to all 13 claims that Japan set out in its panel request. Both parties addressed the sufficiency of Japan's panel request in their written submissions, as well as in their responses to questions posed by the Panel and comments on each other's responses. Some third parties (Ecuador, the European Union, and the United States) also offered their views on the issue in their written submissions and in their responses to questions posed by the Panel.

7.16. In view of the extraordinary scope of Korea's challenge, and the particular provisions at issue in this dispute, the Panel decided not to issue a separate ruling on the matter of the sufficiency of Japan's panel request under Article 6.2 of the DSU, and informed the parties that it would instead address this issue in its final report.[39]

7.17. In this section of our Report, we set out general considerations regarding Korea's challenge. We will subsequently address whether Japan's panel request has provided the requisite brief summary of the legal basis of the complaint sufficient to present the problem clearly, as required by Article 6.2 of the DSU, with respect to each of the specific claims in turn.

7.3.2 Legal background

7.18. Article 6.2 of the DSU provides that:

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

7.19. The "matter" referred to a panel for consideration consists of: (a) the measures at issue; and (b) the specific claims advanced by the complaining party.[40] The identification of the specific measures at issue and the legal basis of the complaint serves a dual function: (a) it forms the basis for a panel's terms of reference under Article 7.1 of the DSU; and (b) it informs other WTO Members of the nature of the dispute, which in turn allows the respondent to prepare its defence and allows other Members to assess whether they have an interest in the matter, for

[35] Appellate Body Report, *EC – Hormones*, para. 104.
[36] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16, DSR 1997:I, p. 323, p. 337.
[37] Korea's preliminary ruling request, pp. 1 and 20.
[38] Korea's response to Panel question No. 14. See also second written submission, annex, para. 3.
[39] Panel communication to the parties dated 7 July 2017 regarding Korea's preliminary ruling request.
[40] Appellate Body Reports, *Guatemala – Cement I*, paras. 69-76; *US – Carbon Steel*, para. 125.

example, to decide whether to participate as third parties.[41] The Appellate Body has observed that, since a panel request is usually approved automatically at the DSB meeting following that at which the request first appears on the DSB's agenda, and therefore the request is normally not subject to detailed scrutiny by the DSB, "it is incumbent upon a panel to examine the request for the establishment of the panel very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU".[42]

7.20. Compliance with the requirements of Article 6.2 must be demonstrated on the face of the panel request. Defects in a panel request cannot be cured in subsequent submissions. However, in considering the sufficiency of a panel request, a panel may consider submissions and statements made by the parties in order to: (a) confirm the meaning of the words used in the panel request; and (b) assess whether the ability of the respondent to defend itself was prejudiced.[43]

7.21. In the present case, Korea's challenge concerns the identification of the legal basis of the complaint as described in Japan's panel request, as opposed to the identification of the measures. The term "legal basis of the complaint" in Article 6.2 of the DSU refers to the "claims" made by the complaining party.[44] In turn, a claim refers to the allegation "that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement".[45]

7.22. In examining the sufficiency of a panel request, a distinction must be drawn between "claims" and "arguments". A claim sets forth the complainant's view that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement. By contrast, "arguments" are statements put forth by a complaining party to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision.[46] A panel request must identify the *claims* put forward by the complainant, but need not identify the complainant's arguments, which may be set out and progressively clarified in the course of the proceedings though the parties' submissions and statements.[47]

7.23. Article 6.2 of the DSU requires only a summary of the legal basis of the complaint, and it may be a brief one. The summary must, however, be one that is "sufficient to present the problem clearly". Accordingly, for purposes of Article 6.2, it is not enough that "the legal basis of the complaint" is summarily identified; the identification must "present the problem clearly".[48]

7.24. It is well understood that, in order to present the problem clearly, a panel request must plainly connect the challenged measures with the provisions of the covered agreements claimed to have been infringed, so that the respondent party is aware of the basis for the alleged nullification or impairment of the complaining party's benefits. Only by such connection between the measures and the relevant provisions can a respondent know what case it has to answer, and begin preparing its defence.[49] The narrative of a panel request functions to explain succinctly *how* or *why* the measure at issue is considered by the complaining Member to be violating the WTO obligations in question.[50]

7.25. As a minimum requirement, a complainant must list, in the panel request, the provisions of the covered agreements claimed to have been violated. The identification of the treaty provisions claimed to have been violated by the respondent is always necessary and is a minimum prerequisite if the legal basis of the complaint is to be presented at all.[51]

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[41] Appellate Body Reports, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, p. 186; *EC – Bananas III*, para. 142; *US – Carbon Steel*, para. 126; *US – Continued Zeroing*, para. 161; and *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 108.
[42] Appellate Body Report, *EC – Bananas III*, para. 142.
[43] Appellate Body Reports, *US – Carbon Steel*, para. 127; *Australia – Apples*, para. 418.
[44] Appellate Body Report, *Guatemala – Cement I*, para. 72.
[45] Appellate Body Report, *Korea – Dairy*, para. 139.
[46] Appellate Body Report, *Korea – Dairy*, para. 139.
[47] Appellate Body Report, *EC – Bananas III*, para. 141.
[48] Appellate Body Report, *Korea – Dairy*, para. 120.
[49] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Review*, para. 162.
[50] Appellate Body Reports, *EC – Selected Customs Matters*, para. 130; *China – Raw Materials*, para. 226; and *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.26.
[51] Appellate Body Report, *Korea – Dairy*, para. 124.

7.26. There are, however, situations in which a "mere listing" of treaty provisions does not satisfy the standards of clarity in the statement of the legal basis of the complaint required by Article 6.2. This is the case, for example, where the provisions listed in the panel request establish not one single, distinct obligation, but rather multiple obligations.[52] To the extent that a provision contains multiple obligations, a panel request must specify which of them is being challenged.

7.27. Whether the listing of treaty provisions allegedly violated is sufficient to constitute a "brief summary of the legal basis of the complaint sufficient to present the problem clearly" depends on the circumstances of each case, and in particular on the extent to which mere reference to a treaty provision sheds light on the nature of the obligation at issue.[53]

7.3.3 The requirement for an objective examination based on positive evidence under Article 3.1 of the Anti-Dumping Agreement

7.28. Of the 13 claims set out in Japan's panel request, seven relate to Korea's injury determination. In each of these seven claims, Japan's panel request invokes Article 3.1 of the Anti-Dumping Agreement together with another subparagraph of Article 3, or, in one claim, Article 4.1 of the Anti-Dumping Agreement. In five of these claims, Japan's panel request paraphrases the language in the first part of Article 3.1 and asserts that the Korean Investigating Authorities' analysis was not based on positive evidence and did not involve an objective examination, with respect to the obligation in the other provision set out in the claim.

7.29. We will address the sufficiency of Japan's panel request for each of the individual claims set out therein. We note that previous decisions of panels and the Appellate Body have elaborated on the meaning of the different paragraphs of Article 3 referred to in Japan's claims. In this context, we find it useful to explain our understanding of the legal framework for injury determination, in order to provide the context for our consideration of whether the claims raised by Japan are properly before the Panel and, if so, for our consideration of Japan's claims regarding Korea's injury determination.

7.30. Article 3 of the Anti-Dumping Agreement is entitled "Determination of Injury" and its provisions require an investigating authority to consider, examine, and evaluate a broad range of factors, and to demonstrate that dumped imports are causing injury to the domestic industry. The provisions of Article 3 are interrelated in the sense that the consideration, examination, and evaluation of the required elements all contribute to the explanation of the ultimate determination whether dumped imports are causing injury to the domestic industry of the importing Member.[54]

7.31. Article 3.1 establishes the basic principles that a determination of injury for purposes of Article VI of GATT 1994:

> [S]hall be based on positive evidence and involve an objective examination of both *(a)* the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and *(b)* the consequent impact of these imports on domestic producers of such products.

7.32. The reference in Article 3.1 to "positive evidence" refers to "the facts underpinning and justifying the injury determination"[55], and to "the quality of the evidence that an investigating authority may rely upon in making a determination".[56] "Positive" suggests that the evidence should be "affirmative, objective, verifiable, and credible".[57] The reference to an "objective examination" relates to the investigative process itself, and requires that the process "conform to the dictates of the basic principles of good faith and fundamental fairness", and be conducted "in

[52] Appellate Body Report, *Korea – Dairy*, para. 124.
[53] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.47, preliminary ruling, para. 79.
[54] Panel Report, *China – Cellulose Pulp*, para. 7.10.
[55] Appellate Body Report, *US – Hot-Rolled Steel*, para. 193. See also Panel Report, *China – Cellulose Pulp*, para. 7.12.
[56] Appellate Body Report, *China – GOES*, para. 126 (referring to Appellate Body Report, *US – Hot-Rolled Steel*, para. 192). See also Panel Report, *China – Cellulose Pulp*, para. 7.12.
[57] Appellate Body Report, *China – GOES*, para. 126 (referring to Appellate Body Report, *US – Hot-Rolled Steel*, para. 192). See also Panel Report, *China – Cellulose Pulp*, para. 7.12.

an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation".[58]

7.33. Article 3.1 "is a fundamental and substantial obligation that functions as a chapeau, and informs the rest of Article 3".[59] It is "an overarching provision that sets forth a Member's fundamental, substantive obligation [with respect to the determination of injury]. Article 3.1 informs the more detailed obligations in succeeding paragraphs".[60] The basic principles in Article 3.1 "do not … establish independent obligations which can be judged in the abstract, or in isolation and separately from the substantive requirements set out in the remainder of Article 3. Instead, they inform the application of all the provisions of Article 3".[61] There is no doubt that a determination of injury may be challenged, so that a panel may be required to review it, and decide whether the investigating authority complied with the relevant substantive and procedural obligations, consistently with the fundamental principles set out in Article 3.1. This does not, however, mean that a claim of inconsistency with Article 3.1 can normally be made independently from other obligations in the Anti-Dumping Agreement.[62]

7.34. The requisite degree of specificity and clarity in a panel request may depend on the particular circumstances of each case, and must be examined on a case-by-case basis. As noted by the Appellate Body:

> Whether or not a general reference to a treaty provision will be adequate to meet the requirement of sufficiency under Article 6.2 is to be examined 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.[63]

7.35. Having said that, merely to mention the first part of Article 3.1, or use the language of that provision (i.e. a determination shall be "based on positive evidence" and involve an "objective examination"), in a panel request will not in itself normally suffice to present a problem clearly with respect to an allegation of violation of the Anti-Dumping Agreement. Such mention in itself would not explain *how* or *why* a complainant considers the measure at issue to be inconsistent with a specific obligation under the Anti-Dumping Agreement. It would not be precise enough to serve the dual function of a panel request, which we recall is: (a) to define the basis for the panel's terms of reference under Article 7.1 of the DSU; and (b) to inform other WTO Members, including the respondent, of the nature of the dispute. An allegation in a panel request that an investigating authority's determination was not based on positive evidence and did not involve an objective examination requires some additional information with respect to the alleged inconsistency, in order to provide the summary of the legal basis of the complaint sufficient to present the problem clearly required by Article 6.2 of the DSU.

7.36. As noted above, this does not mean that the complainant is required to set out its arguments in the panel request. "Article 6.2 of the DSU requires that the *claims*, but not the *arguments*, must all be specified sufficiently in the [panel request] in order to allow the defending party and any third parties to know the legal basis of the complaint".[64] Although Article 6.2 demands only a summary of the legal basis of the complaint, and that summary may be a brief one, the summary must be sufficient to present the problem clearly.[65]

7.37. We shall be guided by the considerations expressed above in our assessment of whether each of the claims of inconsistency with obligations under the WTO Agreements raised by Japan in this dispute has been properly identified in Japan's panel request in accordance with Article 6.2 of the DSU, and is therefore appropriately before the Panel. We shall also examine each of the allegations that the Korean Investigating Authorities' determination did not involve an objective examination or were not based on positive evidence in order to assess whether the panel request

[58] Appellate Body Report, *China – GOES*, para. 126 (referring to Appellate Body Report, *US – Hot-Rolled Steel*, para. 193). See also Panel Report, *China – Cellulose Pulp*, para. 7.12.
[59] Appellate Body Report, *Thailand – H-Beams*, para. 90.
[60] Appellate Body Report, *Thailand – H-Beams*, para. 106.
[61] Panel Report, *China – Cellulose Pulp*, para. 7.13.
[62] Panel Report, *China – Cellulose Pulp*, para. 7.15.
[63] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.17.
[64] Appellate Body Report, *EC – Bananas III*, para. 143. (emphasis original)
[65] Appellate Body Report, *Korea – Dairy*, para. 120.

has properly explained how and why in Japan's view the determination breached the specific treaty obligations.

7.4 Definition of the Domestic Industry

7.4.1 Introduction

7.38. Japan claims that the KTC's definition of the domestic industry was not based on an objective examination of positive evidence as required by Articles 3.1 and 4.1 of the Anti-Dumping Agreement.

7.39. Korea argues that Japan's claim concerning the definition of the domestic industry is outside the Panel's terms of reference because Japan's panel request does not comply with the requirements under Article 6.2 of the DSU with respect to this claim. In the alternative, Korea asks the Panel to reject Japan's claim.

7.4.2 Main arguments of the parties

7.4.2.1 Japan

7.40. In its panel request, Japan asserts that Korea's measures are inconsistent with Articles 3.1 and 4.1 of the Anti-Dumping Agreement:

> [B]ecause Korea failed to make an objective examination based on positive evidence in defining the domestic industry producing the like product and consequently in making a determination of injury[.][66]

7.41. As articulated over the course of the proceedings, Japan claims that Korea acted inconsistently with Articles 3.1 and 4.1 of the Anti-Dumping Agreement by failing to ensure that the process of defining the domestic industry did not give rise to a material risk of distortion.[67] Japan contends that the term "a major proportion" under Article 4.1, when the domestic industry is defined based on the major proportion of the total domestic production, requires both qualitative and quantitative assessments.[68] According to Japan, the following circumstances in the present case lead to a risk of distortion:

a. the KTC defined the domestic industry to include only two domestic producers representing about half of the total domestic production of the like product (55.4%), leaving aside seven other producers representing "the other half of the industry";

b. the KTC defined the domestic industry to include the applicants only, introducing a substantial risk of bias and distortion, and failed to provide an adequate explanation as to why such risk was disregarded;

c. the KTC did not make an effort to collect information from domestic producers other than the applicants, or to collect data from other sources known to the Government of Korea or from other publicly available information[69];

d. the two producers included in the definition of the domestic industry are not representative of the total domestic production because they produce a wide range of models both individually and as part of pneumatic systems, whereas other smaller

[66] Japan's panel request, p. 2.
[67] Japan's first written submission, para. 233.
[68] Japan's second written submission, paras. 191-193 (referring to Appellate Body Reports, *EC – Fasteners (China)*, para. 419; and *EC – Fasteners (China) (Article 21.5 – China)*, paras. 5.301-5.302).
[69] Japan's first written submission, paras. 233, 241, and 244-254. See also second written submission, paras. 189, 195, and 199; opening statement at the first meeting of the Panel, paras. 79-86; and response to Panel question No. 108, paras. 72-74.

producers apparently do not sell a wide range of products, make only limited sales as part of systems, and do not cover the same broad range of industries[70]; and

e. the KTC did not consider objectively the available evidence on the level of production of Korean producers because it allowed the petitioners to provide the data on the level of production of other domestic producers and did not resolve the conflicting evidence regarding figures on domestic production.[71]

7.42. Japan argues in addition that the KTC's discussion of certain information regarding two domestic producers that were not formally included in the definition of the "domestic industry" was not adequately reasoned, and failed to resolve the material risk of distortion.[72] Japan also asserts that the KTC, ignoring contentions of Japanese respondents, defined the domestic industry based on unverified data regarding the production levels of each domestic producer other than the petitioners.[73] Japan argues that, in the particular circumstances of the present case, the KTC should have instead defined the domestic industry as follows:

> First, when the KTC received the questionnaire responses from only the two petitioning firms, the KTC should have assessed whether those two firms were sufficiently representative of the total domestic production. Second, if the KTC could not ensure, based on positive evidence, that the two petitioning firms alone were sufficiently representative of the total domestic production, then, the KTC should have included more domestic producers (regardless of whether they were willing to cooperate at that point of time) in the domestic industry definition so that the definition would be sufficiently representative. Finally, the KTC should have preceded the investigation with that sufficiently representative domestic industry definition.[*] For those firms that would continue to be uncooperative with the investigation, the KTC should have resorted to "facts available" in accordance with Article 6.8 [of the Anti-Dumping Agreement].[74]

[*fn original][191] Japan Response to Panel Q60, para. 117.

7.4.2.2 Korea

7.43. Korea argues that Japan's claim under Articles 3.1 and 4.1 of the Anti-Dumping Agreement, with respect to the definition of the domestic industry, is outside of the Panel's terms of reference and that it should therefore be rejected by the Panel.[75]

7.44. Alternatively, Korea argues that Article 4.1 of the Anti-Dumping Agreement does not stipulate any specific proportion for evaluating whether a certain percentage constitutes a major proportion of the total domestic production. In Korea's view, the proportion of production represented by the domestic producers that were included in the definition of the domestic industry (i.e. 55.4%) was "relatively high" and, as determined by the KTC, constituted a major proportion of the total domestic production.[76] The two domestic producers are genuinely representative of the total domestic production from a qualitative point of view, in terms of the range of the models produced, sales methods, distribution channels, and end-user industries.[77] Moreover, Korea asserts that:

[70] Japan's opening statement at the first meeting of the Panel, para. 85. See also response to Panel question No. 110, paras. 77-78.
[71] Japan's second written submission, paras. 197-198. See also opening statement at the first meeting of the Panel, paras. 84 and 86.
[72] Japan's first written submission, paras. 249-252.
[73] Japan's response to Panel question No. 104, paras. 60-61. See also second written submission, para. 4.
[74] Japan's second written submission, para. 201. See also response to Panel question No. 107, paras. 65-71.
[75] Korea's preliminary ruling request, para. 12. See also first written submission, annex, para. 6; second written submission, annex, para. 1.
[76] Korea's first written submission, paras. 307-308. See also second written submission, paras. 134-135.
[77] Korea's first written submission, paras. 308-311. See also second written submission, paras. 134 and 145.

> There is no basis in the text of the Agreement or in WTO jurisprudence for Japan's argument that a domestic industry definition is consistent with Article 4.1 only when the producers included in the domestic industry defined as "a major proportion" are qualitatively similar to the other producers which are not part of the domestic industry. The major proportion requirement is not a sampling situation but rather concerns, quantitatively, whether the producers included in the definition produce a significant, notable, important and thus "major" proportion of total production and qualitatively whether the process by which the industry was defined was objective and not biased.[78]

7.45. Korea submits that there is no evidence that the process by which the KTC defined the domestic industry was in any way biased or gave rise to a material risk of distortion. The KTC invited all domestic producers to participate and each of them received questionnaires. As explained in the KTC's Final Resolution, only two producers responded in full to the questionnaires; two other producers informed the KTC that they were not in a position to respond to the questionnaires due to lack of personnel, but indicated that they too had suffered material injury as a result of the dumped imports; and the remaining producers did not respond at all.[79] In Korea's view, Japan's allegation that those producers who did not join the application for anti-dumping measures "may well have viewed the market and competitive dynamics differently than the applicants" is unsubstantiated speculation.[80] Korea submits that, in any event, there is no requirement in the Anti-Dumping Agreement for an investigating authority to ensure that its definition of the domestic industry includes producers with different views about the application. Korea adds that the OTI found no alternative source of reliable data, such as industry associations or research institutions, to assess the state of the domestic industry of pneumatic valves.[81]

7.4.3 Relevant facts

7.46. The application for the initiation of an investigation and the imposition of anti-dumping duties on imports of pneumatic valves from Japan was filed on 23 December 2013 by TPC and KCC.[82] The application noted that there were some ten domestic companies producing pneumatic valves in Korea, most of which were small to mid-sized companies; TPC was the leading domestic producer.[83] The applicants declared that their volume of production fulfilled the representativeness requirements stipulated in the Korean domestic legislation, that they had not imported the products at issue within the six months previous to the filing of the application, and that they had no affiliation or special relationship with suppliers (exporters) or importers of the products at issue.[84]

7.47. In its Preliminary Report, citing the application and the responses from the domestic industry, the OTI found that there were 11 domestic producers of the like product, including the two applicants; it also noted that only the applicants submitted responses.[85] Based on the fact that they "were included in the range of domestic industry" (including the fact that one of the applicants (TPC) had no recent history of importing the product under investigation and that the other applicant (KCC) had imported only a small quantity of the product), and the percentage of the total domestic production constituted by "[their] aggregate production quantity of [the] like product", the OTI considered that the two applicants were "regarded to take a significant portion of the total production in [Korea]". Accordingly, the OTI recommended that "in the examination for whether there was injury to domestic industry … 'domestic industry' [be] regarded as 'the total production by TPC Mechatronics and KCC'".[86] Noting the OTI's statements, the KTC determined

[78] Korea's second written submission, para. 144.
[79] Korea's first written submission, para. 312. See also second written submission, paras. 139-143.
[80] Korea's first written submission, para. 314.
[81] Korea's first written submission, paras. 312-316. See also second written submission, paras. 139-143.
[82] Investigation Application, (Exhibit JPN-7(b)). See also KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 2; and OTI's Final Report, (Exhibit KOR-2(b) (BCI)), p. 1.
[83] Investigation Application, (Exhibit JPN-7(b)), pp. 2-3.
[84] Investigation Application, (Exhibit JPN-7(b)), pp. 21-22.
[85] OTI's Preliminary Report, (Exhibit JPN-2(b)), pp. 12 and 14.
[86] OTI's Preliminary Report, (Exhibit JPN-2(b)), p. 15. Under the relevant Korean legislation, the domestic industry may be considered to be either "the total domestic production business producing the like product" or a "considerable portion of the total domestic production of the like product". A production business which is "managed by a producer who has [a] special relationship with suppliers or importers of the product" and a production business which is "managed by such a producer who is an importer of the imported product"

that it was appropriate to include the two applicants (TPC and KCC) in the scope of the domestic industry, and that the collective production of the like product of these two companies constituted "a major proportion of the total domestic production" so that it was "appropriate to set the term 'domestic industry' as 'the production of like product by TPC Mechatronics and KCC' for the investigation of injury to domestic industry".[87]

7.48. In its Interim Report, citing the application, the responses from the domestic industry, and the confirmation of the competent ministry, the OTI again referred to the existence of 11 domestic producers of the like product, including the two applicants; it also noted that only the applicants submitted responses. The OTI noted that the production quantity of the two applicants constituted 51% of the total domestic production of the like product. The OTI indicated that of the nine domestic producers other than the applicants, eight expressed their support for the application, while one producer did not respond.[88] The OTI also indicated that two domestic producers (Yonwoo Pneumatic and Shin Yeong Mechatronics) confirmed their respective quantities of production of the like product as reported.[89] The OTI indicated that the two applicants should be "included in the range of domestic industry", that their "aggregate production quantity of like product … constituted 51% of the total domestic production", and that therefore they should be "regarded to take a significant portion of the total production in the country". The OTI concluded that, accordingly, "[i]n the examination for whether there was injury to domestic industry in this investigation, 'domestic industry' [should be] regarded as 'the total production of like product by TPC Mechatronics and KCC'".[90]

7.49. In its Final Report, citing the application and the responses from the domestic industry, the OTI referred to the existence of nine domestic producers of the like product, including the two applicants. The OTI stated that two of the producers that supported the application and were included as part of domestic production at the initial stage of the investigation (Hyoshin Electronic and A-one Tech) produced two-port valves which were subsequently excluded from the product under investigation; accordingly, these two producers were also excluded from the list of domestic producers. The OTI noted that the production quantity of the two applicants constituted 55.4% of the total domestic production of the like product.[91] The OTI indicated that questionnaires were sent to all nine domestic producers that produced the like product, but only the applicants submitted responses. Two additional producers expressed their support for the investigation but indicated that, due to the lack of accounting personnel, they had difficulty responding to the questionnaires.[92] Accordingly, since it "did not have any reliable source from which it could obtain accurate production data of domestic producers of the pneumatic valves", the OTI calculated the production volume of the other five domestic producers based upon the data provided by the applicants[93]. After the public hearing on 23 October 2014, one of the two domestic producers that supported the investigation but which did not submit a questionnaire response (Yonwoo), submitted that its production in 2013 was [[***]] units, and its sales volume was "similar". The OTI used the same number ([[***]] units) both as Yonwoo's sales volume and production volume[94], but it was not able to verify Yonwoo's statement that Yonwoo's sales volumes were similar to its production volumes.[95] The OTI also noted that one of the applicants (TPC) had purchased an insignificant amount of the products under investigation from a firm that it had no special relationship with. The other applicant (KCC) had imported a small amount of products that

may be excluded. (OTI's Final Report, (Exhibit KOR-2(b) (BCI)), p. 21; see also ibid. p. 19; OTI's Preliminary Report, (Exhibit JPN-2(b)), p. 13; and OTI's Interim Report, (Exhibit JPN-3(b)), p. 15). In a communication dated 10 June 2014, one of the respondents (SMC) requested the KTC to investigate and review whether the total output of domestic producers agreeing to the investigation represented at least 25% of the total domestic output of like products. (Opinion of the respondent on the rebuttal from the applicants (29 May 2014) (Respondent's opinion on the rebuttal), (Exhibit JPN-33(b) (BCI)), pp. 2-3).

[87] KTC's Preliminary Resolution, (Exhibit JPN-1(b)), p. 11.

[88] OTI's Interim Report, (Exhibit JPN-3(b)), p. 14.

[89] OTI's Interim Report, (Exhibit JPN-3(b)), p. 14. In a communication dated 10 June 2014, one of the respondents (SMC) indicated that the KTC had not reflected the "indices of major producers, including Yonwoo Pneumatic that took up a significant share in the domestic pneumatic valve industry". It asked the KTC to conduct an additional investigation on domestic producers including Yonwoo Pneumatic when reviewing injury to the domestic industry. (Respondent's opinion on the rebuttal, (Exhibit JPN-33(b) (BCI)), pp. 2-5).

[90] OTI's Interim Report, (Exhibit JPN-3(b)), p. 17.

[91] OTI's Final Report, (Exhibit KOR-2(b) (BCI)), p. 19.

[92] OTI's Final Report, (Exhibit KOR-2(b) (BCI)), p. 22 and fn 32.

[93] Korea's response to Panel question No. 102, paras. 78 and 81.

[94] OTI's Final Report, (Exhibit KOR-2(b) (BCI)), pp. 19, 71, 110, and 112.

[95] Korea's response to Panel question No. 102, para. 83.

had been excluded from the scope of the product under investigation. The OTI suggested that the two applicants were "within the scope of the domestic industry" and, since their combined production volume accounted for 55.4% of the total domestic production of the like product, they accounted for "a considerable portion of the total domestic production". Accordingly, the OTI suggested that, "[f]or the purpose of the investigation into the injury to the domestic industry … the 'domestic industry' is defined as the 'total of TPC's and KCC's businesses producing a like product'".[96]

7.50. In the Final Report, the OTI noted the Japanese respondents' argument that, for the purpose of assessing the injury to the domestic production, the Investigating Authority should take into account "all identified domestic producers based on various data and information available to the Commission". The OTI responded that:

> It is desirable to include all domestic producers for the purpose of analyzing the industrial injury if it is possible to obtain the relevant data, however, if it is impossible to obtain such data on the entire domestic industry despite the relevant efforts of the investigation authorities, and if the companies whose data are available account for a majority proportion of the domestic industry, it is appropriate and reasonable to analyze the injury to the domestic industry only based on the data from such companies given the WTO regulations or the general investigative practices of other investigation authorities.[97]

7.51. The OTI added that it had sent questionnaires to all identified domestic producers that produced the like product, but only the applicants submitted responses; "[t]herefore, the [OTI] could not objectively figure out the status of such producers that failed to respond". Also, "[s]ince most domestic producers [were] small and medium sized companies with no associations, groups or research institutions in connection with the pneumatic valve industry", the OTI found it "impossible to obtain reliable materials on the business conditions of the overall domestic industry, such as the indicators of production, sales and profit, etc.". Accordingly, the OTI deemed the production of the two applicants "as the scope of the domestic industry".[98]

7.52. Since the respondents had referred to the specific cases of two domestic producers (other than the applicants) "to support [their] argument that no injury has been inflicted on the domestic industry, the [OTI] conducted an additional investigation into the two companies above to an available extent and then included the results thereof in its report".[99] In response to the specific arguments advanced by the respondents with respect to changes in profit, the OTI "conducted an additional analysis of subjects including data of some domestic producers who [had] not participated in the investigation to an available extent".[100] In this respect, the OTI noted that the respondents argued that the two domestic producers in question, which did not participate in the investigation, enjoyed increased profits during the POI, and that there would be no injury to the domestic industry if those producers that did not participate in the investigation were included in that industry. In order to verify the respondents' argument, the OTI examined the status of these two companies and found that both showed changes in indicators similar to those of the applicants during the POI as they recorded improved sales and operating profits in 2011, but showed deteriorated sales and operating profits in 2012 and 2013. The operating profit ratio of these two companies was relatively good compared to that of the applicants, which the OTI attributed mainly to the fact that "the two companies spent a relatively small amount of [selling, general, and administrative (SG&A)] expenses as their sales focused on regular customers and they maintained smaller sales forces".[101]

7.53. Upon review of the investigation as described in the OTI's Final Report, the KTC issued its Final Resolution determining that the domestic industry producing the like product was materially injured by the dumping of pneumatic valves from Japan and recommending that the MOSF impose on suppliers of such pneumatic valves anti-dumping duties at the following rates for five years:

[96] OTI's Final Report, (Exhibit KOR-2(b) (BCI)), pp. 22-23.
[97] OTI's Final Report, (Exhibit KOR-2(b) (BCI)), p. 23.
[98] OTI's Final Report, (Exhibit KOR-2(b) (BCI)), p. 23.
[99] OTI's Final Report, (Exhibit KOR-2(b) (BCI)), p. 24. See also ibid. pp. 70-71.
[100] OTI's Final Report, (Exhibit KOR-2(b) (BCI)), pp. 23-24.
[101] OTI's Final Report, (Exhibit KOR-2(b) (BCI)), pp. 70-71.

(a) for SMC and exporters of its products, 11.66%; and (b) for CKD and exporters of its products, Toyooki and exporters of its products, and other suppliers of products from Japan, 22.77%.[102]

7.54. The KTC's Final Resolution noted the OTI's finding that there were nine domestic producers of the like product, including the two applicants, and that the OTI sent questionnaires to all nine producers, but only the applicants submitted responses.[103] The KTC also noted the respondents' argument that both TPC and KCC had imported the product under investigation. The KTC concluded, however, that there was no reason to exclude either of these companies from the scope of the domestic industry, since TPC was not in a special relationship with the supplier and had bought only a small volume and KCC had not, in fact, imported the product under investigation.[104] The KTC considered therefore that the two applicants were properly included in the scope of the domestic industry and that their total production of the like product amounted to 55.4%, which was "a substantial portion of the gross domestic production". The KTC concluded that "in investigating an injury to the domestic industry caused by dumping in the present case, the 'domestic industry' [would be] defined as the 'total of TPC's and KCC's business producing the like product' in accordance with Article 59, Paragraph 2 of the Enforcement Decree of the Customs Act ('Enforcement Decree')".[105] The KTC also noted that, in analysing profit indicators, the OTI had "conducted an additional analysis by including some producers mentioned by the Respondents among the domestic producers who did not participate in the investigation, to the extent that data related thereto were available".[106]

7.55. With respect to the respondents' argument that the domestic industry should not be limited to the two applicants but should include all domestic producers based on available data and information, the KTC indicated that, when it is impossible to obtain data of the entire domestic industry despite the efforts of the investigating authorities and the companies whose data are available account for a majority of the domestic production, analysing the injury to the domestic industry based only on the data from such companies would not violate WTO obligations nor applicable domestic laws and regulations, and would be "reasonable even compared to the general investigative practices of other investigating authorities".[107] The KTC noted that the OTI conducted an "additional investigation into the business status of [two domestic producers different from the applicants (Yonwoo Pneumatic and Shin Yeong Mechatronics)] with the cooperation of the two companies and found that the sales volume and operating profit of both companies increased in 2011 but the trends similar to the business indicators of the Applicants occurred in 2012 and 2013, with their sales volume and sales amount decreasing and the operating profit worsening".[108] The KTC also noted that the operating profit of the two companies in question had a significant decrease in 2013 "due to the adverse impact of the sharp increase in the import of the dumped products and the significant decrease in the sales price thereof". The KTC concluded that the inclusion of these companies "would not significantly change the overall trends of the injury indicators of the domestic industry".[109]

7.4.4 Panel's terms of reference

7.4.4.1 Main arguments of the parties

7.56. Korea argues that Japan's claim under Articles 3.1 and 4.1 of the Anti-Dumping Agreement with respect to the definition of the domestic industry is outside of the Panel's terms of reference. According to Korea, "Japan's panel request does not provide *a brief summary* of the complaint [as required by Article 6.2 of the DSU] but merely paraphrases the legal obligation contained in the articles alleged to have been violated".[110]

7.57. Korea argues that Article 4.1 "especially when read in the light of relevant WTO jurisprudence … has many different aspects … [it] effectively contains a multi-layered set of

[102] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), pp. 1-2.
[103] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 12.
[104] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 13.
[105] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 13.
[106] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 14. See also ibid. p. 24.
[107] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 13.
[108] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 24. (fn omitted)
[109] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 24.
[110] Korea's preliminary ruling request, para. 12 (emphasis original). See also first written submission, annex, para. 6; and second written submission, annex, para. 1.

obligations and exceptions to such obligations that could be the basis for a multi-layered set of challenges".[111]

7.58. In Korea's view, "Japan's panel request … is extremely short and completely uninformative when it comes to the identification of the claim in respect of the Korean investigating authority's definition of the domestic industry".[112] Korea asserts that "Japan's panel [request] fails to connect the relevant aspects of the investigating authority's determination or the underlying investigation with the specific aspects of the provision alleged to have been violated".[113] Korea adds that "Japan's panel request fails to identify the specific concern that Japan has with the definition of the domestic industry and does not provide any narrative that would allow Korea to understand the case it has to answer so that it can start preparing its defence".[114] According to Korea, Japan's panel request "merely mentions that KTC 'failed to make an objective examination based on positive evidence in defining the domestic industry'", and "does not mention anything about the 'proportion' of the domestic industry in the overall domestic producers or any potential 'distortion'".[115]

7.59. In response, Japan argues that its "claim under Articles 3.1 and 4.1 is consistent with the requirement of Article 6.2 of the DSU".[116] In Japan's view, Korea is "suggesting that Japan should have advanced detailed legal *arguments* about the interpretation of the provision in the Panel Request in order to comply with Article 6.2 of the DSU".[117] Japan asserts that this is "contrary to the Appellate Body's interpretation of Article 6.2 of the DSU that it does not require a panel request to present the arguments in support of the claim".[118] Japan argues that the panel request "clearly points to Korea's definition of 'the domestic industry' that was used in the anti-dumping investigation at issue, and plainly connects it with the obligation under Articles 3.1 and 4.1 to ensure that the investigating authority's definition of 'domestic industry' complies with the specified requirements based on positive evidence and objective examination".[119] According to Japan, this approach sufficiently provides a brief summary of the legal basis of the complaint sufficient to present the problem clearly, as required by Article 6.2 of the DSU.[120] Japan also argues that,"[a]s the author of the measures, with access to the full record for many months, Korea had a more than sufficient idea of the problems in this dispute and how to prepare a response to them. … That Japan had not yet presented its arguments did not limit Korea's understanding of the claims themselves".[121]

7.4.4.2 Evaluation by the Panel

7.60. We will start by examining the sufficiency of Japan's panel request with respect to Japan's claim under Articles 3.1 and 4.1 of the Anti-Dumping Agreement regarding the definition of the domestic industry. We will consider in this regard whether, with respect to this claim and in accordance with Article 6.2 of the DSU, Japan's panel request provides a brief summary of the legal basis of the complaint which is sufficient to present the problem clearly. We will keep in mind in this regard the double function of a panel request: (a) to set the terms of reference for the Panel under Article 7.1 of the DSU and define the scope of the dispute; and (b) to serve the due process objective of notifying the respondent and the other WTO Members of the nature of the complainant's case.[122] If Japan's panel request fails to explain succinctly *how* or *why* the measures at issue are considered by Japan to be inconsistent with the WTO obligations in question, it does

[111] Korea's preliminary ruling request, para. 42. See also first written submission, annex, paras. 6 and 12.
[112] Korea's preliminary ruling request, para. 42.
[113] Korea's preliminary ruling request, para. 43. See also first written submission, annex, para. 5.
[114] Korea's preliminary ruling request, para. 44. See also first written submission, annex, paras. 5, 6, 11, and 14.
[115] Korea's second written submission, annex, para. 3.
[116] Japan's response to Korea's preliminary ruling request, para. 63. See also second written submission, annex I, para. 1.
[117] Japan's response to Korea's preliminary ruling request, para. 61 (emphasis original). See also response to Panel question No. 85, para. 29.
[118] Japan's response to Korea's preliminary ruling request, para. 61 (emphasis original). See also response to Panel question No. 9, para. 3.
[119] Japan's response to Korea's preliminary ruling request, para. 62.
[120] Japan's response to Korea's preliminary ruling request, para. 62. See also response to Panel question No. 85, para. 28.
[121] Japan's second written submission, annex I, para. 6.
[122] Appellate Body Reports, *EC – Bananas III*, para. 142; *US – Carbon Steel*, para. 126.

not fulfil the requirement of Article 6.2 of the DSU. In that case, we will conclude that Japan's claim under Articles 3.1 and 4.1 with respect to the definition of the domestic industry is not within the scope of the Panel's terms of reference.

7.61. As noted above, in its panel request, Japan asserts that Korea's measures are inconsistent with Articles 3.1 and 4.1 of the Anti-Dumping Agreement, "because Korea failed to make an objective examination based on positive evidence in defining the domestic industry producing the like product and consequently in making a determination of injury".[123] With respect to the claim concerning the definition of the domestic industry, Japan's panel request paraphrases the language in the first part of Article 3.1 (i.e. a determination shall be "based on positive evidence" and involve an "objective examination"). On its face, the panel request does not provide any indication or suggestion as to *how* or *why* Korea's definition of the domestic industry is allegedly inconsistent with the obligations in Articles 3.1 and 4.1 of the Anti-Dumping Agreement.

7.62. We recall that Article 3.1 "is a fundamental and substantial obligation that functions as a chapeau, and informs the rest of Article 3".[124] However, the basic principles in Article 3.1 "do not … establish independent obligations which can be judged in the abstract, or in isolation and separately from the substantive requirements set out in the remainder of Article 3. Instead, they inform the application of all the provisions of Article 3".[125] Accordingly, a claim that a measure is inconsistent with the principles contained in Article 3.1 cannot normally be made in isolation from other obligations in the Anti-Dumping Agreement.[126]

7.63. In other words, Article 3.1 establishes basic principles that inform other provisions in the Agreement setting out more detailed requirements for injury determinations. The obligation in the first part of Article 3.1 that an injury determination "shall be based on positive evidence and involve an objective examination" does not in itself establish an independent obligation with respect to the definition of the domestic industry in an anti-dumping investigation.

7.64. On its face, with respect to the definition of the domestic industry, Japan's panel request asserts that Korea's measures are inconsistent with Articles 3.1 and 4.1 of the Anti-Dumping Agreement, "because Korea failed to make an objective examination based on positive evidence in defining the domestic industry producing the like product and consequently in making a determination of injury". In our view, this general reference to the language in Article 3.1 is not sufficient to present the problem clearly. Merely paraphrasing the language in the first part of Article 3.1, and asserting that "Korea failed to make an objective examination based on positive evidence" does not explain *how* or *why* Japan considers the measures at issue to be inconsistent with the specific obligations in Articles 3.1 and 4.1 of the Anti-Dumping Agreement, with respect to the definition of the domestic industry. More specifically, it does not explain *how* or *why* Japan considers that the Korean Investigating Authorities' definition of the domestic industry did not involve an objective examination or was not based on positive evidence. Japan's claim is essentially generic – nothing in the panel request links the claim to the particular circumstances of the investigation at issue.

7.65. Accordingly, Japan's panel request, with respect to the claim under Articles 3.1 and 4.1 of the Anti-Dumping Agreement, is not precise enough to serve the dual function of: (a) defining the basis for the Panel's terms of reference under Article 7.1 of the DSU; and (b) informing other WTO Members, including the respondent, of the nature of the dispute.

7.66. Our conclusion is confirmed when we take into account the broad and diverse scope of the allegations concerning the alleged inconsistency in the definition of the domestic industry advanced in Japan's submissions: (a) that the Korean Investigating Authorities defined the domestic industry to include only two domestic producers representing about half of the total domestic production of the like product, and left aside other producers representing the other half of the domestic industry; (b) that the Korean Investigating Authorities defined the domestic industry to include the applicants only, introducing a substantial risk of bias and distortion, and failed to provide an adequate explanation as to why such risk was discarded; (c) that the Korean Investigating Authorities made no effort to collect information from domestic producers other than

[123] Japan's panel request, p. 2.
[124] Appellate Body Report, *Thailand – H-Beams*, para. 90.
[125] Panel Report, *China – Cellulose Pulp*, para. 7.13.
[126] Panel Report, *China – Cellulose Pulp*, para. 7.15.

the applicants, or to collect data from other sources; (d) that the two producers included in the definition of the domestic industry are not representative of the total domestic production; (e) that the Korean Investigating Authorities did not consider objectively the available evidence on the level of production of Korean producers; and (f) that the Korean Investigating Authorities' discussion of information regarding two domestic producers that were not formally included in the definition of the "domestic industry" was not adequately reasoned, and failed to resolve the material risk of distortion.

7.67. For the reasons explained above, we conclude that Japan's claim under Articles 3.1 and 4.1 of the Anti-Dumping Agreement, concerning the definition of the domestic industry, is not properly within the Panel's terms of reference, and we will neither consider it further nor resolve it.

7.5 Volume of the dumped imports

7.5.1 Introduction

7.68. Japan claims that the KTC's consideration of the volume of the dumped imports was not based on an objective examination of positive evidence as required by Articles 3.1 and 3.2 of the Anti-Dumping Agreement. According to Japan:

a. the KTC improperly concluded that there was a "significant increase" of the dumped imports;

b. the KTC failed to demonstrate a competitive relationship between the dumped imports and the domestic like product;

c. the KTC improperly included in its volume analysis the effect of imports which were held in inventory and were not competing with domestic producers; and

d. the KTC improperly found displacement by the dumped imports.

7.69. Korea argues that Japan's claim concerning the volume of dumped imports is outside the Panel's terms of reference because Japan's panel request does not comply with the requirements under Article 6.2 of the DSU with respect to this claim. In the alternative, Korea asks the Panel to reject Japan's claim.

7.5.2 Main arguments of the parties

7.5.2.1 Japan

7.70. In its panel request, Japan asserts that Korea's measures are inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement, "because Korea's analysis of a significant increase of the imports under investigation did not involve an objective examination based on positive evidence".[127]

7.71. As articulated over the course of the proceedings, Japan asserts that the KTC improperly concluded that there was a "significant increase" of the dumped imports despite the fact that: (a) imports decreased during the first two years of the three-year period of trend analysis (2011 and 2012); and (b) when considering the full period of trend analysis, the dumped imports increased only slightly, by [[***]]% on an absolute basis, and decreased relative to domestic consumption and production.[128] According to Japan, "the KTC never said how much subject imports increased over the full period, or explained why that increase should be considered a 'significant increase'".[129]

7.72. Japan argues that the KTC failed to consider the existence of a competitive relationship between the dumped imports and the domestic like product, in conjunction with the margins of

[127] Japan's panel request, p. 1.
[128] Japan's first written submission, paras. 116-117 and 128-130.
[129] Japan's first written submission, para. 128.

dumping.[130] According to Japan, "[t]he consistent and significant overselling, the diverging price trends, the differing magnitudes of price changes were all consistent with the lack of meaningful competitive relationship".[131]

7.73. Japan asserts that the KTC improperly included in its volume analysis the effect of imports which were held in inventory in Korea and were not competing with domestic producers. In Japan's view, imports in inventory have a different commercial impact and should not be taken into account in determining whether there is a "significant increase" under Article 3.2.[132]

7.74. Japan argues that the KTC improperly found displacement by the dumped imports notwithstanding that:

a. domestic industry market share was still higher at the end of the period than in 2010 despite falling in 2013;

b. the volume of domestic sales actually increased in 2013 when compared with 2012; and

c. the KTC provided no supporting analysis or factual context for its assertion that there were instances of "aggressive marketing" by Japanese exporters, and it failed to explain to what degree this factor affected domestic sales.[133]

7.75. Japan argues that the increase in dumped imports, when considered in the context of the increasing demand, was due to growth of the domestic Korean market, and did not occur at the expense of domestic sales.[134]

7.5.2.2 Korea

7.76. Korea asserts that Japan's claim under Articles 3.1 and 3.2 with respect to the volume analysis is outside the Panel's terms of reference and that it should therefore be rejected. With respect to the substance of Japan's arguments, according to Korea, the KTC properly explained how it found a significant increase in the volume of the dumped imports in absolute and relative terms. The KTC stated that the volume of dumped imports sharply increased by 78.9% in 2013 alone, and by nearly [[***]]% over the whole POI. Similarly, the KTC stated that the volume of the dumped imports increased by [[***]]% relative to domestic production in 2013. Finally, the market share of dumped products increased in 2013 by [[***]]% from the year before, while the market share of the domestic like product decreased by [[***]]%. Korea submits that 2013 was the most significant year for the anti-dumping investigation because it was the POI for dumping purposes.[135] In response to an allegation by Japan, Korea asserts that the KTC set out the amount of the end-point to end-point increase in dumped imports in the confidential version of the KTC's Final Resolution, although it was redacted for confidentiality reasons from the non-confidential version.[136]

7.77. Korea contends that Japan failed to substantiate its allegation that it was "not at all obvious why this modest increase over the entire period [of [[***]]%] should be considered a 'significant increase'".[137] In Korea's view, an increase of nearly 10% on an end-point to end-point basis, together with a sharp increase of [[***]]% in absolute terms and [[***]]% relative to domestic production during the year when dumping occurred "is an important, notable or consequential increase under any standard".[138] The fact that the market share of the dumped imports reached a level that was below the 2010 starting point of the period of trend analysis does not undermine the KTC's overall finding. Rather than looking at the end-point to end-point comparison of the dumped

[130] Japan's second written submission, paras. 91 and 106-108.
[131] Japan's first written submission, para. 133. See also ibid. paras. 117 and 132-133.
[132] Japan's first written submission, paras. 117 and 134-136; second written submission, paras. 91 and 113-117.
[133] Japan's first written submission, paras. 117 and 137-142; second written submission, paras. 98-105 and 107.
[134] Japan's second written submission, para. 110.
[135] Korea's first written submission, paras. 165-169 and 172.
[136] Korea's first written submission, para. 173.
[137] Korea's first written submission, para. 173 (referring to Japan's first written submission, para. 129).
[138] Korea's first written submission, para. 174.

import's market share in isolation, the KTC considered the intervening trends, which showed a declining dumped import market share from 2010 to 2012, and a dramatic reversal to increase in 2013 when dumping occurred.[139]

7.78. Korea rejects Japan's assertion that the KTC improperly assumed a competitive relationship between the domestic products and the dumped imports. In Korea's view, Japan's arguments concerning interchangeability in this context are the same as those Japan made with respect to price effects. Referring to its arguments in that context [140], Korea asserts that the Korean Investigating Authorities "thoroughly examined and assessed the degree of substitutability and competition between the dumped imports and the like product" and concluded that there was sufficient overlap between the two groups, "all of which pointed to the existence of a competitive relationship".[141]

7.79. Korea disagrees with Japan's position that it was improper for the KTC to include in its volume analysis dumped imports that went into inventory after importation. According to Korea, there is no provision in the Anti-Dumping Agreement that an investigating authority must exclude from its import volume analysis dumped imports that are held in inventory. Korea argues that, in any event, there was no evidence before the KTC that imports were being held as part of an inventory build-up in line with a change of the safety-stock policy.[142]

7.80. Finally, Korea rejects Japan's view that the KTC improperly found displacement of domestic like product in the market by dumped imports even though domestic shipments were actually increasing. Korea argues that there is no provision in the Anti-Dumping Agreement requiring an investigating authority to conduct a causation and non-attribution analysis in the context of its volume consideration under Article 3.2. Korea notes that the market share of the dumped imports decreased from 2010 to 2012 but increased sharply in 2013, thereby displacing domestic like product in the market in the context of an expansion of domestic consumption. The fact that the dumped imports' market share were at 2010 levels in 2013 does not vitiate the KTC's observation that displacement occurred in 2013.[143]

7.5.3 Relevant facts

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

7.82. In its Final Resolution, the KTC stated, concerning the volume of the dumped imports:

> According to the [OTI's] Investigation Report[*], the import volume of the product under investigation ("dumped products") decreased from [[***]] units in 2010, to [[***]] units in 2011, to [[***]] units in 2012, a decline of 9.8% and 32.0% year on year, and then increased to [[***]] units in 2013, an increase of 78.9% year on year. The import volume of 2013 represented an increase of [[***]]% from that of 2010.
>
> The market share of the dumped products in the domestic market also decreased from [[***]]% in 2010 to [[***]]% in 2011, to [[***]]% in 2012 and then sharply increased to [[***]]% in 2013. The ratio of the import volume of the dumped products to the domestic production of the like product also decreased from [[***]]%

[139] Korea's first written submission, paras. 173-174.
[140] Korea's first written submission, para. 176. See also response to Panel question No. 34(b).
[141] Korea's first written submission, para. 129.
[142] Korea's first written submission, paras. 177-181.
[143] Korea's first written submission, paras. 182-184.

> in 2010 to [[***]]% in 2011, to [[***]]% in 2012 and then remarkably increased to [[***]]% in 2013.
>
> Hence, the import of the dumped products decreased both in absolute and relative terms until 2012 and then sharply increased in 2013. Although the market share of the dumped products in 2013 did not reach that of 2010, it is clearly shown that the decreasing trend until 2012 was reversed into a sharp increase of imports in 2013.
>
> On the contrary, the domestic market share of the like product was on continuous rise from [[***]]% in 2010 to [[***]]% in 2011, to [[***]]% in 2012 and then plummeted to [[***]]% in 2013, a similar level to 2010. The sudden decrease of the market share in 2013 appears to have been affected by the dumped products given that the import volume of the dumped products largely increased and their price greatly fell in the same year.[144]

[*fn original][19] Investigation Report, pp. 46-51[.]

7.83. During the investigation, interested parties had argued that in considering the volume of the dumped imports, the KTC should not include dumped imports held in inventory in Korea by the related importer of the exporting producers. In response, the KTC stated, in its Final Resolution:

> Respondent SMC argued that the import of the dumped products increased in 2013 because SMC Korea increased imports to secure inventories due to a change of its inventory policy, and that the actual sales after importation did not increase as much as the increase of imports.
>
> With respect to this, the Commission confirmed that under the Customs Act or the WTO Antidumping Agreement, for the examination of increase of import volumes, it is sufficient to examine the increase of import volumes in absolute and relative terms, and that it is not necessary to consider the purpose of imports or actual sales after importation.[145]

7.84. In the Final Report, the OTI found that [[***]]'s inventory consisted of products that "are likely to be sold in the near future".[146] The OTI further stated:

> [[***]][147]

7.5.4 Panel's terms of reference

7.5.4.1 Main arguments of the parties

7.85. In its panel request, Japan asserts that Korea's measures are inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement, "because Korea's analysis of a significant increase of the imports under investigation did not involve an objective examination based on positive evidence".[148]

7.86. Korea argues that Japan's claim under Articles 3.1 and 3.2 of the Anti-Dumping Agreement with respect to the analysis of the increase in dumped imports is outside of the Panel's terms of reference.[149] According to Korea, "Japan's panel request does not provide *a brief summary* of the complaint [as required by Article 6.2 of the DSU] but merely paraphrases the legal obligation contained in the articles alleged to have been violated".[150] In Korea's view, Japan's panel request:

[144] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 14.
[145] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 15. (fn omitted)
[146] OTI's Final Report, (Exhibit KOR-2(b) (BCI)), p. 50 and fn 40.
[147] OTI's Final Report, (Exhibit KOR-2(b) (BCI)), p. 108.
[148] Japan's panel request, p. 1.
[149] Korea's preliminary ruling request, paras. 21-23 and 27.
[150] Korea's preliminary ruling request, para. 12 (emphasis original). See also first written submission, annex, para. 6; and second written submission, annex, para. 1.

> [S]imply refers to the general obligation of Article 3.1 of making an objective determination of injury based on positive evidence concerning the increase in imports without connecting any aspect of the challenged measures with this obligation.[151]

7.87. Korea argues that "Articles 3.1 and 3.2 contain different legal obligations" and "Japan's panel request does not provide any information on which of these legal obligations it considers to have been violated". According to Korea, "it is not even clear if Japan is alleging a violation of Article 3.2 since it paraphrases only the legal obligation of Article 3.1".[152] Korea asserts that, with Japan's panel request, it "is left to guess 'how or why' the measures are alleged to be violating Articles 3.1 and 3.2".[153]

7.88. Japan argues that Article 3.1 "sets forth an *overarching* obligation that should be read together with the other paragraphs of Article 3 of the Anti-Dumping Agreement".[154] "[T]he first sentence of Article 3.2, read together with Article 3.1, provides for a *single* obligation to 'consider whether there has been a significant increase in dumped imports' based on 'positive evidence' and 'objective examination'".[155] In Japan's view:

> The language of this claim plainly connects the challenged measure ("Korea's analysis of a significant increase") with a single specific obligation under Articles 3.1 and 3.2, first sentence. The "problem" being addressed by this claim is Korea's failure to make a proper finding of volume. This language refers specifically to the "legal basis" for the claim – the failure to make a proper assessment of whether there was a "significant increase" as required by Article 3.2. This language also refers to the two specific provisions at issue, and refers to the specific part of Article 3.2 that is at issue. The claim regarding volume has been distinguished from the claim regarding price effects under Article 3.2 … This language is "sufficient to present the problem clearly" and to avoid any possible confusion about which of multiple obligations under Article 3.2 are at issue for this specific claim.[156]

7.5.4.2 Evaluation by the Panel

7.89. We will first examine the sufficiency of Japan's panel request with respect to Japan's claim under 3.1 and 3.2 of the Anti-Dumping Agreement regarding the Korean Investigating Authorities' consideration of the volume of the dumped imports. We will consider in this regard whether, with respect to this claim and in accordance with Article 6.2 of the DSU, Japan's panel request provides a brief summary of the legal basis of the complaint which is sufficient to present the problem clearly. We will keep in mind in this regard the double function of a panel request: (a) to set the terms of reference for the Panel under Article 7.1 of the DSU and define the scope of the dispute; and (b) to serve the due process objective of notifying the respondent and the other WTO Members of the nature of the complainant's case.[157] If Japan's panel request fails to explain succinctly *how* or *why* the measures at issue are considered by Japan to be violating the WTO obligations in question, it would not fulfil the requirement of Article 6.2 of the DSU. In that case, Japan's claim under Articles 3.1 and 3.2 with respect to the consideration of the volume of the dumped imports would not be within the scope of the Panel's terms of reference.

7.90. As noted above, Article 3.1 "is a fundamental and substantial obligation that functions as a chapeau, and informs the rest of Article 3".[158] The basic principles in Article 3.1 "do not … establish independent obligations which can be judged in the abstract, or in isolation and separately from the substantive requirements set out in the remainder of Article 3. Instead, they inform the application of all the provisions of Article 3".[159] Accordingly, a claim that a measure is inconsistent

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[151] Korea's preliminary ruling request, para. 21.
[152] Korea's preliminary ruling request, para. 21.
[153] Korea's preliminary ruling request, para. 23. See also Korea's first written submission, annex, paras. 5, 6, and 11.
[154] Japan's response to Korea's preliminary ruling request, para. 27. (emphasis original)
[155] Japan's response to Korea's preliminary ruling request, para. 31. (emphasis original)
[156] Japan's response to Panel question No. 85, para. 16. (fn omitted)
[157] Appellate Body Reports, *EC – Bananas III*, para. 142; *US – Carbon Steel*, para. 126.
[158] Appellate Body Report, *Thailand – H-Beams*, para. 90.
[159] Panel Report, *China – Cellulose Pulp*, para. 7.13.

with the principles contained in Article 3.1 cannot normally be made in isolation from other obligations in the Anti-Dumping Agreement.[160]

7.91. On its face, Japan's panel request asserts that Korea's analysis of a significant increase of the imports under investigation is inconsistent with the obligations contained in Articles 3.1 and 3.2 of the Anti-Dumping Agreement because it "did not involve an objective examination based on positive evidence". The panel request does not contain any additional narrative description of the problem or problems Japan considers constitute this alleged inconsistency. In our view, this general reference to the language in Article 3.1 is not sufficient to present the problem with respect to an alleged violation of Article 3.2 clearly. Merely paraphrasing the language in the first part of Article 3.1, and asserting that "Korea failed to make an objective examination based on positive evidence" does not explain *how* or *why* Japan considers the measures at issue violate the specific WTO obligations in question, namely those in Articles 3.1 and 3.2 of the Anti-Dumping Agreement, with respect to the consideration of the volume of imports. More specifically, it does not explain *how* or *why* Japan is of the view that the Korean Investigating Authorities' consideration of whether there had been a significant increase in the imports did not involve an objective examination or was not based on positive evidence. Japan's panel request does not go beyond a mere reference to the requirements of Article 3.1, which is not sufficiently precise to mark out the parameters of the case of alleged inconsistency with Article 3.2 that it advances in this dispute. Japan's claim is essentially generic – nothing in the panel request links the claim to the particular circumstances of the investigation at issue.

7.92. Therefore, we conclude that the language used in Japan's panel request is not precise enough to serve the dual function of a panel request: (a) to define the basis for the Panel's terms of reference under Article 7.1 of the DSU; and (b) to inform other WTO Members, including the respondent, of the nature of the dispute.

7.93. The conclusion above is confirmed when we take into account the scope of the allegations concerning volume effects advanced in Japan's submissions: (a) that the KTC failed to find an increase in the volume of dumped imports that was "significant"[161]; (b) that the KTC improperly assumed a competitive relationship between domestic products and dumped imports[162]; (c) that the KTC improperly considered the effect of dumped imports that were still in inventory[163]; and (d) that the KTC failed to consider that no domestic volume had been displaced by the dumped imports.[164]

7.94. For the reasons explained above, we conclude that Japan's claim under Articles 3.1 and 3.2 of the Anti-Dumping Agreement, concerning the volume of the dumped imports, is not properly within the Panel's terms of reference, and we will neither consider it further nor resolve it.

7.6 Effect of the dumped imports on prices

7.6.1 Introduction

7.95. Japan claims that the KTC's analysis of price effects was inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement. In its written submissions, Japan challenges the KTC's analyses of price depression, price suppression, and price comparability between specific products or product segments of the dumped imports and the domestic like product.

7.96. Korea argues that Japan's claim concerning price effects is outside the Panel's terms of reference because Japan's panel request does not comply with the requirements under Article 6.2 of the DSU with respect to this claim. In the alternative, Korea asks the Panel to reject Japan's claim.

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[160] Panel Report, *China – Cellulose Pulp*, para. 7.15.
[161] Japan's first written submission, paras. 117 and 128.
[162] Japan's first written submission, paras. 117 and 132-133; second written submission, paras. 106-112.
[163] Japan's first written submission, paras. 117 and 134-136; second written submission, paras. 113-117.
[164] Japan's first written submission, paras. 117 and 139-141; second written submission, paras. 98-105.

7.6.2 Main arguments of the parties

7.6.2.1 Japan

7.97. In its panel request, Japan asserts that Korea's measures are inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement, "because Korea's analysis of the effect of the imports under investigation on prices in the domestic market for like products did not involve an objective examination based on positive evidence; and because Korea failed to properly consider whether the effect of the imports under investigation was to depress prices to a significant degree or prevent price increase, which otherwise would have occurred, to a significant degree".[165]

7.98. According to Japan, as articulated over the course of the proceedings, the KTC failed to conduct objective analyses of price depression and suppression because it:

a. ignored "dramatically diverging price trends" between dumped imports and domestic products, evidenced by the fact that the prices of dumped imports and the domestic like product moved in opposite directions from 2011 to 2012, and the rate of change in dumped import and domestic prices differed by large magnitudes from 2012 to 2013[166];

b. overlooked the fact that dumped import prices were consistently and significantly higher than the prices of the domestic like product, and relied instead on circumstantial evidence of isolated cases of pricing behaviour[167]; and

c. failed to consider whether the alleged price depression and price suppression effects of dumped imports were significant.[168]

7.99. Specifically with respect to the KTC's price suppression analysis, Japan alleges two additional errors:

a. the KTC failed to explain its "reasonable sales price" methodology. Moreover, the fact that the "reasonable sales price" estimated by the OTI followed similar trends to those of the domestic industry's prices undermines the KTC's finding of price suppression[169]; and

b. the KTC's finding of price suppression was based on an isolated consideration of domestic prices and costs of production in 2013 only. The KTC failed to explain how higher prices for the dumped imports could have suppressed lower domestic prices. Japan also argues that the overall trends in the price-cost relationship suggest that there was no price suppression in 2011 and 2012 and that, although domestic prices went down in 2013, these trends did not support the KTC's finding of price suppression for that year. Moreover, the absence of price suppression in earlier years offsets the price suppression in 2013.[170]

7.100. Japan also argues that the KTC failed to consider the counterfactual question of how prices and volumes might have been different in the absence of dumping.[171] According to Japan, such a counterfactual analysis is required for considering whether there are "truly price effects".[172] Japan asserts that this exercise requires the investigating authority to consider the competitive relationship between the dumped imports and the domestic like product in conjunction with the dumping margins at issue.[173]

[165] Japan's panel request, p. 1.
[166] Japan's first written submission, paras. 64 and 72-83.
[167] Japan's first written submission, paras. 84-90 and 94; second written submission, paras. 46-49.
[168] Japan's first written submission, paras. 64, 90, and 106. For the discussion of the price depression analysis, see Japan's first written submission, paras. 72-90. For the discussion of the price suppression analysis, see Japan's first written submission, paras. 91-106.
[169] Japan's first written submission, paras. 64, 92, and 97-99.
[170] Japan's first written submission, paras. 64, 91-93, and 100-106.
[171] Japan's second written submission, paras. 17 and 25-32.
[172] Japan's second written submission, paras. 25-27.
[173] Japan's second written submission, para. 31.

7.101. Finally, Japan asserts that, in its price effect analysis, the KTC failed to ensure comparability between the prices of specific products or product segments of the dumped imports and the domestic like product. Dumped imports consisted of a wide variety of models that were very different in terms of their physical characteristics, consumer preferences, end-uses, prices, and other factors. However, according to Japan, the KTC assumed, without any basis, that the dumped imports and the domestic like product could be used interchangeably.[174] Japan argues that the obligation of the investigating authority under Article 2.6 of the Anti-Dumping Agreement when defining "like product" is fundamentally different from its obligation with respect to the price effects analysis under Article 3.2.[175] Japan further argues that even a finding of the existence of some competitive relationship between the dumped imports and the domestic like product is not sufficient for purposes of an Article 3.2 price effects analysis because the requisite consideration of market interaction requires the examination of the competitive relationship in conjunction with the dumping margins at issue.[176]

7.6.2.2 Korea

7.102. Korea asserts that Japan's claim under Articles 3.1 and 3.2 with respect to price effects is outside of the Panel's terms of reference and that it should therefore be rejected by the Panel. With respect to the substance of Japan's arguments, Korea responds that the KTC's consideration of price effects was based on an objective examination of positive evidence.[177] According to Korea, in its price effects analysis, the KTC objectively considered the existence of a competitive relationship between the dumped imports and the domestic like product through "model to model" and "segment to segment" comparisons of the physical characteristics and customer evaluations of the valves. The KTC also evaluated the trends in the prices of the domestic like product and the dumped imports by using both a simple average sales price per unit and a price fluctuation index proposed by the Japanese respondents. The KTC found price suppression and depression on the basis of the "fierce competition" from the dumped imports, evidenced by a number of instances where the dumped imports were offered at prices lower than those of the domestic like product to compete for customers.[178]

7.103. Korea rejects Japan's argument that divergent price trends for the dumped imports and the domestic like product undermine the KTC's finding of "market interaction".[179] Korea makes four arguments in this respect.

7.104. First, Korea asserts that the KTC considered the price trends of the dumped imports and the domestic like product on both an end-point to end-point and a year-on-year basis. Although prices moved in different directions in 2012, the difference in trends was too small to invalidate the price effects of the dumped imports found by the KTC.[180] In Korea's view, the different magnitudes of domestic and dumped import price decreases in 2013 did not contradict but instead corroborated the KTC's findings of price depression and price suppression. The drop in the prices of dumped imports narrowed the gap between those prices and the prices of the domestic like product, resulting in a depression of the domestic prices even though the cost of production of the domestic like product increased.[181] Furthermore, as the KTC explained, domestic prices decreased only slightly in 2013 because there was no more scope for further decreases in light of the operating loss suffered by the domestic industry.[182]

7.105. Second, Korea argues that the "average import price" trend alone cannot explain the full effect of dumped imports on prices in the domestic market because: (a) changes in the average import price may simply be the result of changes in the product mix of dumped imports; and (b) the related importers of the Japanese exporters engaged in low pricing behavior when they

[174] Japan's first written submission, paras. 64, 107-108, 110, and 112; second written submission, para. 17.
[175] Japan's second written submission, para. 33; response to Panel question No. 18(a), paras. 18-22.
[176] Japan's second written submission, para. 35.
[177] Korea's first written submission, paras. 77-80 and 93.
[178] Korea's first written submission, paras. 90, 101, and 133.
[179] Korea's first written submission, paras. 98-100 and 104; second written submission, paras. 22 and 29-31.
[180] The average price of the dumped imports increased by 2.5% while the average price of the domestic like product decreased by 1.7% when compared with 2011 levels. (Korea's first written submission, para. 99).
[181] Korea's first written submission, para. 102.
[182] Korea's first written submission, para. 102.

actually sold the imported products in the domestic market. For these reasons, the KTC compared the "representative models" of the dumped imports which competed directly with the "representative models" of the domestic like product. This comparison showed that the average prices of the representative models of the dumped imports and the average prices of the representative models of the domestic like product followed the same trends.[183]

7.106. Third, the KTC noted that the "resale prices" of the dumped imports charged by a related entity of the exporting producer showed the same trends as the prices of the domestic like product.[184]

7.107. Fourth, according to Korea, the verified instances in which the dumped imports were offered to customers at prices similar to or lower than the prices of the domestic like product demonstrate "market interaction" between the dumped imports and the domestic like product.[185]

7.108. Korea maintains that the KTC properly addressed the fact that the average price of dumped imports was higher than that of the domestic like product. The KTC found that the fact that the average sales price of the dumped imports was higher than that of the like product did not undermine its conclusion that the dumped imports suppressed and depressed the prices of the domestic like product because the average price overselling was caused by "price differentiation in accordance with models, option details or customers". Korea also states that the KTC additionally found that the "strengthened marketing activities" of [[***]] contributed to suppressing and depressing the prices of the domestic like product.[186] Korea points to passages of the KTC's Final Resolution and the OTI's Final Report where in its view the KTC and the OTI specifically discussed this fact.[187]

7.109. Korea contends that the "reasonable sales price" the KTC considered in the context of price suppression is an expected price reflecting the actual cost of production and a reasonable operating profit.[188] According to Korea, in this case the difference between the "reasonable sales price" and the actual domestic price (equivalent to approximately [[***]]% of the actual domestic price) shows that in the absence of dumping the domestic industry could have achieved a reasonable profit by raising its prices.[189] Korea argues that the relevance of this type of methodology is confirmed by WTO jurisprudence.[190] However, in Korea's view, the KTC was not required by Article 3.2 of the Anti-Dumping Agreement to explain how the price increase would have happened in the absence of dumping.[191]

7.110. In response to Japan's argument that there was no price suppression in 2011 and 2012 and that this undermined the finding of price suppression in 2013, Korea asserts that an investigating authority is not required under Article 3.2 to find price suppression for each and every year of its analysis. The KTC's price suppression analysis considered price trends over the entire period of trend analysis. In that context, the fact that domestic prices decreased despite the rising costs of production in 2013, the year in which the dumping and injury periods of investigation overlapped and during which dumping occurred, was highly relevant to the KTC's finding of price suppression.[192]

7.111. Korea argues that the KTC "thoroughly examined and assessed the degree of substitutability and competition between the dumped imports and the like product" and concluded that there was sufficient overlap between the two groups, all of which pointed to the existence of a

[183] Korea's first written submission, paras. 105-109.
[184] Korea's first written submission, para. 108.
[185] Korea's first written submission, paras. 109-110.
[186] Korea's first written submission, para. 113 (referring to KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 19).
[187] Korea's first written submission, paras. 113-124; second written submission, paras. 23 and 33.
[188] Korea's first written submission, paras. 11 and 147.
[189] Korea's first written submission, para. 147.
[190] Korea's second written submission, para. 72 (referring to Panel Report, *Russia – Commercial Vehicles*, para. 7.78 (adoption/appeal pending)).
[191] Korea's first written submission, para. 148; second written submission, para. 70.
[192] Korea's first written submission, paras. 149-151.

competitive relationship. In Korea's view, its authorities properly ensured price comparability between the dumped imports and the like product.[193]

7.6.3 Relevant facts

7.112. The KTC's consideration of price effects in the Final Resolution can be summarized as follows:

a. On the basis of average sales prices, there was no price undercutting during the period of trend analysis. However, the extent of the "overselling" by the dumped imports narrowed in 2013 as compared to 2012.

b. On the basis of the price fluctuation index[194], the prices of dumped imports dropped to a larger extent than those of the domestic like product from 2010 to 2013. This seems to be because the domestic products were sold at prices lower than the "reasonable sales price" and because the domestic industry was already suffering from operating losses and could not decrease prices as much as those of the dumped imports.

c. As a result of "fierce competition with the dumped products that had strong dominance in the domestic market", domestic like product prices were prevented from increasing to a reasonable level from 2010 to 2013[195], and actually decreased in 2012 and 2013.

d. In 2013, the significant decrease in the price of the dumped products apparently depressed the price of the like product despite strong factors warranting an increase of the sales price, such as the increase in the manufacturing cost of the like product.

e. Average price overselling by the dumped imports was caused by the differential pricing of the dumped imports depending on the models, options or customers. However, lower dumped import prices for certain products or customers for which there was a high degree of competition with the domestic industry and strengthened marketing activities of SMC Korea depressed the domestic industry's prices or prevented the domestic industry from raising its prices.[196]

f. The sharp increase in the import volume of the dumped products in 2013, coupled with the sharp decrease in the sales price of the dumped products in the same year, also had the effect of suppressing and depressing the price of the domestic like product.[197]

7.113. In considering price undercutting, the KTC compared average dumped imports prices and average domestic like product prices ("average to average comparisons"), and concluded that dumped products had not been sold at lower prices than the like product.[198] In considering price suppression and depression, the KTC compared, *inter alia*, individual resale transaction prices for dumped imports and average prices of the domestic like product ("transaction to average comparisons"), and concluded that "sales price of the dumped products was much lower than the

[193] Korea's first written submission, paras. 47-54 and 129-143.
[194] Price fluctuation index is computed by first classifying yearly import and sales data from 2010 to 2013 by each product item code, then calculating each year's price change rate for each product item code as compared to previous year's prices, and finally calculating the weighted average of such price change rates for all the product item codes based on the quantities of respective product items imported or sold in the relevant year. Each year's weighted average price change rate so calculated is then presented as an index of price changes using the 2010's weighted average price as 100. (Korea's first written submission, fn 88). By definition, the price fluctuation index does not reflect the actual absolute values of each product item. (Japan's opening statement at the second meeting of the Panel, para. 33).
[195] The gap between the reasonable prices and the actual domestic prices are KRW [[***]] in 2010, by KRW [[***]] in 2011, by KRW [[***]] in 2012 and by KRW [[***]] in 2013. (KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 19).
[196] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), pp. 18-20. See also KTC's Final Resolution, (Exhibit JPN-4(b)), pp. 18-20.
[197] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), pp. 18-20 and 27. See also KTC's Final Resolution, (Exhibit JPN-4(b)), pp. 18-20 and 27.
[198] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 18; OTI's Final Report, (Exhibit KOR-2(b) (BCI)), pp. 55-59.

average sales price in the case of certain products or customers for which the degree of competition with the domestic industry was fierce".[199]

7.114. With respect to the transaction to average comparisons, in its Final Report, the OTI reported price comparisons for certain transactions involving two models of dumped imported valves and the corresponding domestic like product models.[200] The OTI stated that there were nine other models for which SMC Korea allegedly engaged in price discrimination.[201] The OTI did not state whether all of these nine models showed any "price undercutting" comparisons. Exhibit KOR-57, which is a list of 115,524 transactions, shows comparisons of the prices of all of the resale transactions of the Japanese respondent SMC Korea during 2013 with the average price of the corresponding models of the domestic like product. There is no reference in the Final Report or the Final Resolution to Exhibit KOR-57. However, the data source for the price comparisons of the two models in the Final Report indicates that the comparisons were based on actual sales data submitted by the respondents and the applicants. Moreover, in its Onsite Verification Report[202], the OTI stated that, as a follow-up measure, it would "[a]nalyze the system sale data (to substantiate the competition between product models of the applicants and the respondents)".[203] Subsequently, the KTC requested and received from the importers of the Japanese respondents complete resale data for the dumped imports during the POI.[204]

7.115. In addition, the KTC examined "strengthened marketing activities" of the related importer of the Japanese respondents. During the investigation, the OTI received [[***]] customer statements testifying that [[***]] engaged in aggressive marketing activities by offering lower prices in order to get new customers.[205] All but five of these statements was accompanied by sample transaction documents. The KTC's Final Resolution states, in relevant part:

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

[199] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 19. OTI's Final Report, (Exhibit KOR-2(b) (BCI)), pp. 98-101.
[200] OTI's Final Report, (Exhibit KOR-2(b) (BCI)), pp. 100-101.
[201] OTI's Final Report, (Exhibit KOR-2(b) (BCI)), p. 101 and fn 60.
[202] OTI, Excerpts from Report on Domestic On-Site Verification (Producers, Importers, and Customers) For Dumping Investigation of Valves for Pneumatic Transmissions from Japan (December 2014) (Excerpts from On-Site Verification Report), (Exhibit KOR-6(b) (BCI)).
[203] Excerpts from On-Site Verification Report, (Exhibit KOR-6(b) (BCI)), p. 7.
[204] KTC's Resale Data Request to the Importers of the Dumped Imports (24 July 2014) (KTC's Resale Data Request), (Exhibit KOR-56(b) (BCI)).
[205] [[***]], [[***]]'s Price Underselling and Undercutting Case (Excerpt), (Exhibit KOR-8(b) (BCI)); [[***]], [[***]]'s Price Underselling and Undercutting Case (Excerpt), (Exhibit KOR-9(b) (BCI)); [[***]], [[***]]'s Price Underselling and Undercutting Case (Excerpt), (Exhibit KOR-10(b) (BCI)); [[***]], [[***]]'s Price Underselling and Undercutting Case (Excerpt), (Exhibit KOR-11(b) (BCI)); [[***]], [[***]]'s Price Underselling and Undercutting Case (Excerpt), (Exhibit KOR-12(b) (BCI)); [[***]], [[***]]'s Price Underselling and Undercutting Case (Excerpt), (Exhibit KOR-13(b) (BCI)); [[***]], [[***]]'s Price Underselling and Undercutting Case (Excerpt), (Exhibit KOR-14(b) (BCI)); [[***]], [[***]]'s Price Underselling and Undercutting Case (Excerpt), (Exhibit KOR-15(b) (BCI)); [[***]], [[***]]'s Price Underselling and Undercutting Case (Excerpt), (Exhibit KOR-16(b) (BCI)); [[***]], [[***]]'s Price Underselling and Undercutting Case (Excerpt), (Exhibit KOR-17(b) (BCI)); and Additional Cases of [[***]]'s Price Underselling and Undercutting, (Exhibit KOR-49(b) (BCI)).

> *SMC Korea and become forced to decrease the sales price or refrain from increasing prices*.[206]

7.116. The "reasonable sales price" is a target domestic industry price constructed by the OTI. In its Final Report, the OTI appended two explanatory notes regarding the calculation of the reasonable sales price to the table reporting comparisons between the actual price and the reasonable sales price:

> Note 1) Reasonable sales price = (manufacturing cost per unit + SG&A expenses per unit)/(1-reasonable operating profit ratio)
>
> Note 2) [[***]][.][207]

7.117. In considering price suppression, the KTC referred to the difference between the "reasonable sales price" and the actual average domestic prices in the Final Resolution:

> The average sales price per unit of the like product required price increase because the price it was lower than the reasonable sales price by KRW [[***]] in 2010, by KRW [[***]] in 2011, by KRW[[***]] in 2012 and by KRW [[***]] in 2013. However, the average sales price was not increased and on the contrary, it even decreased in 2012 and 2013. Such 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.[208]

7.6.4 Panel's terms of reference

7.6.4.1 Main arguments of the parties

7.118. In its panel request, Japan asserts that Korea's measures are inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement, "because Korea's analysis of the effect of the imports under investigation on prices in the domestic market for like products did not involve an objective examination based on positive evidence; and because Korea failed to properly consider whether the effect of the imports under investigation was to depress prices to a significant degree or prevent price increase, which otherwise would have occurred, to a significant degree".[209]

7.119. Korea argues that Japan's claim under Articles 3.1 and 3.2 of the Anti-Dumping Agreement with respect to the analysis of the price effects is outside of the Panel's terms of reference.[210] According to Korea, "Japan's panel request does not provide *a brief summary* of the complaint [as required by Article 6.2 of the DSU] but merely paraphrases the legal obligation contained in the articles alleged to have been violated".[211] In Korea's view, Japan's panel request:

> [M]erely paraphrases the general obligation of Article 3.1 without specifically linking what aspect of the challenged measures is supposedly not based on "positive evidence" and/or an "objective examination". It is totally unclear from reading Japan's panel request whether the problem under Article 3.1 that it identifies is an "evidence" or data problem or rather an "examination" and evaluation problem. Nor does Japan's panel request provide any indication on what aspect of the determination it considers to be problematic under either aspect of this claim.
>
> In addition, Japan merely paraphrases the obligation in Article 3.2 about the need to consider the price effects of the dumped imports without explaining what it considers to be the problem that allegedly vitiates the price effects analysis of the investigating authority. Japan's panel request merely states that Korea violated the obligation in Article 3.2 to consider whether there has been a significant price suppressing or

[206] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 19. (emphasis added)
[207] OTI's Final Report, (Exhibit KOR-2(b) (BCI)), p. 57.
[208] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 19.
[209] Japan's panel request, p. 1.
[210] Korea's preliminary ruling request, paras. 24-27.
[211] Korea's preliminary ruling request, para. 12 (emphasis original). See also first written submission, annex, para. 6; and second written submission, annex, para. 1.

> depressing effect but does not identify the concern it has with the investigating authority's analysis in light of this obligation. …
>
> …
>
> Korea can only speculate about the nature and scope of the claim of Japan in respect of the Korean investigating authority's price effects analysis since Japan's panel request fails to provide the "how and why" of these allegations.[212]

7.120. In response, Japan argues that Article 3.1 "sets forth an *overarching* obligation that should be read together with the other paragraphs of Article 3 of the Anti-Dumping Agreement".[213] Japan adds that:

> As with the first sentence, the second sentence of Article 3.2 provides for a *single* obligation to consider "the effect of the dumped imports on prices". … The text then sets forth several different ways in which the authority might meet this obligation. The use of "or" between "price undercutting" and "depress prices" and "prevent price increases" makes clear these are not separate obligations that all must be met, but rather different aspects of the same core obligation[.] …
>
> Thus, the second sentence of Article 3.2, read together with Article 3.1, provides a *single* obligation to consider whether there have been the relevant price effects of the dumped imports on the domestic like products based on "positive evidence" and "objective examination".[214]

7.121. In Japan's view, the text of the panel request "plainly connects Korea's price effects analysis with the *single* obligation under Articles 3.1 and 3.2 'to consider whether the effect of the imports … was to depress prices to a significant degree or prevent price increase, which otherwise would have occurred, to a significant degree' based on 'positive evidence' and 'objective examination'".[215]

7.122. Japan also asserts that:

> The claim regarding volume has been distinguished from the claim regarding price effects under Article 3.2[.] … This language is "sufficient to present the problem clearly" and to avoid any possible confusion about which of multiple obligations under Article 3.2 are at issue for this specific claim.[216]

7.6.4.2 Evaluation by the Panel

7.123. We will first consider the sufficiency of Japan's panel request with respect to Japan's claim under 3.1 and 3.2 of the Anti-Dumping Agreement regarding the Korean Investigating Authorities' consideration of the effect of the dumped imports on prices. We will consider in this regard whether, with respect to this claim and in accordance with Article 6.2 of the DSU, Japan's panel request provides a brief summary of the legal basis of the complaint which is sufficient to present the problem clearly. We will keep in mind in this regard the double function of a panel request: (a) to set the terms of reference for the Panel under Article 7.1 of the DSU and define the scope of the dispute; and (b) to serve the due process objective of notifying the respondent and the other WTO Members of the nature of the complainant's case.[217] If Japan's panel request fails to explain succinctly *how* or *why* the measures at issue are considered by Japan to be violating the WTO obligations in question, it would not fulfil the requirement of Article 6.2 of the DSU. In that case, Japan's claim under Articles 3.1 and 3.2 with respect to the consideration of the price effects would not be within the scope of the Panel's terms of reference.

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[212] Korea's preliminary ruling request, paras. 24-25 and 27. See also first written submission, annex, paras. 5, 6, and 11.
[213] Japan's response to Korea's preliminary ruling request, para. 27. (emphasis original)
[214] Japan's response to Korea's preliminary ruling request, paras. 34-35. (emphasis original)
[215] Japan's response to Korea's preliminary ruling request, para. 36. (emphasis original)
[216] Japan's response to Panel question No. 85, para. 16.
[217] Appellate Body Reports, *EC – Bananas III*, para. 142; *US – Carbon Steel*, para. 126.

7.124. As set out in the panel request, Japan's claim under Articles 3.1 and 3.2 concerning the KTC's price effects analysis contains two elements:

a. Korea's analysis of the effect of the imports under investigation on prices in the domestic market for like products did not involve an objective examination based on positive evidence; and

b. Korea failed to *properly* consider whether the effect of the imports under investigation was to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree.[218]

7.125. The first element of the claim paraphrases the language in the first part of Article 3.1, alleging that the KTC's consideration of price effects "did not involve objective examination based on positive evidence". We recall our view that a general reference to the language in Article 3.1 in itself is not normally sufficient to present the problem clearly.[219] This formulation does not explain *how* or *why* Japan considers the measures at issue to be violating the specific WTO obligations in question, including that in Article 3.1 of the Anti-Dumping Agreement. We consider that the language used by Japan is not precise enough to serve the dual function of a panel request: (a) to define the basis for the Panel's terms of reference under Article 7.1 of the DSU; and (b) to inform other WTO Members of the nature of the dispute, including the respondent as well as other WTO Members.

7.126. The second element of the claim paraphrases the language of the second sentence of Article 3.2, with two notable differences. First, Japan's price effects claim specifically refers to two of the three price effects mentioned in the second sentence of Article 3.2, price suppression and price depression. It is clear to us on the face of the panel request, therefore, that Japan challenges only the KTC's consideration of price depression and price suppression, and not its consideration of price undercutting. Second, the use of the word "properly" indicates that Japan takes issue with the manner in which the KTC considered price suppression and price depression, which would include the extent of the alleged price suppression and depression. However, Japan's panel request falls short of explaining "how or why" it considers the KTC's consideration of price suppression and price depression to be "improper" and consequently inconsistent with Articles 3.1 and 3.2. The propriety of an investigating authority's consideration of complex economic issues is a broad concept. The true nature of the complaint cannot be presented clearly without some additional identification of the main elements of the alleged violation(s).

7.127. We note in this regard that both parties have referred to prior Appellate Body rulings concerning the standard of clarity in a panel request in support of their respective positions.[220] On the one hand, Korea emphasizes the Appellate Body's statements that a panel request must "explain succinctly *how* or *why* the measure at issue is considered by the complaining Member to be violating the WTO obligation in question"[221], and that the respondent must be put in a situation where it can "know what case it has to answer … so that it can begin preparing its defence".[222] Conversely, Japan recalls the distinction between *claims* and *arguments*[223] and asserts that Korea's challenge amounts to a requirement that a panel request should lay out the complainant's *arguments*.

7.128. In practice, especially in cases alleging violations of provisions governing complex economic issues such as those in the Anti-Dumping Agreement, in which, in addition, the measures at issue rest on a series of intermediate considerations involving such issues and ultimate determinations resting on those considerations, the boundary between a claim and an argument may not be entirely clear. The requisite degree of specificity and clarity sufficient to satisfy Article 6.2 of the DSU thus necessarily will depend on the particular circumstances of each

[218] Japan's panel request, p. 1. (emphasis added)
[219] See para. 7.35 above.
[220] Japan's response to Panel question No. 10, paras. 4-11. Korea's response to Panel question No. 10.
[221] Appellate Body Report, *China – Raw Materials*, para. 226 (referring to Appellate Body Report, *EC – Selected Customs Matters*, para. 130). (emphasis original)
[222] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162 (quoting Appellate Body Report, *Thailand – H-Beams*, para. 88).
[223] Appellate Body Reports, *EC – Selected Customs Matters*, para. 153; *EC – Bananas III*, para. 143. See also Appellate Body Reports, *India – Patents (US)*, para. 88; *Korea – Dairy*, para. 139; and *Dominican Republic – Import and Sale of Cigarettes*, para. 121.

case, and must be examined on a case-by-case basis. This typically requires a panel to consider the language of a panel request to determine whether it contains sufficiently clear allegations so as to allow WTO Members, including the responding Member, to understand the material elements of the alleged inconsistency. In the words of the Appellate Body, the language used in the panel request must "'plainly connect' the challenged measure(s) with the provision(s) [of the covered agreements] claimed to have been infringed".[224] Where a complainant claims that an investigating authority's analysis "did not involve an objective examination based on positive evidence" or that the contested analysis was "improper" or "unreasonable", the inclusion in the panel request of some additional identification of the main elements of the alleged violation(s) may be necessary. That does not mean that the complainant is required to set out its *arguments* in the panel request.[225] The statement of the claim may be as short as the nature of the alleged violation reasonably allows. At the same time, it must set forth sufficiently clear allegation(s) explaining *how* or *why* the measure is inconsistent with a particular treaty provision. In some cases, the description of the material elements of the alleged inconsistency may overlap with some of the complainant's arguments. We note in this regard that:

> Nothing in Article 6.2 prevents a complainant from making statements in the panel request that foreshadow its arguments in substantiating the claim. If the complainant chooses to do so, these arguments should not be interpreted to narrow the scope of the measures or the claims.[226]

7.129. On its face, with respect to this second element of its claim under Articles 3.1 and 3.2, Japan's panel request asserts that Korea failed to properly consider whether the effect of the imports under investigation was to depress prices or to prevent price increases, to a significant degree, inconsistently with the obligations in those provisions. The panel request does not contain any additional narrative description of the problem or problems considered by Japan to constitute the alleged inconsistency. In our view, this general reference to the text of Article 3.2 is not sufficient to present the problem clearly in the circumstances. Merely paraphrasing the language in the second part of Article 3.2 does not explain *how* or *why* Japan considers the measures at issue to be inconsistent with the specific WTO obligations in question, Articles 3.1 and 3.2 of the Anti-Dumping Agreement, with respect to the consideration of the effect of the dumped imports on prices. More specifically, it does not explain *how* or *why* Japan considers that the Korean Investigating Authorities' consideration of price effects was improper. Japan's claim is essentially generic – nothing in the panel request links the claim to the particular circumstances of the investigation at issue.

7.130. This conclusion is confirmed when we take into account the scope of the allegations advanced in Japan's submissions. As articulated in the course of the proceedings, Japan claims that the KTC failed to properly consider price depression and price suppression, inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement, because:

a. the KTC ignored the diverging price trends, different physical characteristics, consumer opinions, and other evidence that suggested the lack of a competitive relationship between dumped imports and the domestic like product, which would have been required to establish price comparability which is necessary when assessing price effects[227];

b. the KTC also ignored the implications of the "dramatically diverging price trends" between dumped imports and domestic products for its analysis of price depression[228];

c. with respect to the KTC's consideration of price suppression, the KTC: (a) failed to explain its "reasonable sales price" methodology and then ignored the consequences of

[224] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.8 (referring to Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162, in turn quoting Appellate Body Report, *Thailand – H–Beams*, para. 88).

[225] Appellate Body Report, *EC – Selected Customs Matters*, para. 153. We note that Korea does not argue that Japan is required to advance arguments and evidence in the panel request in order to meet its legal obligation under Article 6.2 of the DSU.

[226] Appellate Body Report, *EC – Selected Customs Matters*, para. 153.

[227] Japan's first written submission, paras. 64, 70, and 107-113. See also second written submission, para. 31.

[228] Japan's first written submission, paras. 64 and 72-83.

the "reasonable sales price" estimated by the OTI[229]; and (b) the KTC's findings ignored the lack of evidence of price suppression in 2011 and 2012 and the fact that the absence of price suppression in earlier years offset the price suppression in 2013 and failed to explain how higher prices for the dumped imports could have suppressed lower domestic prices[230]; and

d. with respect to its consideration of price depression and price suppression, the KTC: (i) ignored the fact that dumped import prices were consistently and significantly higher than the prices of the domestic like product, as well as the implications of this fact for its analysis of price depression and price suppression[231]; (ii) failed to consider whether the alleged price depression and price suppression effects of dumped imports were "significant"[232]; and (iii) failed to consider the counterfactual issue of how prices and volumes might have been different in the absence of dumping.[233]

7.131. For the reasons explained above, we find that, although the language of Japan's panel request is capable of identifying the subject matter of its complaint, it is not sufficiently precise to present the problem clearly as required by Article 6.2 of DSU. Accordingly, we conclude that Japan's claim under Articles 3.1 and 3.2 of the Anti-Dumping Agreement, with respect to the consideration of the effect of the dumped imports on prices, is not properly within the Panel's terms of reference, and we will neither consider it further nor resolve it.

7.7 Impact of the dumped imports on the domestic industry

7.7.1 Introduction

7.132. Japan claims that Korea's measures are inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement, "because Korea's analysis of the impact of the imports under investigation on the domestic industry at issue did not involve an objective examination based on positive evidence, including an evaluation of all relevant economic factors and indices having a bearing on the state of the domestic industry at issue". Japan challenges the KTC's examination of the impact of the dumped imports on the state of the domestic industry in four respects: (a) failure to link its analysis of volume and price effects with the alleged consequent impact from the dumped imports; (b) failure to demonstrate any "explanatory force" of the dumped imports on the state of the domestic industry; (c) failure to examine two economic factors explicitly listed in Article 3.4 of the Anti-Dumping Agreement: the ability to raise capital or investments and the magnitude of the margin of dumping; and (d) failure to properly take into account positive trends during the period of trend analysis with respect to several economic factors.

7.133. Korea argues that Japan's claim concerning the impact of the dumped imports on the state of the domestic industry is outside the Panel's terms of reference because Japan's panel request does not comply with the requirements of Article 6.2 of the DSU with respect to this claim. In the alternative, Korea asks the Panel to reject Japan's claim.

7.7.2 Main arguments of the parties

7.7.2.1 Alleged failure to link findings on volume and price effects with findings on the state of the domestic industry

7.7.2.1.1 Japan

7.134. Japan argues that the KTC failed to establish any logical link between its findings on volume and price effects under Article 3.2 and its findings on the state of the domestic industry

[229] Japan's first written submission, paras. 64, 92, and 97-99.
[230] Japan's first written submission, paras. 64, 91-93, and 100-106.
[231] Japan's first written submission, paras. 64, 84-90, and 94; second written submission, paras. 46-49.
[232] Japan's first written submission, paras. 64, 90, and 106. For the discussion of the price depression analysis, see Japan's first written submission, paras. 72-90. For the discussion of the price suppression analysis, see Japan's first written submission, paras. 91-106.
[233] Japan's second written submission, paras. 17 and 25-32.

under Article 3.4, in particular with respect to its evaluation of sales, production volume, market share, factors affecting domestic prices, and profits.[234]

7.135. Japan asserts that the KTC did not clearly address the volume of dumped imports in its discussion of domestic sales volume, and addressed the volume of dumped imports in its discussion of domestic production volume "only in passing". According to Japan, evidence in the record suggested that the consequent impact of the volume of dumped imports on the domestic industry was negligible.[235]

7.136. Japan also asserts that the KTC failed to consider the decrease in the domestic industry's market share from 2012 to 2013 in the context of: (a) an overall increase in the domestic industry's market share from 2010 to 2013; (b) the export orientation of the domestic industry in 2013; and (c) the impact of the increase in the market share of third country imports (even though this increase might be negligible in absolute terms). Furthermore, the KTC failed to discuss the relationship between the increase in the volume of domestic sales and the decrease in their market share.[236]

7.137. Japan submits that, in its evaluation of the trends of domestic prices, the KTC failed to discuss how the fact that the prices of dumped imports were consistently higher than domestic prices affected its analysis of the impact of those imports on the state of the domestic industry, as well as its analyses of price effects and causation.[237]

7.138. According to Japan, the trend in the domestic industry's profits was largely unrelated to dumped imports. Japan asserts that the KTC failed to explain:

a. why the operating losses of the domestic industry expanded in 2012 at a time when the volume of dumped imports decreased and the prices of those imports increased;

b. why the effects of dumped imports on profits were different in 2012 and 2013, including why those imports had an effect in 2013 when they did not have an effect earlier in the period; and

c. why the dumped imports would have an impact on the domestic industry when their prices were significantly higher than the domestic prices and even though the volume of domestic shipments increased in 2013.[238]

7.139. Japan also argues that in the absence of a proper consideration of the dumped imports' effects on the domestic like product as a whole, the impact examination in the present case is necessarily inconsistent with Article 3.4 of the Anti-Dumping Agreement.[239]

7.7.2.1.2 Korea

7.140. Korea responds that Article 3.4 of the Anti-Dumping Agreement does not require an investigating authority to link its examination of each and every economic factor in this provision with its consideration of the price and volume effects under Article 3.2. The focus of this examination should be on all relevant economic factors having a bearing on the state of the domestic industry, and not on demonstrating that the dumped imports were causing injury to the domestic industry. Article 3.4 requires the examination of the impact of the dumped imports "as a whole" on the domestic industry, based on the evaluation of "all relevant economic factors and indices having a bearing on the state of the industry". Korea argues that, in this sense, Japan's argument that the KTC's impact analysis was inconsistent with Article 3.4 because it failed to "link" each of the indices or factors it addressed specifically to the volume or price effect of the dumped imports, is unavailing. In addition, according to Korea, the obligation under Article 3.4 is to *examine* the impact of dumped imports on the domestic industry, not to *demonstrate* that dumped imports are causing injury to the domestic industry. Similarly, in its examination of Article 3.4

[234] Japan's first written submission, paras. 149-162.
[235] Japan's first written submission, paras. 150-151.
[236] Japan's first written submission, paras. 152-159.
[237] Japan's first written submission, para. 160.
[238] Japan's first written submission, paras. 161-162.
[239] Japan's second written submission, para. 128.

economic factors, an investigating authority is not required to conduct a fully-fledged non-attribution analysis, as Japan's arguments seem to suggest.[240]

7.7.2.2 Alleged failure to examine the explanatory force of the dumped imports on the state of the domestic industry

7.7.2.2.1 Japan

7.141. Japan argues that the KTC failed to meaningfully examine the explanatory force of dumped imports on the state of the domestic industry under Article 3.4 of the Anti-Dumping Agreement. According to Japan, the KTC did not engage in a meaningful examination of whether the state of the domestic industry could be connected to the effect of dumped imports. Japan asserts that factors other than the dumped imports have explanatory force on the state of the domestic industry:

a. the decline in consumption in 2012 has more explanatory force for the decrease of domestic sales in 2012 than the dumped imports which also decreased in 2012;

b. the domestic industry's loss of market share in 2013 was caused by the sharp increase of consumption in 2013, rather than by dumped imports which were a less important explanatory factor;

c. the fact that dumped import prices are higher than domestic prices undermines the explanatory force of those imports for the decrease in the prices of the domestic like product in 2013;

d. competition between the two applicants, as a result of the increase in their respective capacity, has more explanatory force than the dumped imports for the trends in the prices of the domestic industry; and

e. the explanatory force of the dumped imports for the decrease of domestic like product prices is undermined by the fact that domestic prices decreased by 3.6% in 2012 whereas dumped import prices increased by 7%, and domestic prices decreased by only 1.2% in 2013, when dumped import prices fell by 31.1%.[241]

7.7.2.2.2 Korea

7.142. Korea maintains that Article 3.4 of the Anti-Dumping Agreement does not require an investigating authority to determine causation. Korea asserts that the KTC examined and adequately explained the relationship between the dumped imports and the state of the domestic industry. In Korea's view, Article 3.4 does not require an investigating authority to establish the "explanatory force" of the dumped imports for each factor individually. Korea argues, however, that the KTC did examine and adequately explain "the relationship between [dumped imports] and the state of the domestic industry" and, as such, derived an understanding of the impact of dumped imports.[242] Korea states that in its Final Resolution, the KTC specifically included analysis explaining the impact of the dumped imports on the relevant economic factors.[243]

7.143. Korea also states that Japan's specific arguments concerning the lack of explanatory force of the dumped imports, such as the lack of "market interaction", price overselling, and others, are simply recasting arguments previously made by Japan under the price effects analysis.[244]

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[240] Korea's first written submission, paras. 207-213.
[241] Japan's first written submission, paras. 163-172.
[242] Korea's first written submission, para. 215 (referring to Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.205; and *China – GOES*, para. 149).
[243] Korea's first written submission, paras. 215-221 (referring to KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), pp. 21-27).
[244] Korea's first written submission, paras. 214-225.

7.7.2.3 Alleged failure to examine relevant economic factors listed in Article 3.4 of the Anti-Dumping Agreement

7.7.2.3.1 Japan

7.144. Japan argues that the KTC failed to adequately examine the following two factors explicitly listed in Article 3.4 of the Anti-Dumping Agreement:

a. concerning the ability to raise capital or investments, the KTC provided a conclusory statement that the domestic industry's funding ability had deteriorated due to continuous operating losses and increasing liability, without any factual support. Moreover, the KTC's conclusion was contradicted by evidence in the record that there was massive investment in new facilities in 2011 and 2012 when the domestic industry was incurring losses[245]; and

b. concerning the magnitude of the margin of dumping, the KTC merely stated that "the margin was not small" and that "dumping influenced much on the selling price". This conclusion has no factual support, and is contradicted by the fact that the prices of the dumped imports were consistently higher than domestic like product prices.[246]

7.7.2.3.2 Korea

7.145. Korea maintains that Article 3.4 does not require a comprehensive analysis of whether the dumped imports caused injury. In Korea's view, the KTC examined the two factors identified by Japan, and the basis for its findings was explained adequately in its Final Resolution and in the OTI's Final Report. According to Korea:

a. concerning the ability to raise capital, the KTC found that the domestic industry's ability to raise capital was negatively affected because of its operating losses and its increasing indebtedness, on the basis of evidence contained in the audited reports. The fact that the domestic industry raised capital in 2011 and 2012 does not undermine the common sense conclusion that persistent operating losses and increasing debt were detrimental to the domestic industry's ability to raise capital; and

b. concerning the magnitude of the margins of dumping, the KTC considered the actual figures for the margin of dumping (11.66% to 31.61%) and found that the magnitude was not insignificant and had a significant impact on the prices of the dumped imports and those of the domestic industry like product.[247]

7.7.2.4 Alleged failure to properly take into account positive trends

7.7.2.4.1 Japan

7.146. Japan argues that the KTC attached a high degree of importance to economic factors showing negative trends for the domestic industry and disregarded or downplayed factors showing positive trends. The KTC also failed to explain the weight attributed to any given factor, as well as to explain the inferences it drew from those factors showing positive trends for the domestic industry, such as domestic sales and new investments.[248]

7.147. Japan asserts that the volume of domestic sales increased in two out of the three years that were part of the period of trend analysis, and increased by 14% over the full period. However, the KTC focused on the fact that the 7.6% increase in domestic sales in 2013 was only a "slight

[245] Japan's first written submission, paras. 174-176.
[246] Japan's first written submission, paras. 177-178 (referring to KTC's Final Resolution, (Exhibit JPN-4(b)), p. 26). We note that Japan uses direct quotations in a number of places throughout its first written submission, but the quoted text does not always accurately reflect the text in the KTC's Final Resolution, as translated in the exhibit provided by Japan itself. In this instance, the quoted text should read "the magnitude of the margin of dumping was not small" and "such dumping margin had considerably influenced the selling price of the dumped imports and the price of like products".
[247] Korea's first written submission, paras. 226-232.
[248] Japan's first written submission, para. 180.

increase" and was "not much".[249] The KTC failed to explain why this increase in 2013 was harmful.[250]

7.148. According to Japan, the KTC focused on the negative trend in investment in an unbalanced manner. The KTC failed to discuss the fact that the domestic industry dramatically expanded capacity over the period, which reflected a positive trend, albeit one that came with risks. Instead, the KTC's statement that in 2013 the dumped imports "started dominating the domestic market"[251] ignores the full period of trend analysis and is not supported by the facts. In Japan's view, in 2013 the dumped imports were merely returning to the market following a decrease in volume in 2011 and 2012 when overall consumption declined.[252]

7.7.2.4.2 Korea

7.149. Korea responds that Japan failed to substantiate its argument that the KTC improperly disregarded certain positive economic factors. According to Korea, the KTC's determination on the state of the domestic industry was based on a comprehensive review of all relevant economic factors. The KTC's overall conclusion is not undermined by the fact that a few economic factors do not necessarily indicate injury, because neither one nor several of these economic factors necessarily give decisive guidance.[253]

7.150. With respect to the two economic factors referred to by Japan, Korea argues that:

a. the KTC evaluated the trend in the domestic industry's sales. The KTC explained that the slight increase in sales in 2013 was disappointing when viewed in the context of increased costs and the loss of market share amid the expansion of consumption; and

b. the KTC also evaluated the sharp increase of investment in the beginning of the period of trend analysis, and its positive impact on the domestic industry's manufacturing costs. Nevertheless, the KTC found that that investment could not offset the overall injury to the domestic industry.[254]

7.7.3 Relevant facts

7.151. The Korean Investigating Authorities' evaluation of all of the economic factors set out in Article 3.4 in its examination of the impact of the dumped imports on the state of the domestic industry is set out in the Final Resolution of the KTC[255] and the Final Report of the OTI.[256]

7.152. Concerning market share of the domestic industry, the KTC stated in its Final Resolution:

> The domestic market share of the like product increased from [[***]]% in 2010 to [[***]]% in 2011 and to [[***]]% in 2012 and then rapidly decreased in 2013 to [[***]]%, a similar level with 2010.

[249] As noted above, Japan uses direct quotations throughout its first written submission, but the quoted text does not always accurately reflect the text in the KTC's Final Resolution, as translated in the exhibit provided by Japan itself. In this instance, the text in the KTC's Final Resolution reads "in 2013, the domestic sales of like products were increased by 7.6% … [i]n spite of *slight increase* of sales, there was a material injury to domestic industry of losing the market share significantly" and "[i]n 2013, although the domestic consumption was increased, the domestic sales of like products did not increase as much as expected due to a sharp increase of dumped imports". (KTC's Final Resolution, (Exhibit JPN-4(b)), pp. 20 and 22 (emphasis added)).

[250] Japan's first written submission, para. 181.

[251] The quoted texts do not correspond with the text in the KTC's Final Resolution. The KTC's Final Resolution stated, in relevant part, that "in 2013, dumped imports largely eroded the domestic market, so the domestic industry failed to increase the output in accordance with the expansion of facility capability". (KTC's Final Resolution, (Exhibit JPN-4(b)), p. 25).

[252] Japan's first written submission, para. 182.

[253] Korea's first written submission, paras. 233-234.

[254] Korea's first written submission, paras. 235-239.

[255] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), pp. 20-26.

[256] OTI's Final Report, (Exhibit KOR-2(b) (BCI)), pp. 60-76.

> In 2011, when domestic consumption decreased by 3.3%, the like product expanded its market share by increasing domestic sales by13.4%; in 2012, when domestic consumption decreased by as much as 22.9%, the decrease in the domestic sales of the like product was by only 6.6%, while its market share expanded by [[***]]%. Such expansion of the domestic market share by the domestic industry appears to have been enabled by suppressing the increase of, or decreasing, the sales price of the like product through cost reduction.
>
> However, in 2013, when domestic consumption soared by 52.8%, the market share of the like product decreased [[***]]%, while domestic sales thereof increased by 7.6%. This indicates that the like product was materially injured when its market share was lost significantly despite the slight increase in the sales volume.[257]

7.153. The KTC concluded that the loss in market share despite a slight increase in sales indicated that the domestic industry was materially injured. Moreover, the domestic industry was not able to further reduce its sales price in 2013 to compete with the dumped imports (whose prices declined significantly in 2013) because of the deterioration in operating profit.[258] As a consequence, the domestic industry lost a significant portion of its market share during this period:

> The sharp increase in the imports of the dumped products caused the domestic companies to lose their market share which they had struggled to expand until 2012, and in terms of the price, the price of the domestic like product was suppressed from increases, or was reduced, in response to the decrease in the price of the dumped products. This clearly inflicted material injury to the domestic industry including the continued operating losses.[259]

7.154. In its Final Report, the OTI stated:

> The market share of the like products rose from [[***]]% in 2010 to [[***]]% in 2011 to [[***]]% in 2012 and then fell to [[***]]% in 2013.
>
> Throughout the entire period of investigation, the market share thereof remained unchanged.
>
> ...
>
> During the entire period of investigation, the like products undermined the domestic market share of the dumped products until 2012 and then lost most of the two-year increase in the market share in 2013.
>
> The domestic industry appears to have increased its market share until 2012 as it endeavored to secure the market by enhancing its price competitiveness through reduction of manufacturing costs, etc. under the circumstances that domestic demand was on the decrease and the import of the dumped products decreased.
>
> ...
>
> In 2013, under the circumstances that domestic demand considerably increased, the import of dumped products increased as much as 78.9% and the dumped products recovered most of their lost market share through substantial price reduction and aggressive marketing activities.
>
> On the contrary, despite a drastic increase in domestic consumption, the like products appear to have lost the increased market share due to the difficulties in reducing prices additionally because of their operating deficits.

[257] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 20. See also OTI's Final Report, (Exhibit KOR-2(b) (BCI)), pp. 62-63.
[258] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), pp. 20-21.
[259] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 21.

...

During the period of investigation, SMC Korea, the importer of SMC products, was confirmed to have strived to expand its market share through a variety of aggressive marketing activities.[260]

7.155. Concerning domestic industry prices, the KTC stated:

The average sales price of the like product increased by 5.9% from KRW [[***]] in 2010 to KRW [[***]] in 2011, but decreased by 3.6% to KRW [[***]] in 2012, and by 1.2% to KRW [[***]] in 2013; in sum, the average sales price of the like product increased by 0.8% from 2010 to 2013.

The review of the changes in the price based on the price fluctuation index, which takes into consideration the changes in the composition of the products being sold, shows that, assuming the price of 2010 to be 100, the price index stood at 100.3 in 2011, 98.6 in 2012 and 96.5 in 2013, indicating that the sales price of the like product decreased by [[***]]% throughout the entire period of investigation.[261]

7.156. Concerning investment, the KTC stated:

According to the [OTI's] Investigation Report, the investment in facility by the domestic industry was KRW [[***]] in 2010, KRW [[***]] in 2011, KRW [[***]] in 2012 and KRW [[***]] in 2013, showing *a sharp increase in 2011 and 2012*. As discussed previously, the domestic industry expanded its investment in facility, in the expectation that economic recovery and the expansion of investment in automation would increase demand, but the domestic and international demand significantly decreased in 2012 due to the fiscal crises in Europe, etc. and the dumped products largely dominated the domestic market, resulting in the failure to increase output in accordance with the expansion of the production capacity.

Accordingly, the domestic industry's demand for investment in facility *is expected to shrink significantly* for the time being, and it appears that the dumped products are having potentially adverse impact on the domestic industry's investment in facility.[262]

7.157. Concerning the domestic industry's funding ability, the KTC observed that the domestic industry research and development (R&D) expenditure increased since 2011 despite operating losses, but noted at the same time that the ratio of R&D expenditure to sales increased only in 2011 and decreased continuously thereafter. The KTC stated:

The domestic industry is making efforts for technological development, e.g., by spending more than KRW [[***]] per year since 2011 despite the operating losses, but the ratio of R&D spending to the sales amount increased only in 2011 and has since decreased continuously.

Due to the continued operating loss, the domestic industry's internal capability for investment is dwindling and the demand for investment in facility is shrinking as the capacity utilization of facilities and the market share decrease due to the rapid growth in the import of the dumped products. In sum, it appears that the overall growth of the domestic industry has been significantly undermined.

...

The continuing operating loss of the domestic industry is weakening its internal capital raising capacity, and the increase in debt caused by such operating loss is weakening the external capital raising capacity as well.[263]

[260] OTI's Final Report, (Exhibit KOR-2(b) (BCI)), pp. 62-63.
[261] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 22.
[262] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 25. (emphasis added; fn omitted)

7.158. With respect to its evaluation of the magnitude of the margin of dumping, the KTC stated:

> As discussed previously, the final dumping margins of the dumped products were ranged between 11.66% and 31.61%, which means the size of dumping margin is not insignificant. Accordingly, such dumping appears to have had significant impact on the sales price of the dumped products and that of the like product.[264]

7.159. With respect to sales, the KTC stated:

> According to the Investigation Report, the domestic shipment of the like product indicated yearly fluctuations, increasing by 13.4% from [[***]] units in 2010 to [[***]] units in 2011, decreasing by 6.6% to [[***]] units in 2012, and increasing again by 7.6% to [[***]] units in 2013. As such, the shipment in 2013 was [[***]]% higher than that of 2010.
>
> ...
>
> However, in 2013, when domestic consumption soared by 52.8%, the market share of the like product decreased [[***]]%, while domestic sales thereof increased by 7.6%. This indicates that the like product was materially injured when its market share was lost significantly despite the slight increase in the sales volume.[265]

7.160. With respect of the domestic industry's profitability, the KTC found that the domestic industry recorded negative growth over the entire period of trend analysis. The KTC attributed the deterioration of the operating profit after having improved in 2011 to the decreasing prices and increasing costs of the domestic industry:

> The operating profit from domestic sales by the domestic industry remained in deficit during the period of investigation, and the operating loss rate decreased from [[***]]% in deficit in 2010 to [[***]]% in deficit in 2011 and the loss rate widened again to [[***]]% in deficit in 2012 and to [[***]]% in deficit in 2013. As the operating loss continued, the domestic industry's return on investment as a percentage of the assets invested in the production of the like product recorded negative growth throughout the entire period of investigation.
>
> The deterioration of the operating profit in 2012, after improving in 2011, was a result of the price reduction of the like product and the increase in the operating cost in response to the competition with the dumped products.[266]

7.7.4 Panel's terms of reference

7.7.4.1 Main arguments of the parties

7.161. In its panel request, Japan asserts that Korea's measures are inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement, "because Korea's analysis of the impact of the imports under investigation on the domestic industry at issue did not involve an objective examination based on positive evidence, including an evaluation of all relevant economic factors and indices having a bearing on the state of the domestic industry at issue".[267]

7.162. Korea argues that Japan's claim under Articles 3.1 and 3.4 of the Anti-Dumping Agreement with respect to the analysis of the impact of the imports under investigation on the domestic industry is outside of the Panel's terms of reference.[268] According to Korea, "Japan's panel request does not provide *a brief summary* of the complaint [as required by Article 6.2 of the DSU] but

[263] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), pp. 25-26.
[264] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 26.
[265] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 20. (fn omitted)
[266] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 23; see also OTI's Final Report, (Exhibit KOR-2(b) (BCI)), p. 68.
[267] Japan's panel request, p. 1.
[268] Korea's preliminary ruling request, paras. 30-32.

merely paraphrases the legal obligation contained in the articles alleged to have been violated".[269] In Korea's view, Japan's panel request:

> [M]erely paraphrases the obligations of Article 3.1 on positive evidence and an objective examination and copies the first part of the first sentence of Article 3.4 asserting that Korea's analysis did not involve an objective examination based on positive evidence "including an evaluation of all relevant economic factors and indices having a bearing on the state of the domestic industry".[270]

7.163. Korea argues that:

> Article 3.4 establishes multiple obligations that must be complied with in an anti-dumping investigation … However, Japan's panel request in relation to this third claim under Article 3.4 does not explain which of these obligations included in Article 3.4 it considers to have been violated, nor does it identify the specific aspects of the anti-dumping investigation or resulting final determination that it considers to be flawed in light of these obligations. There is no narrative of any kind to assist Korea, the third parties or the Panel for that matter to understand the complaint of Japan … Korea is left to guess what the concern of Japan is and which aspect of the challenged measures it considers to violate the many obligations set forth in Article 3.4.[271]

7.164. In response, Japan argues that Article 3.4 of the Anti-Dumping Agreement "provides for a *single* obligation for an investigating authority to conduct the *integrated* examination of the impact of the dumped imports on the domestic industry which '*shall include* an evaluation of all relevant economic factors and indices'". The different factors listed in Article 3.4 "must all be considered as part of the single obligation to examine the impact of dumped imports on the domestic industry". "[R]ead with Article 3.1, Article 3.4 provides for a single obligation to examine 'the impact of the dumped imports on the domestic industry' based on 'positive evidence' and 'objective examination'".[272]

7.7.4.2 Evaluation by the Panel

7.165. We will first examine the sufficiency of Japan's panel request with respect to Japan's claim under Articles 3.1 and 3.4 of the Anti-Dumping Agreement regarding the examination of the impact of the imports under investigation on the domestic industry. We will consider in this regard whether, with respect to this claim and in accordance with Article 6.2 of the DSU, Japan's panel request provides a brief summary of the legal basis of the complaint which is sufficient to present the problem clearly. We will keep in mind the double function of a panel request: (a) to set the terms of reference for the Panel under Article 7.1 of the DSU and define the scope of the dispute; and (b) to serve the due process objective of notifying the respondent and the other WTO Members of the nature of the complainant's case.[273] If Japan's panel request fails to explain succinctly *how* or *why* the measures at issue are considered by Japan to be violating the WTO obligations in question, it would not fulfil the requirement of Article 6.2 of the DSU. In that case, Japan's claim under Articles 3.1 and 3.4 with respect to the examination of the impact of the imports under investigation on the domestic industry would not be within the scope of the Panel's terms of reference.

7.166. With respect to the claim at issue, the first part of the relevant paragraph paraphrases the first part of Article 3.1, asserting that the KTC's examination of the impact of the dumped imports on the state of the domestic industry "did not involve an objective examination based on positive evidence". The second part of the paragraph refers to the alleged failure to conduct "an evaluation

[269] Korea's preliminary ruling request, para. 12 (emphasis original). See also first written submission, annex, para. 6; and second written submission, annex, para. 1.
[270] Korea's preliminary ruling request, para. 31.
[271] Korea's preliminary ruling request, paras. 30-31. See also first written submission, annex, paras. 5, 6, and 11.
[272] Japan's response to Korea's preliminary ruling request, paras. 41-42 and 44 (emphasis original). See also response to Panel question No. 11, para. 13.
[273] Appellate Body Reports, *EC – Bananas III*, para. 142; *US – Carbon Steel*, para. 126.

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

7.167. As mentioned above, a general reference to the language in Article 3.1 in itself is not normally sufficient to present the problem clearly.[274] This formulation does not explain *how* or *why* Japan considers the measures at issue to be violating the specific WTO obligations in question, including that in Article 3.1 of the Anti-Dumping Agreement.

7.168. Accordingly, we must consider the second part of the paragraph, i.e. the assertion of an alleged failure to conduct "an evaluation of all relevant economic factors and indices having a bearing on the state of the domestic industry at issue". We recall in this regard that the text of 3.4 of the Anti-Dumping Agreement requiring that "[t]he examination of the impact of the dumped imports on the domestic industry concerned *shall* include an evaluation of all relevant factors and indices having a bearing on the state of the industry, *including* …"[275] sets forth a mandatory list of relevant factors which must be evaluated in every case. The list of factors and indices in Article 3.4 is therefore not merely indicative or illustrative, and the examination of each of them is necessary for compliance with the provision.[276]

7.169. Japan's panel request refers to whether, in examining the impact of the dumped imports on the domestic industry, the Korean Investigating Authorities properly evaluated each of the relevant factors and indices listed in Article 3.4. In this respect, on its face Japan's panel request suggests that the failure by the KTC to evaluate one or more of these factors constitutes a violation of Articles 3.1 and 3.4 of the Anti-Dumping Agreement. This formulation indicates *how* or *why* Japan considers the measures at issue to be inconsistent with the specific WTO obligations in question, namely those in Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

7.170. The allegations in Japan's submissions that the KTC failed to evaluate two of the specific factors listed in Article 3.4 (the ability to raise capital or investments, and the magnitude of the margin of dumping) may be viewed as *arguments* seeking to demonstrate the *claim* set out in the panel request. Accordingly, we consider these allegations to be within our terms of reference.

7.171. With respect to this claim, the language used by Japan is precise enough to serve the dual function of a panel request: (a) to define the basis for the Panel's terms of reference under Article 7.1 of the DSU; and (b) to inform other WTO Members, including the respondent, of the nature of the dispute.

7.172. In the course of the proceedings, Japan has advanced other allegations of violation of Articles 3.1 and 3.4 of the Anti-Dumping Agreement, specifically that: (a) the KTC did not establish a logical link between its findings on the volume and price effects under Article 3.2 and its finding of adverse impact under Article 3.4; (b) with respect to certain factors listed in Article 3.4, the KTC failed to demonstrate any explanatory force of dumped imports for understanding domestic industry trends; and (c) the KTC attached a high degree of importance to the relevant factors highlighting negative aspects, while disregarding or downplaying without any explanation the factors suggesting that the Korean industry was not suffering injury.

7.173. On its face, the panel request does not indicate or suggest that Japan's claim regarding Korea's analysis of the impact of the imports under investigation on the domestic industry extends to include these allegations. With respect to these allegations, as mentioned above, a general reference to the language in Article 3.1 in itself is not sufficient to present the problem concerning the KTC's examination of the impact of the dumped imports on the state of the domestic industry clearly. Japan's assertion that Korea failed to conduct "an evaluation of all relevant economic factors and indices having a bearing on the state of the domestic industry at issue" does not cover these three additional allegations, which do not refer to any failure to evaluate relevant economic factors and indices. There is no indication in Japan's panel request that these allegations are part of the *how* or *why* Japan considers the measures at issue to be violating the specific WTO obligations in question, namely those in Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

[274] See para. 7.35 above.
[275] Emphasis added.
[276] See, for example, Panel Reports, *Thailand – H-Beams*, para. 7.225; and *Argentina – Poultry Anti-Dumping Duties*, para. 7.314.

7.174. With respect to these allegations, the language used by Japan is not precise enough to serve the dual function of a panel request: (a) to define the basis for the Panel's terms of reference under Article 7.1 of the DSU; and (b) to inform other WTO Members, including the respondent, of the nature of the dispute.

7.175. Accordingly, we find that Japan's claim concerning the state of the domestic industry, under Articles 3.1 and 3.4 of the Anti-Dumping Agreement, is limited to the allegation that the KTC failed to evaluate two of the specific factors listed in Article 3.4. We conclude that all other allegations of inconsistency with Article 3.4 argued by Japan are not properly within the Panel's terms of reference, and we will neither consider them further nor resolve them.

7.7.5 Alleged failure to examine two economic factors listed in Article 3.4 of the Anti-Dumping Agreement

7.176. Having concluded that Japan's claim that the KTC failed to evaluate two of the specific factors listed in Article 3.4 is properly before us, we now turn to examine this claim.

7.7.5.1 Relevant provisions

7.177. Article 3.1 of the Anti-Dumping Agreement provides:

> A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both *(a)* the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and *(b)* the consequent impact of these imports on domestic producers of such products.

Article 3.4 of the Anti-Dumping Agreement provides:

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

7.178. Article 3.4 does not require merely an examination of the state of the domestic industry in the abstract. Rather, it contemplates that an investigating authority must also "derive an understanding of *the impact of* subject imports" on the basis of an examination of the relationship between dumped imports and the state of the domestic industry.[277]

7.179. Article 3.4 requires that the *examination* of the impact of the dumped imports on the domestic industry *shall* include an *evaluation* of all relevant economic factors, including each of the fifteen listed in that provision.[278] Article 3.4 does not require an investigating authority to make a *determination* regarding the impact of dumped imports, but rather to *examine* that impact. The fact that no determination need be made makes it clear that no particular outcome is a necessary prerequisite for going on to address and resolve the "ultimate question" of injury caused by dumped imports.[279] Neither Article 3.4 nor any other provision of the Anti-Dumping Agreement provides any guidance regarding a specific methodology on how these factors and indices shall be evaluated. The evaluation of the relevant factors must respect, however, the overarching principle set out in Article 3.1 concerning the objective examination of positive evidence. An "evaluation" of each of the factors in Article 3.4 requires a process of analysis and assessment of the role,

[277] Appellate Body Report, *China – GOES*, para. 149 (emphasis original). See also Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.205.
[278] Appellate Body Report, *Thailand – H-Beams*, para. 125.
[279] Article 3.4 specifically provides that no one or several of the factors listed therein can necessarily give decisive guidance, which the panel in *China – Cellulose Pulp* understood to mean that "no one or several of the factors listed can give decisive guidance as to the ultimate question whether dumped imports are causing material injury to the domestic industry". (Panel Report, *China – Cellulose Pulp*, fn 53).

relevance and relative weight of each factor in the particular investigation. In addition, if an investigating authority concludes that a particular factor listed in Article 3.4 is not relevant, this conclusion must be explained.[280]

7.7.5.2 Evaluation by the Panel

7.180. With respect to its assertion that the KTC failed to examine the ability to raise capital or investments and the magnitude of the margin of dumping, Japan's argument is not that the KTC did not examine these factors at all, but rather that the KTC did not adequately or properly examine these factors.[281] We recall that neither Article 3.4 nor any other provision of the Anti-Dumping Agreement provides any methodology on how these factors and indices shall be evaluated, apart from the overarching principle set out in Article 3.1 concerning the objective examination of positive evidence.[282] Moreover, as discussed, no determination is required in the context of the Article 3.4 examination of factors. In this situation, it seems to us that, since the ultimate question is whether there is injury caused by dumped imports regardless of any outcomes of the Article 3.4 examination, the only issue that remains to be decided is whether the KTC's evaluation of these two factors, in the context of its overall examination of the impact of dumped imports on the state of the domestic industry, was that of a reasonable and objective investigating authority in light of the evidence and arguments that were before the KTC.

7.7.5.2.1 Ability to raise capital or investments

7.181. Japan argues that the KTC's statement that the domestic industry's funding ability had deteriorated due to continuous operating losses and increasing liability was "contradicted" by evidence in the record that the domestic industry engaged in massive investment in new facilities in 2011 and 2012 at the same time when it was incurring losses.[283] Japan also argues that continued operating loss does not always negatively affect the domestic industry's ability to raise capital. Japan contends that "[t]he markets are full of examples of companies and industries that have had continuing operating losses and are nevertheless eagerly sought out by investors and able to raise large amounts of capital".[284] For this reason, Japan argues that it is not sufficient for the KTC to state in its evaluation of the domestic industry's ability to raise capital that "the continuing operating loss of the domestic industry is weakening its internal capital raising capacity, and the increase in debt caused by such operating loss is weakening the external capital raising capacity as well". Korea argues that the KTC evaluated the domestic industry's ability to raise capital. Korea contends that the KTC has reached its conclusion on the basis of the audited reports of the domestic producers.[285]

7.182. The KTC stated, with respect to its evaluation of investment:

> According to the [OTI's] Investigation Report, the investment in facility by the domestic industry was KRW [[***]] in 2010, KRW [[***]] in 2011, KRW [[***]] in 2012 and KRW [[***]] in 2013, showing *a sharp increase in 2011 and 2012*. As discussed previously, the domestic industry expanded its investment in facility, in the expectation that economic recovery and the expansion of investment in automation would increase demand, but the domestic and international demand significantly decreased in 2012 due to the fiscal crises in Europe, etc. and the dumped products largely dominated the domestic market, resulting in the failure to increase output in accordance with the expansion of the production capacity.
>
> Accordingly, the domestic industry's demand for investment in facility *is expected to shrink significantly* for the time being, and it appears that the dumped products are having potentially adverse impact on the domestic industry's investment in facility.

[280] Panel Report, *EC – Bed Linen (Article 21.5 – India)*, para. 6.162.
[281] Japan argues in its first written submission that the KTC failed to evaluate at all these two factors. (Japan's first written submission, para. 144). However, in its second written submission, Japan argues instead that the KTC's examination was not adequate. (Japan's second written submission, paras. 143-144 and 145-147).
[282] Appellate Body Reports, *US – Hot-Rolled Steel*, paras. 196-197; *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.203.
[283] Japan's first written submission, paras. 174-176.
[284] Japan's second written submission, para. 146.
[285] Korea's first written submission, para. 229.

> The domestic industry is making efforts for technological development, e.g., by spending more than KRW [[***]] per year since 2011 despite the operating losses, but the ratio of R&D spending to the sales amount increased only in 2011 and has since decreased continuously.
>
> Due to the continued operating loss, the domestic industry's internal capability for investment is dwindling and the demand for investment in facility is shrinking as the capacity utilization of facilities and the market share decrease due to the rapid growth in the import of the dumped products. In sum, it appears that the overall growth of the domestic industry has been significantly undermined.
>
> ...
>
> *The continuing operating loss of the domestic industry is weakening its internal capital raising capacity, and the increase in debt caused by such operating loss is weakening the external capital raising capacity as well*.[286]

7.183. The parties do not disagree that, as the KTC observed, investment expanded in 2011 and 2012. The KTC itself characterized the expansion as a "sharp increase" in investment. Japan essentially takes issue with the relative weight the KTC gave to this expansion in its overall evaluation of the domestic industry's ability to raise investments. In Japan's view, the fact that investment expanded in those two years contradicts the KTC's overall evaluation of the domestic industry's ability to raise capital.

7.184. We are not persuaded by Japan's arguments. Having found that investment increased sharply from 2011 to 2012, the KTC went on to analyse the reasons for the increase in the first place, and the impact of the fiscal crisis-led contraction in demand on investment. The KTC did not find any actual decline in investment, but referred to a potential decline in investment, noting "the domestic industry's demand for investment in facility is expected to shrink significantly for the time being". Concerning the domestic industry's funding ability, the KTC again observed that the domestic industry's R&D expenditure increased after 2011 despite operating losses, but noted that the ratio of R&D expenditure to sales increased only in 2011 and decreased continuously thereafter.

7.185. In order to demonstrate that the KTC acted inconsistently with Articles 3.1 and 3.4, Japan bears the burden of persuading us that the KTC's analysis was not objective and that a reasonable and unbiased investigating authority could not have evaluated the ability of the domestic industry to raise capital as the KTC did. The mere allegation that an increase in investment expansion during one part of the period of trend analysis somehow contradicts the KTC's finding that investment is expected to shrink due to over-investment and low capacity utilization is not sufficient in this regard. In the context of declining demand for the product in the domestic market and operating losses in the domestic industry, we do not see a necessary contradiction between the fact that investment increased in the first two years of the period examined and the KTC's overall evaluation that the industry's ability to fund investment decreased by the end of the period. Moreover, we are not persuaded that the KTC's view that the continued operating losses weakened the domestic industry's ability to raise capital is one that no reasonable and unbiased investigating authority could have reached. While we agree that it is possible that a loss-making enterprise may still be able to raise capital on the market by taking a loan or selling its shares, under normal market conditions, a company's ability to raise capital is strengthened if it is profit making, and is weakened when it is loss making. Japan has not pointed to any facts on the record that would suggest that in this case, it was unreasonable for the KTC to consider that the normal situation prevailed.

7.186. In light of the above, Japan has not demonstrated that the KTC's evaluation of the investment and funding ability of the domestic industry is not one that a reasonable and objective investigating authority could make in light of the evidence and arguments before it.

[286] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), pp. 25-26. (emphasis added; fn omitted)

7.7.5.2.2 Magnitude of the margin of dumping

7.187. Japan argues that the KTC's conclusion regarding the magnitude of the margin of dumping has no factual support and is contradicted by the fact that the dumped imports oversold the domestic like products.[287]

7.188. In its Final Resolution, the KTC stated, with respect to its evaluation of the magnitude of the margin of dumping:

> As discussed previously, the final dumping margins of the dumped products were ranged between 11.66% and 31.61%, which means the size of dumping margin is not insignificant. Accordingly, such dumping appears to have had significant impact on the sales price of the dumped products and that of the like product.[288]

7.189. Article 3.4 does not require that the magnitude of the margin of dumping be evaluated in any particular manner or be given any particular weight. However an evaluation of the magnitude of the margin of dumping in the assessment of the impact of dumped imports on the domestic industry must "be undertaken as a substantive matter".[289] "[A]n investigating authority is required to evaluate the magnitude of the margin of dumping and to assess its relevance and the weight to be attributed to it in the injury assessment."[290] Simply listing of the margins of dumping, whether in the application for the initiation of the investigation[291], in the context of the determination of dumping in the investigation report[292], in the consideration of whether a cumulative assessment under Article 3.3 of the Anti-Dumping Agreement is appropriate[293], or in the consideration of whether margins of dumping are more than *de minimis* within the meaning of Article 5.8 of the Anti-Dumping Agreement[294], is not sufficient to demonstrate that the magnitude of the margin of dumping was evaluated within the meaning of Article 3.4.

7.190. In the present case, the KTC did more than merely list or indicate the existence of margins of dumping of a particular magnitude in its determination. Rather, it observed that the dumping margins were significant, and consequently that dumping had had a significant impact on prices of both the dumped product and the domestic like product. There is no dispute as to the actual information regarding the magnitude of the margins of dumping evaluated. Japan simply disagrees with the KTC's observations as to the import of those margins.

7.191. We recall that there is no guidance in the Anti-Dumping Agreement regarding methodology for the evaluation of economic factors in the context of Article 3.4. We fail to see any textual basis for Japan's argument that, in order to evaluate the magnitude of the margins of dumping, an investigating authority is *required* to undertake some form of counterfactual analysis, specifically in this case by adding the dumping margin to the actual prices of the dumped imports, or comparing the magnitude of the dumping margin with the level of overselling.[295] Japan itself acknowledges that an investigating authority is not always required to conduct a counterfactual analysis in order to evaluate the magnitude of the margins of dumping. Rather Japan suggests that such an analysis may be of particular importance depending on the specific factual circumstances of a case.[296] However, even assuming that such an analysis might be relevant, a question which is for an investigating authority to consider in the first instance, Japan has failed to demonstrate what specific factual circumstances made such an analysis obligatory in this case. In our view, the KTC's statement in its Final Resolution is sufficient to demonstrate that it evaluated the magnitude of the margins of dumping "as a substantive matter".

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[287] Japan's first written submission, paras. 177-178 (referring to KTC's Final Resolution, (Exhibit JPN-4(b)), p. 26).
[288] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 26.
[289] Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.162.
[290] Panel Report, *China – X-Ray Equipment*, para. 7.183.
[291] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.321.
[292] Panel Report, *China – X-Ray Equipment*, paras. 7.183-7.184.
[293] Panel Report, *Russia – Commercial Vehicles*, para. 7.161 (adoption/appeal pending).
[294] Panel Reports, *China – HP-SSST (Japan)/China – HP-SSST (EU)*, paras. 7.161-7.162.
[295] Japan's responses to Panel question No. 45, para. 91, and No. 46, para. 95.
[296] Japan's response to Panel question No. 47, para. 96.

7.7.5.3 Conclusion

7.192. Accordingly, we conclude that, to the extent its claim is within the Panel's terms of reference, Japan has failed to establish that the Korean Investigating Authorities acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement with respect to the examination of the impact of the dumped imports on the state of the domestic industry.

7.8 Causation

7.8.1 Introduction

7.193. Japan brings three separate claims under Articles 3.1 and 3.5 of the Anti-Dumping Agreement.[297] According to Japan: (a) the KTC's causation analysis is undermined by its flawed price effects and volume analyses under Article 3.2, and by its flawed impact analysis under Article 3.4, "irrespective and independent of" whether the Panel finds these three analyses to be inconsistent with Articles 3.2 and 3.4; (b) the KTC failed to properly establish a causal link between the dumped imports and the alleged injury[298]; and (c) the KTC failed to conduct a proper non-attribution analysis.

7.194. Korea argues that Japan's claims under Articles 3.1 and 3.5 are all outside the Panel's terms of reference because Japan's panel request does not comply with the requirements of Article 6.2 of the DSU with respect to these claims. In the alternative, Korea asks the Panel to reject Japan's claims.

7.8.2 Main arguments of the parties

7.8.2.1 Japan

7.8.2.1.1 First claim: "independent" causation claim

7.195. Japan argues that the KTC's causation determination was undermined by its flawed analyses of the volume of the dumped imports, the price effects and the impact of the dumped imports on the state of the domestic industry, "irrespective and independent" of whether the Panel finds the KTC's analyses of volume, the price effects and impact to be inconsistent with Articles 3.2 and 3.4 of the Anti-Dumping Agreement.[299]

7.8.2.1.2 Second claim: Alleged failure to properly establish a causal link

7.196. Japan asserts that the KTC failed to demonstrate the existence of a causal link between the dumped imports and the state of the domestic industry. In Japan's view, the absence of sufficient correlation between the trends in volumes, prices, and the domestic industry's profits casts doubt on the existence of any causal link:

a. Insufficient correlation in the key volume trends: The fact that the volume of dumped imports decreased from 2010 to 2012 (i.e. during most of the period of trend analysis), and the fact that the domestic industry's market share remained stable on an end-point to end-point basis undermine the existence of a causal link.

b. Insufficient correlation in the key price trends: The diverging price trends in 2012 and 2013 do not suggest the necessary causal link: (i) prices of dumped imports increased in 2012 while the prices of the domestic like product decreased; and (ii) prices of the dumped imports fell sharply in 2013 while the prices of the domestic like product only decreased slightly.

c. Insufficient correlation in the trends of the profits of the domestic industry: The domestic industry incurred losses from 2010 to 2012, when the prices of dumped imports increased and their volumes decreased. When the prices of dumped imports increased

[297] Japan's panel request, p. 2.
[298] Japan's first written submission, para. 185.
[299] Japan's first written submission, paras. 192-196; second written submission, paras. 153-154.

in 2012, and their volumes and market share decreased, the domestic industry should have been in good health. Instead, the declining profits of the domestic industry in 2012 and 2013 show that the domestic industry was incurring losses regardless of the trends in the dumped imports' volumes and prices.

d. Finally, the KTC failed to consider the cumulative effects of the above-mentioned inconsistencies in its reasoning.[300]

7.197. Japan contends that, although the OTI's Final Report documented the above-mentioned diverging trends and inconsistencies, the KTC's Final Resolution largely overlooked them and, in its "overall evaluation" section, focused on the year 2013 in isolation.[301]

7.8.2.1.3 Third claim: Alleged failure to conduct a proper non-attribution analysis

7.198. Japan argues that the KTC failed to conduct an objective analysis of certain known factors other than the dumped imports allegedly causing injury to the domestic industry at the same time as dumped imports, and failed to examine at all some other known factors. According to Japan, the following factors were inadequately considered by the KTC: (a) third country imports; (b) trends in domestic consumption; and (c) exports by the Korean industry. The following factors allegedly were not considered at all: (a) the extent to which Korean producers other than the applicants were gaining volume and market share; (b) the extent to which Korean producers other than the applicants were affecting domestic prices; and (c) the competition between the two applicants.[302]

7.199. Japan asserts that the KTC failed to explain its finding that third country imports played almost no role in the injury suffered by the domestic industry. The OTI mentioned in its Final Report that third country imports were minimal in absolute terms, but the KTC failed to make this point in its Final Resolution. Moreover, the KTC failed to address the impact of the 62.2% decrease in the prices of third country imports on the prices of the domestic industry. The KTC failed to examine the impact on the domestic industry of dumped imports and third country imports (both of which were priced higher than the domestic like product) consistently.[303] Japan argues that the KTC failed to compare the rates of change in the volumes of dumped imports and third countries imports, and to compare the sizes of the increased quantities of the dumped imports and the third country imports. In Japan's view, the KTC also failed to compare the changes in market share of the dumped imports and third country imports.[304]

7.200. Japan submits that, by finding that it is uncertain whether the decrease in domestic consumption from 2010 to 2012 had a negative impact on the domestic industry, the KTC failed to conduct a proper non-attribution analysis. Japan makes the following arguments in support of this assertion:

a. The KTC "misleadingly cited" a 5.9% increase in domestic industry sales from 2010 to 2012 when consumption declined during the same two-year period.[305] The KTC's reliance on this increase, which covers the two-year period from 2010 to 2012, is contradicted by the decrease in the domestic industry's sales by 6.6% from 2011 to 2012.[306]

b. The KTC "misleadingly cited" an increase in the domestic industry's market share in 2012. The domestic industry's market share increased because the volume of dumped imports decreased much more than did the domestic industry's sales. Therefore the increase in domestic industry market share does not support the KTC's conclusion that the domestic industry was not adversely affected by the sharp decline in consumption.[307]

[300] Japan's first written submission, paras. 197-210.
[301] Japan's first written submission, para. 209.
[302] Japan's first written submission, paras. 212-229.
[303] Japan's first written submission, para. 214.
[304] Japan's second written submission, paras. 173 and 175.
[305] Consumption declined by 25.4% from 2010 to 2012. (KTC's Final Resolution, (Exhibit JPN-4(b)), p. 26).
[306] Japan's first written submission, para. 216.
[307] Japan's first written submission, para. 217.

c. The KTC failed to consider the impact of the decline in consumption on the decline in domestic industry prices in 2012.[308]

d. The KTC's finding that the consumption hike in 2013 brought no positive impact is undermined by the fact that the domestic industry's sales increased by 7.6% following the 52.8% increase in consumption in 2013.[309]

e. The KTC focused on quantities, but failed to examine the impact of consumption on the domestic industry's sales by value. When measured by value, the trends strongly indicate that the domestic industry's sales performance was significantly affected by the changes in consumption.[310]

7.201. Japan also argues that the KTC failed to conduct a proper non-attribution analysis concerning the impact of the domestic industry's export performance. The decline in the domestic industry's exports contributed to the adverse conditions in the industry in 2012, such as the decline in sales and the increased operating losses. According to Japan, the weak performance of the domestic industry in 2013 was also due to weak exports in that year.[311]

7.202. Japan submits that the KTC entirely failed to conduct a non-attribution analysis of the impact of the domestic producers not part of the domestic industry on the sales, prices, and market share of the domestic industry. In Japan's view, these producers may have had some effect on market prices, and may have gained sales and market share from the domestic industry. Japan argues that the KTC had partial data from at least two such domestic producers (Yonwoo Pneumatic and Shin Yeong Mechatronics). Despite the fact that information concerning these producers was limited, the KTC should have examined the trends of sales and market share for all four of these domestic producers as well as the extent to which the producers not part of the domestic industry were affecting domestic prices, instead of limiting its analysis to the two applicants only.[312]

7.203. Japan also argues that the KTC failed to conduct a proper non-attribution analysis of the impact of possible competition between the two applicants themselves. The expansion of the domestic industry's capacity in 2011 and a sharp decline in consumption in 2012 set the stage for more intensive competition between these two domestic producers, leading to a decline in domestic industry sales and prices in 2012.[313]

7.204. Finally, Japan argues that the KTC also failed to consider the cumulative effect of all known factors. Even if some of these known factors in isolation do not break the causal link, several of these factors collectively may have broken this link.[314]

7.8.2.2 Korea

7.8.2.2.1 First claim: "independent" causation claim

7.205. Korea argues that Japan's "independent" causation claim is entirely consequential, and should be rejected for the same reasons it elaborated concerning Japan's claims with respect to the KTC's volume, price effects, and impact analyses.[315]

7.8.2.2.2 Second claim: Alleged failure to establish a causal link

7.206. Korea responds that the KTC examined and explained the basis for its finding of a causal relationship between the dumped imports and injury to the domestic industry by finding coincidence and correlation in trends between the dumped imports and the injury factors.[316]

[308] Japan's first written submission, para. 218.
[309] Japan's first written submission, para. 219.
[310] Japan's first written submission, para. 220.
[311] Japan's first written submission, para. 222.
[312] Japan's first written submission, paras. 225-227.
[313] Japan's first written submission, paras. 228-229.
[314] Japan's first written submission, paras. 230-231.
[315] Korea's first written submission, para. 260.

7.207. Concerning the volume trends, Korea argues that the fact that the domestic industry's market share in 2013 returned to its 2010 level does not in and of itself undermine the KTC's finding of correlation between the key volume trends. The correlation between the dumped imports' volume and the market share of the domestic industry is established by the fact that when the dumped imports' volume decreased in 2011 and 2012, the market share of the domestic industry increased; when the volume of the dumped imports increased in 2013, the domestic industry's market share fell sharply.[317]

7.208. Concerning the price trends, Korea reiterates its view that Japan's argument, that there was a diverging trend between dumped imports and the domestic like product, is without foundation.[318]

7.209. In response to Japan's argument that the domestic industry's operating loss was unaffected by the dumped imports, Korea argues that the KTC adequately explained its assessment of the domestic industry's operating loss in 2012.[319]

7.210. In response to Japan's argument that the KTC's causation determination was based on the situation in 2013 in isolation, Korea argues that the KTC did not focus on 2013 in isolation but rather examined trends over the period of trend analysis, including 2013, when dumping occurred. Korea further argues that Japan was incorrect to focus only on the KTC's Final Resolution. In Korea's view, the OTI's Final Report was available to all parties and contains important analyses of facts upon which the KTC based its determination.[320]

7.8.2.2.3 Third claim: Alleged failure to conduct a proper non-attribution analysis

7.211. Korea argues that the KTC properly examined the effect of imports from third countries. The KTC examined the volume of those imports both in absolute terms and in terms of market share. The KTC also examined the price effects of the third country imports, observing that those prices were the highest in the domestic market. In light of the small market share of imports from countries other than Japan, i.e. [[***]]%, the KTC properly concluded that third country imports "had almost no adverse impact on the domestic industry".[321]

7.212. Korea notes that Japan takes issue with certain KTC findings relating to developments in 2011 and 2012. Korea argues, however, that the KTC's injury determination was primarily based on the trends in 2013, when the domestic industry lost significant market share, despite a sharp increase in consumption. For this reason, the KTC found that changes in domestic consumption did not affect the injury suffered by the domestic industry in 2013. The KTC also concluded that for the period between 2010 and 2012, the negative impact of decreased consumption on the domestic industry's condition was not clear because during this period both the sales and the market share of the domestic industry increased.[322]

7.213. Korea also argues that the KTC examined the impact of the domestic industry's export performance by quantifying the impact of the export volume *vis-à-vis* the domestic industry's capacity utilization, and found that the export volume did not affect domestic prices in light of the low capacity utilization. The KTC also examined the correlation between the domestic industry's export performance and the development of major indicators having a bearing on the state of the domestic industry, and concluded that the fluctuations in export performance did not coincide with the overall trends of the state of domestic industry.[323]

7.214. Finally, Korea rejects Japan's assertion that the KTC should have considered the impact of competition between domestic producers. According to Korea, the issue of domestic competition was not a "known" factor because it was not "clearly raised" before the investigating authority.[324]

[316] Korea's first written submission, para. 262.
[317] Korea's first written submission, paras. 264-265.
[318] Korea's first written submission, para. 266.
[319] Korea's first written submission, paras. 267-269.
[320] Korea's first written submission, paras. 270-274.
[321] Korea's first written submission, para. 278.
[322] Korea's first written submission, paras. 279-282 and fn 358.
[323] Korea's first written submission, paras. 283-286.
[324] Korea's first written submission, paras. 287-288.

Korea argues that WTO jurisprudence confirms that only factors that are "clearly raised" before an investigating authority and that are properly substantiated with evidence of injury caused to the domestic industry must be examined by investigating authorities as part of the non-attribution analysis.[325] According to Korea, there is no obligation under Article 3.5 for investigating authorities to seek out and examine on their own initiative the effects of all possible factors.[326]

7.8.3 Panel's terms of reference

7.8.3.1 Japan's first claim under Articles 3.1 and 3.5 of the Anti-Dumping Agreement

7.8.3.1.1 Main arguments of the parties

7.215. In its panel request, Japan asserts that Korea's measures are inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement:

> [B]ecause Korea's demonstration of causation lacks any foundation in its analyses of the volume of the imports under investigation, the effects of the imports under investigation on prices, and/or the impact of the imports under investigation on the domestic industry at issue, *irrespective and independent* of whether Korea's flawed analysis of the volume and/or flawed analysis of the effects of the imports under investigation on prices, on the one hand, and Korea's flawed analysis of the impact of the imports under investigation on the domestic industry on the other, would be inconsistent with, respectively, Articles 3.1 and 3.2 of the AD Agreement and Articles 3.1 and 3.4 of the AD Agreement[.][327]

7.216. In its preliminary ruling request, Korea argues that this claim:

> [I]s unclear at even the most general level and is clearly insufficient to present the problem clearly and to allow Korea to start preparing its defence. … Japan's panel request seems to suggest that Article 3.5 would be violated as a consequence of the allegedly flawed volume, price effects and overall injury analysis even if the Panel were to reject all of the relevant challenges that Japan brought under Articles 3.1, 3.2 and 3.4. Korea is left wondering whether this claim sets forth a new "claim" and if so what the legal basis of this claim would be. Is Japan's claim that a WTO consistent volume, price and overall injury analysis cannot be the basis of a WTO consistent causation analysis? Or is the claim that there was a consequential violation of Article 3.5 because the alleged flaws identified by Japan were perhaps not sufficient to establish a WTO violation under the respective legal provision but still sufficiently problematic to have a consequential impact on the causation determination? It is simply impossible to tell from Japan's panel request[.][328]

7.217. Japan contends that it set forth an "*independent* [claim] of violation of Article 3.5 with respect to Korea's flawed volume, price effects, and impact analyses, even if the Panel should find that those flaws do not constitute violations of Articles 3.2 and 3.4". According to Japan, the Appellate Body has "clarified the distinction between a *consequential* claim and an *independent* claim under Article 3.5. … Thus, a panel may reach a conclusion that an investigating authority has violated Article 3.5 due to the flaws in its volume, price effects, and impact analyses, even if these analyses are consistent with Articles 3.2 and 3.4, but in order for a panel to address such possibility, the complaining Member must make it clear that it is advancing *independent* claims under Article 3.5".[329]

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[325] Korea's first written submission, para. 288 (referring to Panel Report, *Thailand – H-Beams*, para. 7.273; and *China – X-Ray Equipment*, para. 7.267; and Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 175); second written submission, para. 127; and response to Panel question No. 53.

[326] Korea's second written submission, para. 128; response to Panel question No. 53.

[327] Japan's panel request, p. 2. (emphasis added)

[328] Korea's preliminary ruling request, para. 38. See also first written submission, annex, paras. 5, 6, and 11.

[329] Japan's response to Korea's preliminary ruling request, paras. 57-58 (referring to Panel Reports, *China – HP-SSST* (Japan) / *China – HP-SSST* (EU), paras. 7.189-7.192; and Appellate Body Reports, *China – HP-SSST* (Japan) / *China – HP-SSST* (EU), paras. 5.287-5.298) (emphasis original). We note that Japan's

7.8.3.1.2 Evaluation by the Panel

7.218. On its face, Japan's panel request alleges that Korea's demonstration of causation lacks any foundation in its analyses of volume of dumped imports, effects of imports on prices, and the impact of those imports on the domestic industry, "*irrespectively and independently"* of whether Korea's analyses are found to be inconsistent with Articles 3.1, 3.2, and 3.4 of the Anti-Dumping Agreement. Article 3.5 requires an investigating authority to demonstrate that "the dumped imports are, through the effects of dumping, as set forth in [Articles 3.2 and 3.4], causing injury" to the domestic industry. In our view, the narrative in Japan's panel request, albeit brief, is sufficiently precise on its face to present the problem clearly, namely that, in Japan's view, the KTC's causation determination is undermined by certain aspects of its volume, price effects, and impact analyses whether or not those aspects are inconsistent with Article 3.1, 3.2, or 3.4 of the Anti-Dumping Agreement.

7.219. Korea argues that the term "irrespectively and independently" in Japan's panel request makes it unclear whether this allegation sets forth a new "claim" and if so what the legal basis of this claim would be. In our view, Japan's "independent claim" is contingent in nature. If we were to find that the KTC's consideration of volume and price effects and examination of impact are inconsistent with Articles 3.1, 3.2, and/or 3.4, such inconsistencies would support finding a consequential violation of Articles 3.1 and 3.5, and there would be no need to go on to consider Japan's independent claim of inconsistency with Articles 3.1 and 3.5. However, if we were to reject all of Japan's allegations of inconsistency under Articles 3.1, 3.2, and 3.4, in light of the "irrespectively and independently" language, we would need to go on to examine whether the KTC's determination of a causal relationship is inconsistent with Article 3.5 because of the alleged flaws in the KTC's analysis of volume, price effects, and impact in that determination.

7.220. The first decision scenario described above is easy to understand. Panels have found consequential violations of Article 3.5 following findings of inconsistency in an investigating authority's consideration of volume and price effects and examination of impact under Articles 3.1, 3.2, and 3.4, to the extent that the investigating authority relied on these analyses in finding a causal relationship.[330] This aspect of Japan's claim is clear on the face of the panel request, and is confirmed by Japan's written submissions.[331]

7.221. The nature of the independent claim in the second decision scenario is less evident. Although a WTO-consistent consideration of volume and price effect, or examination of impact cannot lead to a finding of consequential violation of Article 3.5, we cannot preclude the possibility that an investigating authority's determination of causation may be inconsistent with Article 3.5 due to inadequacies in its analysis of the volume, price effects, or impact of dumped imports, even if these do not demonstrate a violation of Articles 3.2 and/or 3.4. Japan's claim seems to rest on the following premises:

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

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

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

7.222. In order to confirm our understanding of the nature of Japan's claim, we carefully reviewed its written submissions. We have found that Japan's arguments in the context of its independent claim are the same as those in support of its allegations of inconsistency with Articles 3.1, 3.2, and 3.4. While its claim may be independent, Japan makes no new, separate or additional

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independent causation claim is brought under Articles 3.1 and 3.5, and not only under Article 3.5 of the Anti-Dumping Agreement.

[330] See, for example, Panel Reports, *China – GOES (Article 21.5 – US)*, para. 7.124; *China – X-Ray Equipment*, para. 7.239; *China – Autos (US)*, paras. 7.327-7.328; *China – HP-SSST (Japan)/China – HP-SSST (EU)*, para. 7.191; *Russia – Commercial Vehicles*, para. 7.182 (adoption/appeal pending); and *China – Cellulose Pulp*, para. 7.146.

[331] Japan's first written submission, para. 192; second written submission, paras. 153-154.

arguments in support of that claim, simply referring back to certain of the arguments it made in support of its claims under Articles 3.1, 3.2, and 3.4 to support its independent claim of inconsistency with Articles 3.1 and 3.5.

7.223. In its first written submission, with respect to volume, Japan argues that the following two elements "disprove" the existence of a causal relationship between the dumped imports and the injury to the domestic industry:

a. dumped imports decreased in two out of the three years of the period of trend analysis; and

b. the volume of dumped imports increased only modestly in absolute terms and decreased in market share in 2013 compared with 2010.[332]

7.224. With respect to price effects, Japan argues that the following two elements "disprove" the existence of a causal relationship between the dumped imports and the injury to the domestic industry:

a. dumped import prices consistently and significantly oversold domestic prices;

b. there is a lack of parallelism in the price trends of the dumped imports and domestic like product; and

c. there is no competitive relationship between the dumped imports and the domestic like product.[333]

7.225. With respect to impact, Japan argues that the following three elements "disprove" the existence of a causal relationship between the dumped imports and the injury to the domestic industry:

a. there is no logical connection between the effects of the dumped imports and the condition of the domestic industry;

b. the KTC failed to examine two factors specifically required by the Anti-Dumping Agreement; and

c. the KTC ignored certain positive trends.[334]

7.226. In the circumstances of the present case, it is clear that Japan has asserted an independent claim that aspects of the KTC's consideration of the volume and price effects, and examination of the impact, of dumped imports preclude the finding of a causal relationship consistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement. We therefore conclude that the independent causation claim advanced by Japan is within the Panel's terms of reference.

7.227. We note, however, that Japan made a variety of arguments in support of its claims under Articles 3.1, 3.2, and 3.4, but has only referred to a selected few of those arguments in support of its independent causation claim. We will limit our examination of Japan's independent causation claim to those specific aspects of the KTC's consideration of the volume and price effects, and examination of the impact, of dumped imports identified by Japan in its submissions as independently demonstrating the inconsistency of the KTC's determination of causation. Further, we recall that we have concluded that Japan's claims under Articles 3.2 and 3.4 are outside the Panel's terms of reference in this dispute[335], and we will therefore not consider any arguments made in connection only with those claims in our examination of Japan's independent causation claim.

[332] Japan's first written submission, para. 194 (referring to first written submission, section V.C).
[333] Japan's first written submission, para. 193 (referring to first written submission, section V.B).
[334] Japan's first written submission, para. 195 (referring to first written submission, section V.D).
[335] See sections 7.5, 7.6, and 7.7 above.

7.8.3.2 Japan's second claim under Articles 3.1 and 3.5 of the Anti-Dumping Agreement

7.8.3.2.1 Main arguments of the parties

7.228. In its panel request, Japan asserts that Korea's measures are inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement, "because Korea failed to demonstrate that the imports under investigation were, through the effects of dumping, causing injury to the domestic industry based on an objective examination of the alleged causal relationship between the imports under investigation and the alleged injury to the domestic industry, on the basis of all relevant positive evidence before the authorities".[336]

7.229. In its preliminary ruling request, Korea argues that Japan's panel request:

> [S]imply refers to the challenged measures and the general obligations of Articles 3.1 and 3.5 to demonstrate the existence of a causal relationship and to conduct a non-attribution analysis without connecting any specific aspect of the challenged final determination with a specific obligation contained in these provisions. Article 3.5 is a multi-faceted provision[.] … However, nothing in Japan's panel request allows Korea to know which of these legal obligations Japan's complaint is related to and "how and why" it considers that the Korean investigating authority acted inconsistently with these legal obligations.[337]

7.230. In response, Japan argues that its panel request comprises three separate and distinct claims related to Article 3.5. The claim at issue relates "to the first two sentences of Article 3.5 that both relate to the core obligation of demonstrating the 'causal relationship'". According to Japan, its panel request "plainly connects Korea's failure to demonstrate the causal relationship with the specific obligation of the demonstration of the causal relationship".[338]

7.8.3.2.2 Evaluation by the Panel

7.231. Japan's panel request with respect to its second causation claim alleges that Korea's measures are inconsistent with Articles 3.1 and 3.5 because:

> Korea failed to demonstrate that the imports under investigation were, through the effects of dumping, causing injury to the domestic industry based on an objective examination of the alleged causal relationship between the imports under investigation and the alleged injury to the domestic industry, on the basis of all relevant positive evidence before the authorities[.][339]

This formulation paraphrases the language of the first part of Article 3.1 ("a determination of injury … shall be based on positive evidence and involve an objective examination") and the first two sentences of Article 3.5.

7.232. On its face, Japan's panel request contains two aspects:

a. Korea failed to conduct an objective examination of the alleged causal relationship on the basis of all relevant positive evidence before the authorities; and

b. Korea failed to demonstrate any causal relationship between the dumped imports and the injury to the domestic industry.

7.233. With respect to the first aspect, as we have discussed earlier, a general reference to the language of Article 3.1 in itself is not normally sufficient to present the problem clearly.[340] However, Japan's claim is qualified by the second aspect, its assertion that Korea failed to demonstrate any causal relationship between the dumped imports and the injury to the domestic

[336] Japan's panel request, p. 2.
[337] Korea's preliminary ruling request, para. 35. See also first written submission, annex, paras. 5, 6, and 11.
[338] Japan's response to Korea's preliminary ruling request, paras. 46 and 48-50.
[339] Japan's panel request, p. 2.
[340] See para. 7.35 above.

industry on the basis of all of the evidence before the investigating authority. We recall that the first sentence of Article 3.5 provides specifically that it must be "demonstrated that the dumped imports are, through the effects of dumping … causing injury". Thus, this obligation establishes the ultimate question on which the imposition of an anti-dumping measure rests: whether there is a causal relationship between dumped imports and injury, that is, a relationship in which dumped imports contribute to "bringing about", "producing", or "inducing" material injury.[341] This question is fundamental given that anti-dumping measures can only be imposed if the answer is yes, in light of Article VI:1 of the GATT 1994, which provides "dumping … is to be condemned if it causes or threatens material injury".[342] Absent a causal relationship between dumped imports and injury, no anti-dumping measure can be imposed regardless of the extent of the dumping or the injury. Japan's presentation of the problem in its panel request is unequivocal in this regard. It alleges that the KTC failed to demonstrate causation. In light of the nature of the obligation at issue, we consider that despite its brevity, the panel request makes it clear that Japan's claim focuses on the alleged failure to demonstrate the existence of a causal relationship between dumped imports and injury to the domestic industry. Japan's formulation thus meets the minimum requirement to connect the challenged measure with the obligation at issue, so that the respondent party and other Members are aware of the nature of the complaint.

7.234. The allegations raised in Japan's submissions, that there is a lack of correlation in the trends of volumes, prices, and profits, can be considered arguments in support of its claim that the KTC failed to demonstrate any causal relationship between the dumped imports and injury to the domestic industry. Japan's panel request in this regard is extremely succinct and could have provided a more explicit description of the legal basis of the complaint. Nonetheless, in our view, with respect to Japan's claims concerning the Korean Investigating Authorities' demonstration of the existence of a causal relationship, the panel request suffices, albeit barely, to explain *how* or *why* Japan considers the measures at issue to be inconsistent with the specific WTO obligations in question, namely those in Articles 3.1 and 3.5 of the Anti-Dumping Agreement. More specifically, the brief description provided in Japan's panel request is just sufficient to present the problem clearly and to explain *how* or *why* Japan considers the measures at issue to be inconsistent with the specific WTO obligations in question.

7.235. Accordingly, we consider that Japan's allegation that the KTC failed to demonstrate any causal relationship between the dumped imports and the injury to the domestic industry, and thus acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement, is within the Panel's terms of reference.

7.8.3.3 Japan's third claim under Articles 3.1 and 3.5 of the Anti-Dumping Agreement

7.8.3.3.1 Main arguments of the parties

7.236. In its panel request, Japan asserts that Korea's measures are inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement, "because Korea failed to consider adequately all known factors other than the imports under investigation that were injuring the domestic industry at the same time and therefore incorrectly attributed injury caused by these other factors to the imports under investigation".[343]

7.237. In its preliminary ruling request, Korea argues that Japan's panel request:

> [S]imply refers to the challenged measures and the general obligations of Articles 3.1 and 3.5 to demonstrate the existence of a causal relationship and to conduct a non-attribution analysis without connecting any specific aspect of the challenged final determination with a specific obligation contained in these provisions. Article 3.5 is a multi-faceted provision. … However, nothing in Japan's panel request allows Korea to

[341] Appellate Body Report, *US – Wheat Gluten*, para. 67. While the Appellate Body was referring to the meaning of the "causal link" between increased imports and serious injury required under Article 4.2(b) of the Agreement on Safeguards in this case, we are of the view that prior decisions relating to the causation requirement in the Agreement on Safeguards can provide guidance in interpreting the very similar phrase "causal relationship" in Article 3.5 of the Anti-Dumping Agreement. (Appellate Body Report, *US – Hot-Rolled Steel*, para. 230).

[342] Article VI of the GATT 1994.

[343] Japan's panel request, p. 2.

know which of these legal obligations Japan's complaint is related to and "how and why" it considers that the Korean investigating authority acted inconsistently with these legal obligations.[344]

7.238. In response, Japan argues that this claim "concerns the distinct obligation regarding non-attribution analysis, as set forth in the third and fourth sentences of Article 3.5". In Japan's view, "[t]he text of Article 3.5 makes clear this obligation is distinct from and in addition to the obligation to show the 'causal relationship'". Japan argues that "the third and fourth sentences of Article 3.5 provide for a *single* integrated obligation to properly conduct a non-attribution analysis". According to Japan, its panel request "plainly connects Korea's inadequate non-attribution analysis to the obligation to properly conduct non-attribution analysis under Article 3.5".[345]

7.8.3.3.2 Evaluation by the Panel

7.239. On its face, Japan's panel request alleges that Korea failed to consider adequately all known factors other than the dumped imports that were injuring the domestic industry at the same time and therefore incorrectly attributed injury caused by these inadequately considered other factors to the dumped imports.

7.240. In our view, with respect to this claim, the panel request provides a brief explanation of *how* or *why* Japan considers the measures at issue to be violating the specific WTO obligations in question, namely those in Articles 3.1 and 3.5 of the Anti-Dumping Agreement, sufficient to present the problem clearly and to explain *how* or *why* Japan considers that the Korean Investigating Authorities' non-attribution analysis was flawed.

7.241. In this context, the allegations in Japan's submissions that the KTC considered three known factors other than the dumped imports that could be injuring the domestic industry in isolation, and failed to examine them adequately, may be seen as arguments seeking to demonstrate the claim set out in the panel request. Accordingly, we consider this aspect of Japan's panel request as setting forth a claim that is within the Panel's terms of reference.

7.242. In contrast, we recall that in the course of the proceedings, Japan has argued that the KTC ignored other known factors different than the dumped imports that it should have considered. As discussed above, however, on its face the panel request asserts that the KTC did not consider *adequately* all known factors causing injury to the domestic industry at the same time as imports. In our view, this allegation does not extend to cover the allegation that the KTC failed to consider some known factors *at all*. Nothing in the panel request even hints that the KTC failed to consider some known factors causing injury at all, much less what other known factors in Japan's view the KTC should have considered. Therefore, these additional assertions are not covered by the language used in Japan's panel request.

7.243. Accordingly, we conclude that Japan's non-attribution claim under Articles 3.1 and 3.5 of the Anti-Dumping Agreement, is limited to the allegation that the KTC considered certain known factors other than the dumped imports in isolation and dismissed them without adequately examining them. Any other allegations in this regard are not within the Panel's terms of reference, and we will neither consider them further nor resolve them.

7.8.3.4 Conclusion on the Panel's terms of reference

7.244. For the reasons stated above, we conclude that:

a. Japan's first causation claim is within the Panel's terms of reference;

b. Japan's second causation claim is within the Panel's terms of reference; and

[344] Korea's preliminary ruling request, para. 35. See also first written submission, annex, paras. 5, 6, and 11.
[345] Japan's response to Korea's preliminary ruling request, paras. 51-52 and 54. (emphasis original)

c. Japan's third causation claim is within the Panel's terms of reference only to the extent that it alleges that certain other known factors were examined by the KTC in an inadequate manner. All other allegations regarding the examination of other known factors are not within the Panel's terms of reference for this dispute, and we will neither consider them further nor resolve them.

7.8.4 Evaluation by the Panel

7.245. We now turn to Japan's three causation claims in turn.

7.8.4.1 Relevant provisions

7.246. Article 3.1 of the Anti-Dumping Agreement is set forth above. Article 3.5 of the Anti-Dumping Agreement provides that:

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

7.247. Article 3.5 requires that an investigating authority demonstrate, on the basis of an objective examination of positive evidence, that:

a. dumped imports are causing injury to the domestic industry; and

b. injury caused by other known factors is not attributed to the dumped imports.[346]

In making such a determination, the investigating authority must demonstrate a relationship of cause and effect, such that dumped imports are shown to have contributed to the injury to the domestic industry. Dumped imports need not be "the" cause of the injury suffered by the domestic industry, provided they are "a" cause of such injury.[347] That other factors may also have caused injury to the domestic industry is no bar to establishing this causal relationship.

7.248. Article 3.5 specifically refers to the "effects of dumping, as set forth in [Articles 3.2 and 3.4]" as elements of the demonstration of the causal relationship. Thus, in order to impose anti-dumping measures, an investigating authority must demonstrate that dumped imports are, through their volume, price effects, and impact on the domestic industry, causing material injury to the domestic industry. The outcomes of the consideration of volume and price effects of the dumped imports under Article 3.2 and the examination of the impact of the dumped imports on the state of the domestic industry are "necessary building block[s]"[348] for the demonstration required by Article 3.5.[349] That being said, however, it is clear to us that no particular intermediate findings are a necessary prerequisite for reaching and resolving the "ultimate question" under Article 3.5.[350] Moreover, an investigating authority is not limited, in addressing the issue of causation, to the consideration, examination, and evaluation of evidence with respect to the factors set forth in Articles 3.2 and 3.4. Article 3.5 provides that the demonstration of a causal relationship "shall be based on the examination of *all* relevant evidence before the authorities".[351]

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[346] Panel Reports, *Mexico – Steel Pipes and Tubes*, para. 7.352; *Thailand – H-Beams*, para. 7.262.
[347] Appellate Body Report, *US – Wheat Gluten*, para. 67.
[348] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.162.
[349] Appellate Body Report, *China – GOES*, para. 143.
[350] Panel Report, *China – Cellulose Pulp*, paras. 7.21-7.22.
[351] Emphasis added.

It is in our view certainly possible that evidence that does not fall squarely within the parameters of Articles 3.2 and 3.4 may be relevant and persuasive with respect to whether a causal relationship can be demonstrated.

7.249. With respect to non-attribution, Article 3.5 requires an investigating authority to examine other known factors that are causing injury to the domestic industry at the same time as dumped imports, and sets out an illustrative list of such factors.[352] It further requires that the investigating authority not attribute to dumped imports injuries caused by such other factors. The investigating authority must undertake an assessment that enables it to "separat[e] and distinguish[] the injurious effects of the other factors from the injurious effects of the dumped imports".[353] For this obligation to be triggered, however, the "other factor" at issue must be:

a. "known" to the investigating authority;

b. a factor "other than dumped imports"; and

c. injuring the domestic industry at the same time as the dumped imports.[354]

Article 3.5 sets forth no guidance on how an investigating authority is to analyse either causation of injury by dumped imports, or non-attribution.[355] The investigating authority's demonstration of causation and non-attribution is subject to the overarching obligation under Article 3.1 that the determination of injury must involve an objective examination based on positive evidence.

7.8.4.2 First claim: independent causation claim

7.8.4.2.1 Volume

7.8.4.2.1.1 Consideration of volume

7.250. We begin with Japan's allegation that certain flaws in the KTC's analysis of the volume of dumped imports "independently" undermine its causation determination.

7.251. Japan advances two grounds in support of this allegation:

a. the fact that the volume of dumped imports decreased in two years of the three-year period of trend analysis; and

b. the fact that the volume of dumped imports increased only modestly in absolute terms and decreased in terms of market share in 2013 compared with 2010.

Before evaluating Japan's arguments, we find it useful to set out the KTC's findings concerning the volume of the dumped imports.

7.252. In its Final Resolution, the KTC made the following findings concerning the volume of the dumped imports:

> According to the [OTI's] Investigation Report [the OTI's Final Report][*], the import volume of the product under investigation ("dumped products") decreased from [[***]] units in 2010, to [[***]] units in 2011, to [[***]] units in 2012, a decline of 9.8% and 32.0% year on year, and then increased to [[***]] units in 2013, an increase of 78.9% year on year. The import volume of 2013 represented an increase of [[***]]% from that of 2010.
>
> The market share of the dumped products in the domestic market also decreased from [[***]]% in 2010 to [[***]]% in 2011, to [[***]]% in 2012 and then

[352] Panel Report, *Thailand – H-Beams*, para. 7.275.
[353] Appellate Body Report, *US – Hot-Rolled Steel*, para. 223. See also Appellate Body Reports, *China – GOES*, para. 151; and *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.283.
[354] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 175.
[355] Appellate Body Report, *US – Hot-Rolled Steel*, para. 224.

> sharply increased to [[***]]% in 2013. The ratio of the import volume of the dumped products to the domestic production of the like product also decreased from [[***]]% in 2010 to [[***]]% in 2011, to [[***]]% in 2012 and then remarkably increased to [[***]]% in 2013.
>
> *Hence, the import of the dumped products decreased both in absolute and relative terms until 2012 and then sharply increased in 2013. Although the market share of the dumped products in 2013 did not reach that of 2010, it is clearly shown that the decreasing trend until 2012 was reversed into a sharp increase of imports in 2013.*
>
> On the contrary, the domestic market share of the like product was on continuous rise from [[***]]% in 2010 to [[***]]% in 2011, to [[***]]% in 2012 and then plummeted to [[***]]% in 2013, a similar level to 2010. *The sudden decrease of the market share in 2013 appears to have been affected by the dumped products given that the import volume of the dumped products largely increased and their price greatly fell in the same year*.[356]
>
> [*fn original][19] Investigation Report, pp. 46-51[.]

The KTC concluded:

> The Commission found that the import of the dumped products increased sharply in 2013 and their price also fell sharply in the same year, thereby suppressing increase of the price of the like product, which had already been lower than the reasonable price, and even causing the price decrease thereof.
>
> Despite the sharp increase in the domestic consumption in 2013, the domestic industry lost most of its market share it had gained up to 2012, due to the sharp growth in the import of the dumped products and the sharp drop in their price. …
>
> Such material injury to the domestic industry can be deemed to have been caused by the price effect of the dumped products which was confirmed by the final dumping margins at 11.66% - 31.61% and the increase in the import thereof.[357]

7.253. Therefore, it is clear that the KTC considered whether there was a significant increase in dumped imports in absolute terms, relative to domestic consumption, and relative to domestic production. The KTC found that, from each of these three perspectives, the volume of the dumped imports decreased from 2010 to 2012, then increased sharply from 2012 to 2013. With respect to market share, the KTC found that, although the market share of the dumped imports decreased on an end-point to end-point basis from 2010 to 2013, the decline from 2010 to 2012 turned into a sharp increase in 2013. In its determination of injury caused by dumped imports, the KTC considered the significant increase in dumped imports from 2012 to 2013 to be a factor suppressing and depressing domestic prices, which in turn led to a deterioration in the state of the domestic industry.

7.254. We begin with Japan's first argument, highlighting the fact that the volume of dumped imports decreased during the first two years of the three-year period of trend analysis. As indicated in the Final Resolution, the KTC found a "sharp increase" from 2012 to 2013 in absolute terms, relative to consumption, and relative to domestic production. The KTC also noted that "[t]he import volume of 2013 represented an increase of [[***]]% from that of 2010", that is, it found an absolute increase on an end-point to end-point basis from 2010 to 2013. In its causation determination, the KTC primarily relied upon the sharp increase in the volume of the dumped imports from 2012 to 2013. However, the KTC did not ignore the decline in dumped imports from 2010 to 2012. The KTC explained that, despite the decrease in imports in the first two years, there was a significant reversal in the trend from 2012 to 2013. We do not consider it unreasonable for the KTC to rely upon the 78.9% increase in the dumped imports from 2012 to 2013, the most recent period, which was the same year in which dumping was found. Nor are we persuaded that the fact that the dumped imports decreased during an earlier part of the period of trend analysis, from 2010 to 2012, undermines the KTC's causation determination, which as noted was primarily

[356] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 14. (emphasis added)
[357] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 27.

based on the undisputed sharp increase from 2012 to 2013. There is no basis in either the text of the Anti-Dumping Agreement or in logic for the view that an investigating authority can only make a determination of causation if it finds a significant increase in dumped imports for the period of trend analysis as a whole, or for each year of the period of trend analysis. The fact that the dumped imports decreased during the earlier part of the period of trend analysis does not, in itself, preclude the investigating authority from finding a causal link, particularly when, as in this case, the volume of the dumped imports increased sharply during the last year of the period of trend analysis, when dumping was found. Accordingly, we reject Japan's first ground of challenge.

7.255. We turn to Japan's second argument, that the KTC's causation determination is undermined by the fact that, on an end-point to end-point basis, there was no *significant* increase in dumped imports.

7.256. First, Japan argues that the [[***]]% increase in dumped imports in absolute terms from 2010 to 2013 was not significant. As mentioned above, we do not understand the KTC to have relied on a finding of a significant increase in dumped imports for the entire period of trend analysis. Unlike the increase from 2012 to 2013, which the KTC referred to variously as "sharp" or "remarkabl[e]", the KTC did not qualify the overall [[***]]% increase. The KTC merely observed that "[t]he import volume of 2013 represented an increase of [[***]]% from that of 2010", which is an undisputed fact. In this situation, we need not decide whether it would have been reasonable for the KTC to have considered a [[***]]% increase to be significant. In any event, in the context of its independent claim, it is for Japan, as the complaining party, to persuade us that the [[***]]% increase in dumped imports in absolute terms from 2010 to 2013 necessarily contradicted or undermined the KTC's causation determination, such that a reasonable investigating authority could not have reached that conclusion in the face of that evidence. Japan has failed to do so.

7.257. Second, Japan argues that, despite the [[***]]% increase in absolute terms, the market share of the dumped imports decreased from [[***]]% in 2010 to [[***]]% in 2013. Japan contends that this end-point to end-point decrease in dumped imports in relative terms "disproves" causation. As mentioned above, the KTC not only examined the trends in volume and market share on an end-point to end point basis, but also took into account the changes year-on-year. The KTC's causation determination was based primarily on the sharp increase in dumped imports from 2012 to 2013, which coincided with an increase of [[***]] percentage points in their market share during this period, notwithstanding the end-point to end-point decline. We recall that an increase in imports in relative terms is not required for a proper finding of causation, let alone an increase on an end-point to end-point basis.[358] Indeed, a decrease in dumped import market share on an end-point to end-point basis would not necessarily undermine, much less disprove, a causation determination, particularly when, as in this case, the market share of imports increased in the last year of the period of trend analysis, albeit to a level lower than at the beginning of the period. The fact that dumped imports increased in absolute terms while market share at the end of the period examined was lower than at the beginning might show, for example, that consumption was growing during the relevant period. This is what happened in the present case. Domestic consumption increased by [[***]]% per year on average during the period of trend analysis, a [[***]]% increase on an end-point to end-point basis, and by 52.8% from 2012 to 2013.[359] In our view, the fact that the market share of dumped imports did not increase from 2010 to 2013 does not, in itself, make it unreasonable for the KTC to have concluded that the increase in the absolute volume of imports, and in particular the significant increase from 2012 to 2013, combined with the price effects of the dumped imports, caused injury to the domestic industry. Japan has not persuaded us that there is any inadequacy in the KTC's consideration and explanation of the relevance and weight of the volume of dumped imports, either in absolute or in relative terms, in its determination of causation. Accordingly, we reject Japan's second ground of challenge.

[358] The first sentence of Article 3.2 sets out three parameters for the consideration of the volumes of the dumped import: in absolute terms, or relative to production, or relative to consumption in the importing country. The use of the disjunctive "either … or" in the first sentence of Article 3.2 suggests that an investigating authority need only to consider whether there is a significant increase either in absolute terms or in relative terms under the first sentence of Article 3.2. The results of the investigation authority's consideration from any of these perspectives can *independently* serve as a basis for its consideration of the ultimate causation question under Article 3.5.

[359] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 26; OTI's Final Report, (Exhibit KOR-2(b) (BCI)), p. 82.

7.8.4.2.1.2 Conclusion regarding volume

7.258. For the above reasons, we conclude that Japan failed to demonstrate that the Korean Investigating Authorities acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement because their causation determination was undermined by alleged flaws in their consideration of the significance of the increase in the volume of the dumped imports.

7.8.4.2.2 Price

7.259. Japan advances three grounds in support of its claim that the KTC's analysis of the price effects of dumped imports "independently" undermined its causation determination:

a. there is a lack of parallelism between the trends in dumped import and domestic like product prices;

b. dumped imports consistently and significantly oversold the domestic like product; and

c. there is no competitive relationship between the dumped imports and the domestic like product, such that their prices are not comparable.

7.260. We will examine Japan's arguments with respect to price comparability first, to be followed by its arguments with respect to the absence of parallel price trends, and finally its arguments concerning overselling. We find it useful to first set out the facts of the KTC's consideration of price effects.

7.8.4.2.2.1 The KTC's findings on price effects

7.261. The KTC's consideration of price effects can be summarized as follows:

a. On the basis of a comparison of average sales prices, there was no price undercutting during the period of trend analysis. However, the degree of "overselling" by the dumped imports declined in 2013 as compared to 2012.

b. On the basis of a price fluctuation index, from 2010 to 2013 the prices of dumped imports dropped more than those of the domestic like product. This was because domestic producers could not reduce prices as much as those of the dumped imports, due to the fact that the dumped imports were sold at below what would be a reasonable sales price for the domestic like product.

c. As a result of "fierce competition with the dumped products that had strong dominance in the domestic market", domestic like product prices were prevented from increasing to a reasonable level from 2010 to 2013[360], and actually decreased in 2012 and 2013.

d. In 2013, the significant decrease in the prices of the dumped imports depressed the price of the like product, despite strong factors, such as the increase in the manufacturing cost of the like product, that would have warranted an increase in domestic like product prices.

e. Overselling by the dumped imports was caused by differential pricing of the dumped imports for different models, options, or customers. Lower dumped import prices for certain products or customers and strengthened marketing activities of SMC Korea depressed the domestic industry's prices or prevented the domestic industry from raising its prices.[361]

7.262. The KTC stated the following regarding injury caused by the dumped imports:

[360] The gap between the reasonable prices and the actual domestic prices are KRW [[***]] in 2010, by KRW [[***]] in 2011, by KRW [[***]] in 2012 and by KRW [[***]] in 2013. (KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 19).

[361] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), pp. 18-20. See also KTC's Final Resolution, (Exhibit JPN-4(b)), pp. 18-20.

> The Commission finds that the dumped products suppressed price increases of the like product and caused decreases thereof, although the average sales price of the dumped products was higher than that of the like product.[362]

7.263. The KTC concluded that:

> Despite the sharp increase in the domestic consumption in 2013, the domestic industry lost most of its market share it had gained up to 2012, due to the sharp growth in the import of the dumped products and the sharp drop in their price. Also, the domestic industry suffered material injury across the overall business indicators, including deterioration of profitability, delay in the recovery of capacity utilization, increase in inventory, decrease in wage and deterioration of productivity and growth, etc.
>
> Such material injury to the domestic industry can be deemed to have been caused by the price effect of the dumped products which was confirmed by the final dumping margins at 11.66% - 31.61% and the increase in the import thereof.[363]
>
> It was investigated that in the same process, the strengthened marketing activities of the importer, a subsidiary of the supplier of the dumped products, also had impact on the domestic industry. Based on the comprehensive review of the import volume and import price of the dumped products and their impact, and various business indicators of the domestic industry, the Commission determines that the domestic industry has suffered material injury due to the import of the dumped products.[364]

7.8.4.2.2.2 Price comparability

7.264. Japan argues that, in its price effects analysis, the KTC failed to ensure price comparability between specific products or product segments of the dumped imports and the domestic like product. Japan contends that the KTC "failed to consider the comparability of products it used to reach its conclusions of price depression and suppression, and equally failed to conduct an objective examination of the overall extent of price competition between subject imports and domestic products".[365] According to Japan, the KTC assumed without any basis that the dumped imports and the domestic like product could be used interchangeably.[366]

7.265. Korea responds that:

a. there is a presumption that the like product is in competition with the corresponding imported product[367];

b. the comparability of domestic like product and dumped import prices may be a relevant issue in a price undercutting context, but not in price suppression or depression, because the question is not specifically about the comparability of price[368]; and

c. in any event, the KTC went beyond merely relying on its "like product" determination under Article 2.6, and properly examined the substitutability of the dumped imports and the domestic like product in terms of their physical characteristics, end uses, quality, and customer evaluations. The KTC objectively found, on the basis of this analysis, the existence of a competitive relationship between the product groups.[369]

7.266. We recall that there is no specific guidance in the Anti-Dumping Agreement as to how an investigating authority is to consider the price effects of dumped imports. However, whatever

[362] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 19.
[363] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 19. See also KTC's Final Resolution, (Exhibit JPN-4(b)), p. 19.
[364] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 27.
[365] Japan's second written submission, para. 17.
[366] Japan's first written submission, paras. 107-108; second written submission, paras. 17 and 59-63.
[367] Korea's response to Panel question No. 18(a).
[368] Korea's response to Panel question No. 18(a).
[369] Korea's second written submission, para. 21.

methodology or approach it uses, it must respect the overarching principle of Article 3.1 that the determination of injury must involve an "objective examination" based on "positive evidence". This means, *inter alia*, that when an investigating authority compares the prices of the dumped imports and those of the domestic like product, it must ensure that the prices being compared are, in fact, properly comparable.[370] "As soon as price comparisons are made, price comparability necessarily arises as an issue."[371] Therefore, an investigating authority must ensure price comparability whenever price comparisons are made, not just in a price undercutting analysis. Of course, the most direct instance of price comparison is in the context of considering price undercutting. However, an investigating authority's consideration of price depression or price suppression may also involve comparison of prices, and to the extent it does, the investigating authority must ensure that the prices being compared are properly comparable.

7.267. In the present case, it is not disputed that the KTC undertook price comparisons:

a. in its price undercutting analysis, the KTC compared average dumped import prices to average domestic like product prices ("average to average comparisons"), and concluded that dumped imports had not been sold at lower prices than the domestic like product, that is, there was no price undercutting[372]; and

b. in its price suppression and depression analyses, the KTC compared, *inter alia*[373], individual resale transaction prices of the dumped imports to the average price of the corresponding model of the domestic like product ("transaction to average comparisons"), and concluded that the "sales price of the dumped products was much lower than the average sales price in the case of certain products or customers for which the degree of competition with the domestic industry was fierce".[374]

7.268. The question for us is whether an objective and unbiased investigating authority could have relied on these comparisons between dumped import and domestic like product prices in determining that dumped imports caused material injury to the domestic industry under Articles 3.1 and 3.5.

Average to average comparisons

7.269. It is undisputed that the underlying investigation covered a wide variety and number of models of both imported dumped valves and Korean-produced valves, which were different in terms of physical characteristics, consumer preferences, end-uses, prices, and other factors.[375] The OTI concluded, however, that despite the large number of different models, only a limited number of basic models were sold in large volumes. The OTI also found that most models of the product under investigation were created by adding detailed options to basic models.[376] The disagreement between the parties is whether the KTC properly compared the prices of imported dumped and domestic like product valves, in light of this broad spectrum of non-identical models of the like product. Korea argues that the KTC ensured that the prices were properly comparable through its "model to model" and "segment to segment" comparisons. We recall that the KTC did not find price undercutting.[377] Thus, the KTC did not rely on the results of any price comparisons between the average dumped import prices and the average domestic like product prices in its injury determination. Accordingly, we need not decide whether the prices in these average to average comparisons were properly comparable.

[370] Appellate Body Report, *China – GOES*, para. 200.
[371] Panel Report, *China – GOES*, para. 7.530 (upheld in Appellate Body Report, *China – GOES*, para. 200).
[372] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 18.
[373] The KTC also compared the price of the domestic like products with their constructed "reasonable sales prices". (KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), pp. 17-19 and 27; see also OTI's Final Report, (Exhibit KOR-2(b) (BCI)), pp. 55-58 and 66-67).
[374] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 19.
[375] Korea's first written submission, para. 47; Japan's first written submission, para. 108.
[376] OTI's Final Report, (Exhibit KOR-2(b) (BCI)), pp. 14-15.
[377] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 18. See also Korea's first written submission, para. 128.

Transaction to average comparisons

7.270. The KTC found price suppression and depression based on, *inter alia*, individual transactions in which certain models of the dumped imports sold or offered to certain customers were priced lower than the average price of a corresponding model of the domestic like product.[378] Korea referred to a series of comparisons between individual resale transaction prices of two models of dumped imported valves and the average prices[379] of corresponding models of the domestic like product[380] reported by the OTI in its Final Report:

Table 1: Transactions in which dumped import price to certain customers was lower than the average domestic price for the corresponding model (underlined)

Transactions for imported model SY7120-5LZ-02

Classification	Series	Model name	Quantity in 2013	Average unit price
Products under investigation	SY7000	SY7120-5LZ-02	[[***]]	[[***]]
Domestic products	DV4000	DV4120-5H-02	[[***]]	**[[***]]**

Customer	Date	Quantity (unit)	Unit price (KRW)
A	02/01/2013	[[***]]	[[***]]
B	02/01/2013	[[***]]	[[***]]
C	02/01/2013	[[***]]	[[***]]
D	08/01/2013	[[***]]	[[***]]
E	14/01/2013	[[***]]	[[***]]
F	28/01/2013	[[***]]	[[***]]
Hereinafter omitted			

Source: OTI's Final Report, (Exhibit KOR-2(b) (BCI)), p. 100.

Transactions for model VF3130-5DZ1-02

Classification	Series	Model name	Quantity in 2013[a]	Average unit price
Products under investigation	VF3000	VF3130-5DZ1-02	[[***]]	[[***]]
Domestic products	TVF3000	DS3130-5DZ-02	[[***]]	**[[***]]**

Customer	Date	Quantity (unit)[a]	Unit price (KRW)
A	02/01/2013	[[***]]	[[***]]
B	10/01/2013	[[***]]	[[***]]
C	17/01/2013	[[***]]	[[***]]
D	23/01/2013	[[***]]	[[***]]
E	20/03/2013	[[***]]	[[***]]
F	26/03/2013	[[***]]	[[***]]
G	07/12/2013	[[***]]	[[***]]
Hereinafter omitted			

Source: OTI's Final Report, (Exhibit KOR-2(b) (BCI)), pp. 100-101.

[378] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 19.
[379] According to Korea, the average sale price of the domestic like products was calculated by dividing (x) the total sales amount of each relevant product model (i.e. domestic like product corresponding to the specific model of dumped products being compared) sold by the applicants to independent customer in 2013 by (y) the total volume of such domestic like product sold in 2013. (Korea's response to Panel question No. 88(b), paras. 19-20).
[380] Korea argues that these are just examples of the price comparisons that the OTI conducted. (Korea's response to Panel question No. 88(c), para. 22). As discussed at para. 7.305 below, in response to the Panel's question No. 88(c), Korea supplied Exhibit KOR-57, which is the data sheet in which the OTI compared all of the transaction prices of SMC Korea during 2013 with the average prices of the corresponding domestic like product.

7.271. As can be seen in the tables above[381], the listed transactions took place on different dates and involved different quantities, from 1 to 152 units. Different time periods and quantities may affect the prices in the individual transactions, which may cast doubt on the relevance and significance of the comparisons. In this case, it can be observed that, in general, the lower the quantity involved in a transaction, the higher the unit price of the dumped imported valve(s). In our view, in light of the possible effect on the comparisons made, an unbiased and reasonable investigating authority could not have properly compared these individual transaction prices with the average domestic like product price of a corresponding model, without further consideration and explanation of the relevance or significance of these differences. The evidence before us does not suggest that either the KTC or the OTI made any effort to consider differences or their potential consequences for price suppression and depression in the determination of material injury caused by dumped imports. This casts doubt on the validity of these price comparisons as support for the KTC's determination.

7.272. Given that the KTC relied upon the price differentials in these comparisons in finding that dumped imports had price suppressing and depressing effects on domestic prices, which in turn was one of the bases for its ultimate determination under Article 3.5, we conclude that the KTC acted inconsistently with Articles 3.1 and 3.5 by failing to ensure price comparability, in terms of the dates and sales quantities involved, when it compared the individual transaction prices of certain models of dumped imports with the average prices of corresponding models of the domestic like product.

7.8.4.2.2.3 Diverging price trends

7.273. Japan argues that the prices of the dumped imports and the domestic like product diverged over the period of trend analysis, both on the basis of average sales price and on the basis of the price fluctuation index. According to Japan, these diverging price trends show that there was no market interaction between the dumped imports and the domestic like product, thus undermining the KTC's price suppression and depression analyses, which in turn formed the basis of the ultimate determination under Article 3.5.

7.274. Korea's defence is four-pronged:

a. a number of factors may affect the price of a product, and it is not necessary that the prices of products move in the same direction for the products to be in competition. In any event, the diverging trend on an average price basis in this case was not significant enough to undermine the existence of market interaction;

b. considering the prices of representative models, there is parallelism in the prices of the dumped imports and the domestic like product;

c. considering resale prices, there is parallelism in the prices of the dumped imports as resold to independent customers, and the domestic like product; and

d. the verified instances in which the dumped imports were offered to customers at prices similar to or lower than the prices of the domestic like product demonstrate "market interaction" between the dumped imports and the domestic like product.

7.275. In considering the price effects of dumped imports, nothing in the Anti-Dumping Agreement stipulates how an investigating authority should proceed. Certainly there is nothing that would explicitly require an investigating authority to consider the degree or nature of competition between the dumped imports and the domestic like product. We recall that Article 2.6 of the Anti-Dumping Agreement defines the like product as a product which is either "alike in all respects" to, or has "characteristics closely resembling" those of the imported products subject to the investigation. Based on this definition, it would be expected that allegedly dumped imports compete with the domestic like product. Indeed, if they did not, it is difficult to imagine on what basis a domestic industry could properly allege that dumped imports were causing injury to the domestic industry producing the like product, so as to justify the initiation of an investigation.

[381] This is further confirmed by our examination of Exhibit KOR-57, which is the entire data sheet on the basis of which the KTC conducted its price comparison for the purpose of its price suppression and depression analyses. (Record Data on the Dumped Imports' Individual Resale Transaction, (Exhibit KOR-57 (BCI))).

However, the fact that allegedly dumped imports compete with the domestic like product in this broader sense does not necessarily mean that the dumped imports will have an effect on domestic like product prices. Competition in the market for the goods in question may depend on a multitude of factors. Particularly where there is more than one model[382] of either the dumped imports or the domestic like product, or both, the nature and extent of competition in the market between dumped imports and the domestic like product may come into question. If there is evidence in the record which may call into question the nature and extent of the competitive relationship between dumped imports and the domestic like product, an investigating authority cannot disregard such evidence in considering the effect of dumped imports on prices. An investigating authority's consideration of whether there is a sufficient degree of competition between the dumped imports and the domestic like product so as to support finding price effects and ultimately a determination of causation under Article 3.5 is subject to the overarching obligation that it be based on an objective examination of positive evidence.

7.276. With the above in mind, we consider Japan's argument that the alleged absence of parallel price trends[383] undermined the existence of a competitive relationship between the dumped imports and the domestic like product. Issues concerning the existence and relevance of parallel trends between the prices of dumped imports and of the domestic like product have arisen in a number of previous disputes. In *China – GOES*, the Appellate Body observed that the existence of parallel price trends "might indicate the nature of competition between the products" and "may explain the extent to which factors relating to the pricing behaviour of importers have an effect on domestic prices" and thus might support an analysis of price depression or suppression.[384] However, parallel price trends are not conclusive evidence that two product groups compete with each other.[385] Equally, the absence of such trends does not necessarily indicate that there is no competitive relationship between two products groups, or that the prices of one group of products could not affect the prices of the other.[386] We therefore do not accept Japan's premise that dumped imports could have had price effects only "if the price levels of the subject imports and domestic like products had been close to each other, and their prices had been consistently moving in the same direction and by similar magnitudes".[387] What relevance and weight an investigating authority attributes to the existence or absence of parallel trends in the prices of dumped imports and the domestic like product is a question that must be considered in each investigation based on the facts, and arguments, in that particular case. Where price trends diverge, a reasonable investigating authority would be expected to take this into account and explain why, nonetheless, it considers that the dumped imports affect domestic like product prices.

7.277. In the present case, the prices of the dumped imports and the domestic like product moved in generally the same direction from 2010 to 2011. However, from 2011 to 2012, prices moved in opposite directions. The average price of the dumped imports in 2012 compared with 2011 increased by 7%, while the average price of the domestic like product decreased by 3.6%. On the basis of the price fluctuation index, the diverging trend is less pronounced: the average dumped import prices increased by [[***]]% whereas the average domestic sales price decreased by [[***]]%. From 2012 to 2013, the average price of the domestic like product decreased

[382] We use the term "model" here to cover the many possible differences between different iterations of the dumped imports and domestic like product which, while not affecting the fact of likeness, may affect the nature and degree of competition in the market. These might include differences in specifications, physical characteristics, quality, size, etc.

[383] The term "parallel price trends" describes a situation in which the prices of two groups of products change in the same or similar direction and degree over time. It is the antonym of diverging price trends.

[384] Appellate Body Report, *China – GOES*, para. 210.

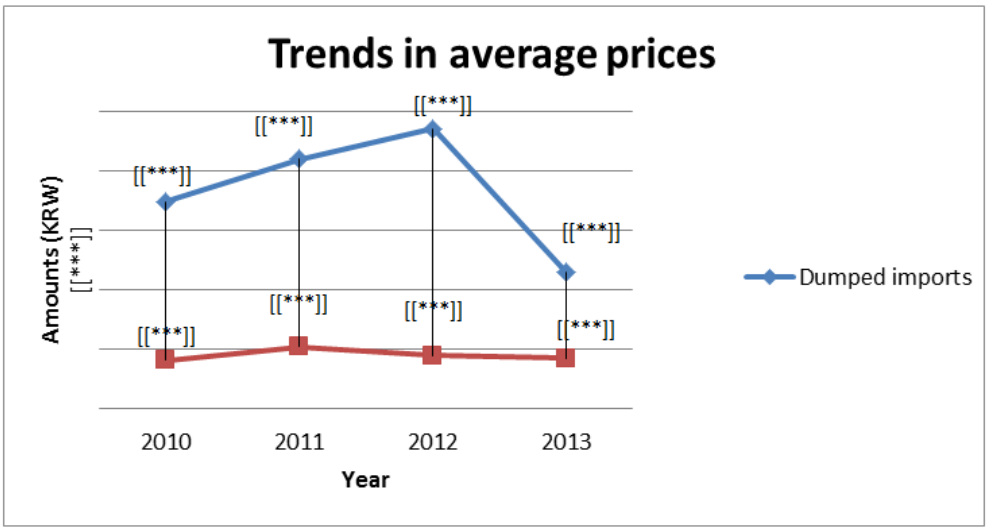
[385] For example, parallel price trends might just be indicative of fluctuations in the prices of certain common inputs.

[386] For example, in a market where company A and company B compete, when A decreases its prices, B will normally respond to this decrease by reducing its own prices. However, where B's pre-existing price is already at a loss-making level, it may not be commercially feasible for B to reduce prices to the same extent as A, or at all. As a result, B's price would remain at the same level, or decline less than A's, and B would most likely lose sales to A. Thus, the prices would not move in parallel. This situation does not in itself call into question that a competitive relationship exists between A and B's products. Nevertheless, if a decrease in A's prices results in neither a drop in B's prices nor a loss of B's sales, this may indicate that the competition between A and B is affected by some factor other than price, for instance a consumer preference for B's products, which may affect whether, or to what degree, A's product affects the prices of B's product. These sorts of issues, if raised by parties, must be taken into consideration by an investigating authority.

[387] Japan's opening statement at the first meeting of the Panel, para. 19; see also response to Panel question No. 18(b), para. 27.

by 1.2%, while the average price of the dumped imports decreased at a much greater rate, by 31.1%, as shown in Figure 1 below. On the basis of the price fluctuation index, the average dumped import prices decreased by [[***]]% whereas the average domestic sales price decreased by [[***]]%.

Figure 1: Trends in average prices

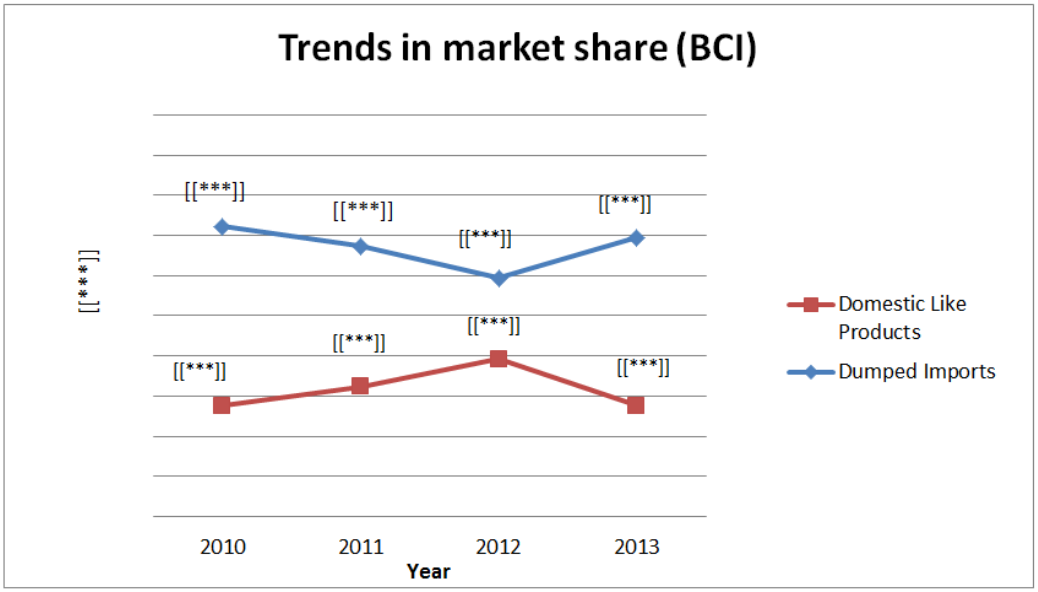


Source: KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), pp. 17 and 19.

7.278. Although domestic like product prices did not decline as much as those of the dumped imports from 2012 to 2013, this difference *in itself* does not demonstrate that the KTC erred in considering that the dumped imports and the domestic like products competed with each other. The KTC's explanation that the prices of the domestic industry were already at unsustainably low levels is not unreasonable.[388] We recall that the domestic industry reported losses during this period. With prices already at loss-making levels, it would have been difficult if not impossible for the Korean producers to lower prices at the same rate as the decline in dumped import prices in an effort to maintain the price differential and consequently sales levels. An expected consequence of these price dynamics would be a loss of sales by the domestic industry, which is in fact what happened – from 2012 to 2013 the domestic industry lost [[***]] percentage points of market share, largely to the dumped imports, whose market share increased by [[***]] percentage points.[389] This is shown in Figure 2 below.

[388] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 18.
[389] Domestic industry's market share decreased from [[***]]% to [[***]]% from 2012 to 2013. Dumped import's market share increased from [[***]]% to [[***]]% during the same period. (KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), pp. 14 and 20).

Figure 2: Trends in market share



Source: KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), pp. 14 and 20.

7.279. From 2011 to 2012, the average price of the dumped imports increased by [[***]]%, while the domestic industry's price decreased by [[***]]%. An increase in the price of the dumped imports might be expected to be accompanied by an increase in domestic prices, especially where the domestic prices have allegedly been suppressed. Korea itself recognised that such opposite price movements could suggest a "lack of competition that may result for example from a different product mix".[390] In such a situation, we would expect a reasonable investigating authority to explain why, nonetheless, it considers that the dumped imports affect the domestic like product prices. And, indeed, the OTI attributed the increase in the dumped import prices to changes in the product mix of the dumped imports to higher-priced valves in the context of the divergence from 2011 to 2012:

> In 2011 and 2012 when domestic consumption decreased, the average sales price of the dumped products rose because the composition of the dumped products was changed that they were mainly composed of high-priced products. However, for the products in fierce competition with the domestic industry, the prices of the dumped products appear to have been frozen or even reduced, which suppressed the price increase in the like products.
>
> The average price of the dumped products increased in 2011 and 2012 not because their actual sales prices rose but mainly because the product composition was changed that they were mainly composed of high-priced products.[391]

7.280. Korea further argues that the KTC examined the nature and extent of the competition between the dumped imports and the domestic like product by undertaking three separate alternative inquiries: (a) considering trends in the prices of "representative models"; (b) comparing price trends of the "resale prices" of dumped imports and the domestic like product; and (c) comparing individual instances in which the dumped imports were offered at prices similar to or lower than the prices of the domestic like product.[392] The KTC found "fierce competition" between the dumped imports and the domestic like product on the basis of these comparisons, which it relied on in finding price suppression and depression.

7.281. Japan argues that these three alleged alternative inquiries are all *post hoc* explanations that are not relevant for purposes of the present proceedings.[393] The question before us is whether

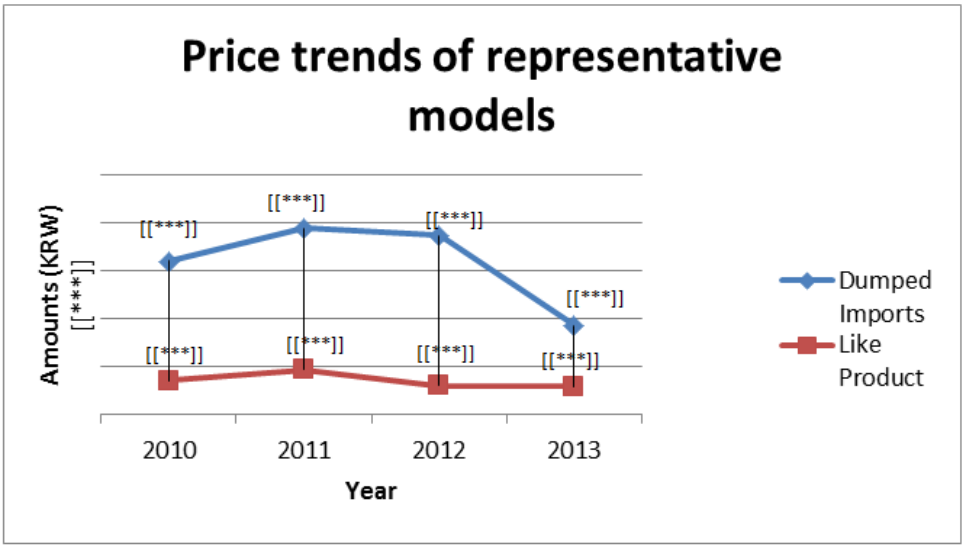
[390] Korea's response to Panel question No. 18(b).
[391] OTI's Final Report, (Exhibit KOR-2(b) (BCI)), p. 58.
[392] Korea's first written submission, paras. 106-109.
[393] Japan's second written submission, para. 72.

the record indicates that the Korean Investigating Authorities actually undertook these alternative analyses, and to the extent they did, whether they support the KTC's consideration of the price effects of dumped imports, and consequently its ultimate determination under Article 3.5, notwithstanding the divergence in average price trends from 2011 to 2012.

Representative models

7.282. Korea argues that the KTC considered trends in the prices of "representative models" of the dumped imports and the domestic like product. These "representative models" were selected models of the dumped imports and the domestic like product that: (a) shared six key physical characteristics; and (b) were sold in large quantities.[394] [[***]]% of total sales of the dumped imports were of "representative models", whereas [[***]]% of total sales of the domestic like product were of "representative models".[395] According to Korea, the KTC essentially found that the average prices of the representative models moved in parallel, including in 2012 (see Figure 3 below).[396]

Figure 3: Price trends of representative models



Source: Korea's first written submission, para. 106.

7.283. Korea alleges that, on the basis of the above, the OTI drew the conclusion that there was strong market interaction between the dumped imports and the domestic like product throughout the period of trend analysis, including in 2012.[397]

7.284. A sufficient degree of competitive overlap between the representative models would certainly be evidence of competition in the market between the domestic like product and the imports and support the Korean Investigating Authorities' consideration of price effects as well as the KTC's ultimate determination under Article 3.5. However, we must determine whether the KTC actually considered this analysis on the basis of the "representative models" during the investigation, and if so, whether competition between [[***]]% of the dumped imports and [[***]]% of the domestic like product is sufficient to support the OTI's conclusion that there was "strong market interaction" between the dumped imports and the domestic like product, which in turn was an element supporting the KTC's findings of price suppression and depression and its ultimate determination under Article 3.5.

7.285. Korea maintains that, as a part of this trend analysis, the OTI observed that the average import prices of the "representative models" of the dumped imports in 2012 decreased by [[***]]% as compared to 2011, and the average domestic sales prices of the "representative

[394] Korea's response to Panel question No. 26(a).
[395] OTI's Final Report, (Exhibit KOR-2(b) (BCI)), p. 15.
[396] Korea's first written submission, paras. 106-107; second written submission, para. 22.
[397] Korea's first written submission, paras. 106-107.

models" of the domestic like product also decreased, by [[***]]%, thereby showing parallel trends. However, neither this factual finding, nor the underlying calculations, can be found in either the OTI's Final Report or the KTC's Final Resolution.

7.286. According to Korea, the calculation was conducted by OTI as a follow-up examination, subsequent to its on-site verification of SMC Korea.[398] In support of this argument, Korea refers to the OTI's On-Site Verification Report, which listed, among the follow-up steps *to be taken* after the on-site verification, to "[a]nalyze the system sale data (to substantiate the competition between product models of the applicants and the respondents)". The verification report, however, does not itself contain any analysis of price trends for "representative models" of the dumped imports and the domestic like product, or the underlying calculations for such an analysis.[399] In response to the Panel's question, Korea submitted a confidential two-page undated document in English with annexes entitled "Representative Model Import Price Analysis" together with the underlying sales data.[400]

7.287. This document sets forth on its first page a table which is identical to table A of Korea's first written submission, and a graph which is identical to graph A of Korea's first written submission.[401] On its second page, it sets forth a table showing the quantity, value, and unit prices of the "representative models" of the dumped imports from 2010 to 2013.[402] The underlying data is set forth on subsequent pages, which record the series, models, quantities, and values of the resale transactions of SMC Korea, import transactions of SMC and the domestic sales of the Korean producer TPC from 2010 to 2013. There are no unit prices given for the reported transactions of either SMC or TPC.

7.288. Japan questions the contemporaneity of this document, arguing that it "is more likely to have been prepared, or at least re-formatted, for purposes of this panel proceeding".[403] We have no reason to doubt that the underlying data was in the record of the investigation. However, the existence of the underlying data in the record of the investigation does not necessarily mean that the investigating authority actually considered whether prices for the representative models moved in parallel during the period of trend analysis, particularly in light of the fact that there is no mention of it in either the OTI's Final Report or the KTC's Final Resolution.[404] Having examined the factual record, we are not able to conclude that the Korean Investigating Authorities actually considered whether the prices of the "representative models" of the dumped imports and the domestic like product actually followed parallel trends.

Resale prices

7.289. Korea argues that the OTI also considered the "resale prices" of the dumped imports charged by SMC Korea (an importer related to the Japanese exporter SMC), which showed the same trends as the prices of the domestic like product in 2012. Korea asserts that this price parallelism strongly suggested the existence of price interaction between the dumped products and the domestic like product, which constituted another basis for OTI's observation that the dumped imports had an effect on the prices of the like product, despite the slight increase of the average price of the dumped imports in 2012.[405]

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[398] Korea's first written submission, fn 122.
[399] Excerpts from On-Site Verification Report, (Exhibit KOR-6(b) (BCI)), p. 7.
[400] Korea's response to Panel question No. 89, paras. 36-38; Record Data and Analysis on the Representative Model, (Exhibit KOR-58 (BCI)). In its comments on Korea's response to Panel question No. 88(c), Japan requests the Panel to reject this exhibit for due process reasons. For the reasons explained below at para. 7.308, we decide that Exhibit KOR-58 is properly before us.
[401] Korea's first written submission, para. 106, table A and graph A.
[402] In fact, the "dumped imports" prices set out in these tables pertain to SMC only, whereas the domestic like product prices pertain to TPC only.
[403] Japan's comments on Korea's response to Panel question No. 89, paras. 43-49 and fn 45. (emphasis original)
[404] We also note that the prices for the domestic like product on the first page of Exhibit KOR-58 do not match the average domestic like product prices calculated by dividing the total sales value by total quantity, as listed on the last page of Exhibit KOR-58. See also Japan's comments on Korea's response to Panel question No. 89, paras. 47-48.
[405] Korea's first written submission, para. 108; response to Panel question No. 18; and OTI's Final Report, (Exhibit KOR-2(b) (BCI)), p. 107.

7.290. We note that, in response to SMC's argument that [[***]], the OTI set forth, in Reference 6 of its Final Report, import volumes, average import prices, resale volumes, and average resale prices and inventories. However, nothing in this section of its Final Report indicates that the OTI considered the trends in the reported dumped import resale prices and the domestic like product prices. Korea has not identified any other relevant documentation which might show that either the KTC or the OTI actually considered this matter.

Verified individual instances of pricing behaviour and marketing activities

7.291. According to Korea, verified instances in which the dumped imports were offered to customers at prices similar to or lower than the prices of the domestic like product demonstrate "market interaction" between the dumped imports and the domestic like product.[406]

7.292. Japan argues that the individual instances of pricing behavior and marketing activities identified by Korea amount to mere "circumstantial evidence". Japan contends that the KTC failed to conduct any "dynamic" analysis of market interactions between the dumped imports and the domestic like product as a whole. According to Japan, the KTC failed to show that these instances of pricing behavior were representative for the domestic like product as a whole in the analysis of the overall price effects.[407] Japan also challenges the probative value of the [[***]] customer statements submitted by Korea as evidence of marketing activities.[408]

7.293. The KTC's Final Resolution states, in relevant part, that:

> The average sales price of the dumped products was higher due to their price differentiation in accordance with models, option details or customers, but it was found that the sales price of the dumped products was much lower than the average sales price in the case of certain products or customers for which the degree of competition with the domestic industry was fierce, which had the effect of suppressing increases in the price of the like product or causing decreases thereof.[409]

7.294. The context of this passage indicates that the KTC made this statement in addressing the arguments of interested parties that the consistent lack of price undercutting undermined the KTC's findings of price suppression and depression. The KTC based its price suppression and depression findings in part on the "fierce" competition between certain dumped imports and the domestic like product, evidenced by SMC Korea's alleged price discrimination among different customers with respect to specific products and product ranges, and its strengthened marketing activities. The evidence of lower prices in sales of certain product models or to certain customers, while in itself not determinative, does support the conclusion that there was competition between dumped imports and the domestic like product in the Korean market for valves (whether "fierce" or not), which in turn lends support to the KTC's price suppression and depression findings.

7.295. On the basis of the considerations above, we draw the following conclusions concerning diverging trends in the average prices of the dumped imports and the domestic like product:

a. The absence of parallel price trends does not necessarily indicate a lack of competitive relationship between two products groups or that one group of products would not affect the prices of the other. Where price trends diverge, a reasonable investigating authority

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[406] Korea's first written submission, paras. 109-110 (referring to OTI's Final Report, (Exhibit KOR-2(b) (BCI)), pp. 57-59, 63-64, 99-101, and 111); [[***]], [[***]]'s Price Underselling and Undercutting Case (Excerpt), (Exhibit KOR-8(b) (BCI)); [[***]], [[***]]'s Price Underselling and Undercutting Case (Excerpt), (Exhibit KOR-9(b) (BCI)); [[***]], [[***]]'s Price Underselling and Undercutting Case (Excerpt), (Exhibit KOR-10(b) (BCI)); [[***]], [[***]]'s Price Underselling and Undercutting Case (Excerpt), (Exhibit KOR-11(b) (BCI)); [[***]], [[***]]'s Price Underselling and Undercutting Case (Excerpt), (Exhibit KOR-12(b) (BCI)); [[***]], [[***]]'s Price Underselling and Undercutting Case (Excerpt), (Exhibit KOR-13(b)); [[***]], [[***]]'s Price Underselling and Undercutting Case (Excerpt), (Exhibit KOR-14(b) (BCI)); [[***]], [[***]]'s Price Underselling and Undercutting Case (Excerpt), (Exhibit KOR-15(b) (BCI)); [[***]], [[***]]'s Price Underselling and Undercutting Case (Excerpt), (Exhibit KOR-16(b) (BCI)); and [[***]], [[***]]'s Price Underselling and Undercutting Case (Excerpt), (Exhibit KOR-17(b) (BCI)).

[407] Japan's second written submission, paras. 47 and 49.

[408] Japan's second written submission, para. 89.

[409] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 19.

is expected to take this into account and explain why, nonetheless, it considers that the dumped imports affect the domestic like product prices.

i. The different magnitude of the price decreases from 2012 to 2013 does not necessarily undermine the KTC's findings with respect to the competitive relationship between the dumped imports and the domestic like product. The KTC's explanation in this regard is reasonable and supported by the facts.

ii. The opposing price movements from 2011 to 2012 could suggest a lack of competition between the dumped imports and the domestic like product. The KTC did not disregard this possibility in its analysis. The KTC explained that the diverging trend from 2011 to 2012 was caused by a change in the product mix of the dumped imports. In certain product groups, the prices of the dumped imports stagnated or decreased, in line with the price trends of the corresponding domestic like products. The KTC's explanation is reasonable and supported by the facts.

b. We find insufficient evidence on the record to conclude that the KTC actually considered whether the prices of "representative models" or resale prices of the dumped imports moved in parallel with domestic like product prices.

c. The verified instances in which the dumped imports were sold at prices lower than those of the domestic like product support the view that there was competition in the Korean market for valves.

d. The KTC's price suppression and depression findings were not solely, or even principally, based on a consideration of average price trends. The KTC primarily relied upon the alleged price discrimination among different customers with respect to specific products or product ranges, and the strengthened marketing activities of SMC Korea.

7.296. Overall, based on the above, we find that the different magnitude of the price decreases from 2012 to 2013, and the opposing price movements from 2011 to 2012, do not in themselves demonstrate that the KTC's determination of a causal relationship is inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

7.8.4.2.2.4 Overselling

7.297. Japan argues that the consistent overselling by the dumped imports i.e. the absence of price undercutting on an average price basis, undermined the KTC's price effects analysis, and consequently its ultimate determination under Article 3.5.[410] Korea argues that the KTC addressed the fact that the average dumped import price was higher than that of the domestic like product, but found that this did not undermine the KTC's conclusion that the dumped imports suppressed and depressed the domestic price of the like product.[411]

7.298. It is well established that price undercutting, price depression, and price suppression may be independent of each other in an investigating authority's consideration of price effects of the dumped imports.[412] Indeed:

> [E]ven if prices of subject imports do not significantly undercut those of like domestic products, subject imports could still have a price-depressing or price-suppressing effect on domestic prices.[413]

In any event:

> [A]n investigating authority is required to examine domestic prices in conjunction with subject imports in order to understand whether subject imports have explanatory force for the occurrence of significant depression or suppression of domestic prices.

[410] Japan's first written submission, paras. 84-89 and 193; second written submission, paras. 78-82.
[411] Korea's first written submission, para. 113.
[412] Appellate Body Report, *China – GOES*, para. 137; Panel Reports, *China – Autos (US)*, para. 7.272; *China – Cellulose Pulp*, para. 7.63; and *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.129.
[413] Appellate Body Report, *China – GOES*, para. 137.

> Moreover, the reference to "the effect of *such* [*dumped or subsidized*] *imports*" in Articles 3.2 and 15.2 indicates that the effect stems from the relevant aspects of such imports, including the price and/or the volume of such imports.[414]

7.299. The existence of price undercutting is frequently relied on as an element suggesting that the effect of dumped imports is price depression or price suppression. However, depending on the facts, an investigating authority may properly consider that the effect of dumped imports is price depression or price suppression notwithstanding the fact that the prices of those imports are higher than those of the domestic like product. In such a situation, an objective examination of positive evidence, in the context of price suppression or depression and the ultimate determination under Article 3.5 requires that an investigating authority faced with evidence of consistent average price overselling, or relevant arguments of interested parties, take this into account in its consideration and explanations. As one panel observed:

> We do not preclude the possibility that price depression may be found to exist in a case where there is overselling by subject imports. However, absent analysis and explanation by the IA, it is difficult to understand how a conclusion of price depression was reached in a situation where prices of imports were, for the most part, significantly higher than those of the domestic like product whose prices were purportedly being depressed during the POI.[415]

7.300. In the present case, interested parties argued during the domestic investigation that the fact that average dumped import prices were higher than those of the domestic like product throughout the period of trend analysis precluded a finding of price suppression or price depression. The KTC rejected this argument because, in its view, the average price overselling was the result of the differential pricing of dumped imports for different models or options and to different customers. Instead, the KTC focused on: (a) the lower prices of certain products to certain customers; and (b) the "strengthened marketing activities" of the related importer SMC Korea as the two bases of its finding on price effects.[416] The KTC's Final Resolution states, in relevant part:

> The Commission finds that the dumped products suppressed price increases of the like product and caused decreases thereof, although the average sales price of the dumped products was higher than that of the like product.
>
> The average sales price of the dumped products was higher due to their price differentiation in accordance with models, option details or customers, but it was found that the sales price of the dumped products was much lower than the average sales price in the case of certain products or customers for which the degree of competition with the domestic industry was fierce, which had *the effect of suppressing increases in the price of the like product or causing decreases thereof*. It was investigated that SMC Korea [[***]] strengthened marketing activities of SMC Korea, 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 SMC Korea and become forced to decrease the sales price or refrain from increasing prices*.[417]

7.301. In our view, whether the fact of consistent average price overselling demonstrates that the KTC's determination of causation was inconsistent with Articles 3.1 and 3.5 cannot be separated from a consideration of whether the KTC's overall analysis of price effects is reasonable, *in light of the consistent average price overselling by the dumped imports*. The question before us is therefore whether the KTC's finding of a causal relationship based in part on price suppressing and

[414] Appellate Body Report, *China – GOES*, para. 138. (emphasis original)
[415] Panel Report, *China – Autos (US)*, para. 7.272.
[416] For the purpose of price suppression, the KTC also calculated a "reasonable sales price", which was higher than the average sales price per unit of the like product throughout the POI. Moreover, the fact that prices did not increase during the POI, and even decreased in 2013, while costs increased and demand surged formed equally the basis for KTC's consideration of significant price suppression. (KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 19).
[417] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 19. (emphasis added)

depressing effects of dumped imports, in light of consistent average price overselling by dumped imports, is one that could have been reached by a reasonable and objective investigating authority on the basis of the evidence and arguments before the KTC.

7.302. Concerning the first basis of the KTC's price depression and price suppression findings, we understand the KTC to have considered that individual cases of dumped import resale prices for some models that were lower than average domestic prices and high-end domestic prices for corresponding models to certain customers[418] (i.e. individual instances of "underselling"[419]) led to price suppression and depression of the domestic like product. In particular, the KTC referred to the effects of individual instances of what we refer to as "underselling" on "the price of the like product". This implies that the KTC found the effects of these individual instances were on domestic like product prices as a whole, and not only on the prices of certain models of the domestic like product.

7.303. While individual instances of "underselling" by dumped imports may indeed indicate price depressing or suppressing effects on the domestic like product prices as a whole, we question whether the KTC's analysis is sufficiently robust to support its conclusions. In particular, it is not clear to us that the KTC considered whether, and if so how, these individual instances of "underselling" with respect to certain models affected the prices of other models of the domestic like product, the extent of total domestic sales affected by such "underselling", or how these instances of "underselling" affected domestic like product prices as a whole.[420] Consideration of such questions would seem particularly warranted in the present case in light of the consistent overall price overselling by the dumped imports and the fact that the *average* prices of the models of dumped imports involved in these individual instances of "underselling" were still higher than the average prices of the corresponding domestic models.[421]

7.304. In its Final Report, the OTI listed "underselling" transactions for two models.[422] The OTI stated that there were nine other models for which SMC Korea allegedly practised price discrimination.[423] The OTI did not state whether all of these nine models involved any "underselling" transactions. Therefore the OTI in its Final Report referred to at most a total of 11 models for which there were individual instances of "underselling" by dumped imports.[424]

7.305. In response to the Panel's question, Korea argues that these 11 models are only "examples" randomly selected during the verification at SMC Korea.[425] According to Korea, the OTI randomly selected at least 13 models, all of which were found to involve price discrimination and "underselling".[426] Along with its response to the Panel's second set of questions, Korea provided Exhibit KOR-57, a list of comparisons of the prices of all of the resale transactions of the Japanese respondent SMC Korea during 2013 with the average and high-end prices of the corresponding models of the domestic like product.

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[418] The OTI's Final Report indicates that the prices used for this analysis are the resale prices of SMC Korea to independent customers. (OTI's Final Report, (Exhibit KOR-2(b) (BCI)), pp. 100-101). This is confirmed by Korea in its response to Panel's question No. 88(b), para. 19. See also Record Data on the Dumped Imports' Individual Resale Transaction, (Exhibit KOR-57 (BCI)).

[419] We use the term "underselling" as shorthand to indicate the situation in which prices of a model of dumped imports in certain transactions were lower than those of the corresponding domestic like product. It is to be differentiated from the price undercutting which is one of the three price effects mentioned in the second sentence of Article 3.2 of the Anti-Dumping Agreement.

[420] Panels have considered that a finding of price depression in a situation where dumped imports oversell the domestic like product requires an explanation of how the investigating authorities reached a conclusion of price depression in such a situation. (Panel Reports, *China – Autos (US)*, para. 7.272; *China – Cellulose Pulp*, para. 7.86).

[421] Japan's second written submission, para. 79.

[422] OTI's Final Report, (Exhibit KOR-2(b) (BCI)), pp. 100-101.

[423] OTI's Final Report, (Exhibit KOR-2(b) (BCI)), p. 101 and fn 60.

[424] These models are: SY3140-5LOZ, SY5220-5LZ-01, SY7120-5LZ-02, VF3130-5DZ1-02, VFN2120N-5DZ-02, VZ5120-5LZ-01, VF5120-2G1-03, VQD1151U-5M, VF1130-5G1-01, VP342-5DZ1-02B, and SY114-5LOZ.

[425] Korea's response to Panel question No. 88(c), para. 22. We note that in its Final Report, the OTI used wording such as "[e]xamples of differences in unit price of the dumped products sold in 2013", "[o]ther cases of sales at lower prices for specific customers", and "[a]nother example of the aggressive marketing of SMC Korea found by the on-site verification is VZ5120-5LZ-01". These references indicate to us that the listing of price undercutting of the two models in the Final Report was indeed by way of example.

[426] Korea's response to Panel question No. 88(c), para. 22.

7.306. Japan argues that we should reject Exhibits KOR-57, 58, and 60.[427] Japan argues that, as a matter of due process, Korea should have submitted this evidence at an earlier stage in the proceedings as a response to a specific question posed by the Panel.[428]

7.307. Paragraph 7 of the Panel's Working Procedures provides that:

> 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.

7.308. With respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party, paragraph 7 of the Panel's Working Procedures allows for an exception to the general rule that all factual evidence shall be submitted no later than during the first substantive meeting. Exhibits KOR-57, 58, and 60 were submitted by Korea in response to questions posed by the Panel. For this reason, we conclude that Exhibits KOR-57, 58, and 60 are properly before us. Moreover, Japan had an opportunity to comment on these exhibits and, indeed, for this reason and at Japan's request, the parties were given additional time to comment on each other's responses to the Panel's questions. While we agree that it would have been preferable had these exhibits been submitted by Korea earlier when the Panel specifically asked for information of this nature (but not as specifically as its later request) after the first substantive meeting of the Panel, we do not consider it inconsistent with due process to take these exhibits into consideration.

7.309. Having decided that it is properly before us, we turn to consider whether Exhibit KOR-57, in conjunction with the OTI's Final Report and the KTC's Final Resolution, supports Korea's contention that the KTC properly examined the extent to which the domestic like product prices were affected by individual instances of dumped imports' underselling.

7.310. Korea argues that Exhibit KOR-57 shows that the KTC examined the extent to which the domestic like product was affected by individual instances of dumped import "underselling". Japan disagrees. According to Japan, "even if the OTI may have collected certain items of evidence about part of the market, that anecdotal evidence does not support the KTC findings unless the KTC actually discusses that evidence and the KTC actually draws a reasonable and objective link between that evidence and the domestic like product as a whole".[429] Exhibit KOR-57 is a list of 115,524 transactions similar to Table 1 above. It reports the product code, series, date, quantity, value, and unit price of resale transactions of certain models of the dumped imports, and the average price and the high-end price of corresponding models of the domestic like product.

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[427] Japan's comments on Korea's response to Panel's question No. 88, paras. 18-22. By letter dated 11 July 2017, Korea asked the Panel to reject Japan's request concerning exhibits 57, 58, and 60. Korea argues that: (a) these exhibits are part of the underlying record of the investigation and there is no basis to doubt their genuine and contemporaneous nature; and (b) Korea did not submit these data before, because the Panel should not conduct a *de novo* review of the underlying raw data but is limited to examining the findings of the investigating authorities that were based on these data. In the same letter, Korea also commented on the substance of Japan's comments concerning these exhibits, and indicated its availability to respond any further questions the Panel may have concerning these exhibits. By letter dated 12 July 2017, Japan asked the Panel to reject Korea's 11 July letter as an unsolicited submission. Japan added that, if the Panel were to consider Korea's 11 July letter, "the substance of the letter is immaterial, not supporting Korea's case in any respects". We note that Korea's 11 July letter was sent outside the deadline for the parties to comment on each other's response to the Panel's questions. Korea has not requested any extension of the deadlines established by the Panel in accordance with its working procedures. In light of the circumstances, we do not find it necessary to take into account Korea's substantive arguments set out in its 11 July letter for the purposes of the present proceedings.

[428] Japan's comments on Korea's response to Panel's question No. 88, paras. 18-22. The Panel's question No. 29 to the parties reads:

> [P]lease indicate the percentage of sales affected by the alleged "strategic low pricing" and/or "aggressive marketing" of the Japanese respondents, referring to where in the record of the investigation this information can be found? Did the KTC refer to this in its Final Determination/Resolution? Please indicate where in the relevant documents in the record.

[429] Japan's comments on Korea's response to Panel question No. 90, paras. 50-52.

Where the transaction resale price of the dumped imports is lower than the average price or the high-end price of the domestic like product, a notation of "undercutting" is recorded for the particular transaction. Exhibit KOR-57 does not contain any other narrative. Exhibit KOR-57 shows that the OTI compared dumped import resale prices in a large number of transactions in 2013 with the average price and the high-end price of the corresponding models of the domestic like product. For some of these transactions, the OTI found that the *transactional* resale price of the dumped imports was lower than the *average* price and/or the high-end price of the corresponding domestic like product model. Exhibit KOR-57 does not, however, 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. We note that this Exhibit does not identify the corresponding models of the domestic like product whose prices are being "undersold", or the quantity or value of the sales of those models. Without such information, it is not clear to us how the investigating authority could have assessed the extent to which domestic like product prices as a whole were affected by the pricing of the dumped imports in the transactions concerned.

7.311. Korea argues that the existence of "underselling" for all of the 13 randomly selected models was sufficient to corroborate that Japanese respondents' strategic low pricing and aggressive marketing was a persistent and prevalent practice that forced domestic producers to react to the fierce competition from dumped imports by reducing prices of domestic like product.[430] We cannot agree. The fact that all 13 selected models referred to in the OTI's Final Report show "underselling" in *some* transactions may just reflect the inherent weaknesses of a "transaction to average" comparison.[431] In any series of transaction prices, some individual transaction prices will be lower than the average price, and others will be higher than the average price. The mere fact that there are some instances of "underselling", even if there are many of them, does not necessarily indicate that the prices of the domestic like product is suppressed or depressed *as a whole* as a result. An explanation and analysis of how and to what extent the prices of the domestic like product are affected is necessary.[432]

7.312. Korea argues that the OTI conducted numerous simulations and analyses on the basis of the resale price data in Exhibit KOR-57 in order to consider the extent to which the domestic like product was affected by individual instances of dumped imports' pricing.[433] In Korea's view, Exhibit KOR-57 shows that:

a. OTI found that SMC's dumped products were frequently sold at prices much lower than its own average prices, across all 28 "series" of the dumped imports. That is, approximately [[***]]% of the representative models of dumped imports were sold at prices lower than the average resale price of that model in 2013. Approximately [[***]]% of the representative models of dumped imports showed price variance of more than 100%. In many cases, the price variance of an identical product model ranged from [[***]]% to [[***]]%.[434]

b. [[***]] units of corresponding representative models of the dumped imports sold by [[***]] in 2013, accounting for [[***]]% of total sales of the corresponding representative models of the domestic like product ([[***]] units), were sold at prices lower than the average sales price of each corresponding representative model of the domestic like product. Further, KOR-57 shows that [[***]] units of the representative models of the dumped imports sold by [[***]] in 2013, equivalent to [[***]]% of total sales of the corresponding representative models of the domestic like products, were

[430] Korea's response to Panel question No. 88(c), para. 23.
[431] We have found, above at para. 7.272, that a comparison of individual transaction prices of certain models of dumped imports on different dates and in different quantities with the average prices of the corresponding domestic like product models, without any consideration of those differences, was not a sufficient basis to conclude that the dumped imports were sold at lower prices than comparable domestic like products in the cases of certain customers and certain product models.
[432] We note that, "Article 3.2 does not ask the question of whether an investigating authority can identify an isolated instance of the dumped imports being sold at lower prices than the domestic like products". (Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.159). While we are not considering a case involving significant price undercutting within the meaning of Articles 3.2, the Appellate Body's reasoning is in our view relevant in a situation where the investigating authority relied upon instances of underselling in its price suppression and depression analyses.
[433] Korea's response to Panel question No. 88(c), para. 26.
[434] Korea's response to Panel question No. 88(c), para. 27.

sold at prices lower than the high-end prices of the corresponding representative models of the domestic like product.[435]

c. "Underselling" by representative models of the dumped imports (i.e. sales transactions at prices below the average price of the corresponding representative domestic model) took place in with respect to [[***]] out of [[***]] corresponding representative models of the domestic like product sold in 2013.[436]

7.313. We are not persuaded by Korea's arguments. We have no doubt that the Korean Investigating Authorities had all the necessary data to conduct this examination, and indeed, may have done so.[437] However, Exhibit KOR-57 does not, *in itself*, sufficiently demonstrate whether and how the OTI conducted the simulations and analyses, and reached the relevant conclusions as argued by Korea during these proceedings. Neither the OTI's Final Report, nor the KTC's Final Determination indicated whether or in what way the Korean Investigating Authorities examined the extent to which the domestic like product was affected by individual instances of "underselling" by dumped imports. Korea has not identified any other document in the record showing that the OTI indeed conducted the analyses in question.

7.314. With regard to "strengthened marketing activities", Korea refers to statements made before the OTI by users of valves describing a number of instances in which SMC Korea offered imported valves at lower prices than those of the Korean domestic producer TPC in order to win customers.[438] Japan challenges the correctness and relevance of some of these exhibits.[439]

7.315. Although the KTC referred to the "strengthened marketing activities" of SMC Korea, the evidence presented by Korea all relates to the ability of SMC Korea to price discriminate, i.e. offer lower prices to certain customers to compete with Korean Producer TPC. When a market player lowers its price to certain customers that might otherwise not purchase from it in order to attract them away from its competitor, that competitor may respond by lowering its own price in an attempt to retain those consumers. Such pricing behaviour may limit the ability of the competitor to increase prices to other customers. For this reason, price discrimination by dumped imports suggests the existence of a degree of price competition between the dumped imports and the domestic like product sufficient to support the view that the dumped imports affect the prices of the domestic like product. Particularly where such price offers are made at generally the same time and in similar quantities to the same customers, evidence substantiating their existence may be highly probative. However, depending on the evidence and arguments in a particular investigation, an investigating authority might have to consider the extent of the domestic sales affected by price discrimination, and must in any event explain its conclusions.

7.316. We must decide whether the evidence of price discrimination/aggressive pricing behaviour in the record sufficiently supports the KTC's finding of price suppressing and price depressing effects on domestic like product prices *as a whole*. In the confidential version of its Final Report, the OTI stated:

[[***]][440]

[435] Korea's response to Panel question No. 88(c), para. 28.
[436] Korea's response to Panel question No. 88(c), para. 29.
[437] Korea's response to Panel question No. 88(c), paras. 25-26; KTC's Resale Data Request, (Exhibit KOR-56(b) (BCI)).
[438] [[***]], [[***]]'s Price Underselling and Undercutting Case (Excerpt), (Exhibit KOR-8(b) (BCI)); [[***]], [[***]]'s Price Underselling and Undercutting Case (Excerpt), (Exhibit KOR-9(b) (BCI)); [[***]], [[***]]'s Price Underselling and Undercutting Case (Excerpt), (Exhibit KOR-10(b) (BCI)); [[***]], [[***]]'s Price Underselling and Undercutting Case (Excerpt), (Exhibit KOR-11(b) (BCI)); [[***]], [[***]]'s Price Underselling and Undercutting Case (Excerpt), (Exhibit KOR-12(b) (BCI)); [[***]], [[***]]'s Price Underselling and Undercutting Case (Excerpt), (Exhibit KOR-13(b) (BCI)); [[***]], [[***]]'s Price Underselling and Undercutting Case (Excerpt), (Exhibit KOR-14(b) (BCI)); [[***]], [[***]]'s Price Underselling and Undercutting Case (Excerpt), (Exhibit KOR-15(b) (BCI)); [[***]], [[***]]'s Price Underselling and Undercutting Case (Excerpt), (Exhibit KOR-16(b) (BCI)); [[***]], [[***]]'s Price Underselling and Undercutting Case (Excerpt), (Exhibit KOR-17(b) (BCI)); and Additional Cases of [[***]]'s Price Underselling and Undercutting, (Exhibit KOR-49(b) (BCI)).
[439] Japan's second written submission, paras. 89-90.
[440] OTI's Final Report, (Exhibit KOR-2(b) (BCI)), p. 58.

[[***]]

The OTI Report also indicates that:

[[***]][.][441]

The OTI Final Report also states that:

[[***[442]]]

7.317. Reference 8, which is a confidential section of the OTI's Final Report entitled "Cases of Price Depression Caused by Aggressive Marketing of [[***]]", reports only one example of aggressive marketing, which took place in March 2013. This case study indicates that, in order to compete with TPC for a contract, [[***]] submitted a quote for [[***]] units of two models of dumped valves at a price lower than TPC's initial quote for domestic valves. In order to keep the contract, TPC offered a lower price quote. Eventually TPC got the sale. Over the course of the proceedings, Korea identified a total of [[***]] instances of aggressive competition.[443] According to Korea, these [[***]] instances of aggressive price competition covered *customers*[444] that collectively purchased approximately [[***]]% of TPC's (one of the two domestic producers in the domestic industry) domestic sales of the like product in 2013 and [[***]]% of the total sales of the domestic like product in 2013.[445]

7.318. While the [[***]] instances of aggressive price competition between two players in the market demonstrate the existence of a competitive relationship between the dumped imports and the domestic like product, their impact on prices for the domestic like product as a whole has to be considered in light of all the relevant facts. For instance, changes in market share for the domestic like product and the dumped imports, or changes in price levels may tend to corroborate the effect of dumped imports on prices, or not. Examples or isolated instances of such pricing behaviour will not, standing alone, suffice to support a finding of price suppressing and depressing effects of dumped imports on domestic like product prices as a whole. It is clear that the confidential case study in Reference 8 is just one example of a body of evidence in the record concerning price competition between two players in the Korean market. However, we find nothing in the OTI's Final Report or the KTC's Final Resolution that indicates how much of the domestic like product was involved in these instances of aggressive price competition. Korea asserts they involved customers accounting for [[***]]% of the total sales of the domestic like product in 2013. But this does not address the relative volume of domestic like product sales that were actually

[441] OTI's Final Report, (Exhibit KOR-2(b) (BCI)), fn 45. (emphasis original)
[442] [[***]]
[443] Korea's first written submission, para. 117 (referring to OTI's Final Report, (Exhibit KOR-2(b) (BCI)), pp. 57-59, 63-64, 99-101, and 111; [[***]], [[***]]'s Price Underselling and Undercutting Case (Excerpt), (Exhibit KOR-8(b) (BCI)); [[***]], [[***]]'s Price Underselling and Undercutting Case (Excerpt), (Exhibit KOR-9(b) (BCI)); [[***]], [[***]]'s Price Underselling and Undercutting Case (Excerpt), (Exhibit KOR-10(b) (BCI)); [[***]], [[***]]'s Price Underselling and Undercutting Case (Excerpt), (Exhibit KOR-11(b) (BCI)); [[***]], [[***]]'s Price Underselling and Undercutting Case (Excerpt), (Exhibit KOR-12(b) (BCI)); [[***]], [[***]]'s Price Underselling and Undercutting Case (Excerpt), (Exhibit KOR-13(b) (BCI)); [[***]], [[***]]'s Price Underselling and Undercutting Case (Excerpt), (Exhibit KOR-14(b) (BCI)); [[***]], [[***]]'s Price Underselling and Undercutting Case (Excerpt), (Exhibit KOR-15(b) (BCI)); [[***]], [[***]]'s Price Underselling and Undercutting Case (Excerpt), (Exhibit KOR-16(b(BCI))); and [[***]], [[***]]'s Price Underselling and Undercutting Case (Excerpt), (Exhibit KOR-17(b) (BCI))); second written submission, para. 51 (referring to Additional Cases of [[***]]'s Price Underselling and Undercutting, (Exhibit KOR-49(b) (BCI))).
[444] We note that Korea does not argue that the [[***]] instances of aggressive marketing affected [[***]]% of the sales of domestic like product in 2013. Korea argues instead that the *customers* involved in these instances from 2010 to 2014 collectively purchased about 16% of the all of the sales of the domestic like product by volume. We note in particular that a significant number of the [[***]] instances of aggressive marketing pertains to the year of 2012. (Additional Cases of [[***]]'s Price Underselling and Undercutting, (Exhibit KOR-49(b) (BCI)), sections 1, 2, 5, 6, 7, 8, 9, 16, 17, 18, 19, 20, 24, 25, 26, 32, 33, 34, 35, 38, and 44). Some of these instances also pertain to the year of 2014. (Ibid. sections 54 and 59).
[445] Korea's second written submission, para. 51 and fns 59-60; response to Panel question No. 90, para. 40. According to Korea, some of these customer statements were verified by the OTI during its visit to several end-users and distribution agents for both SMC and TPC. (Korea's second written submission, para. 52; see also OTI's Final Report, (Exhibit KOR-2(b) (BCI)), fns 42, 45, and 59, reference 8).

affected by this aggressive competition, which would give an indication as to the extent to which it may have affected domestic like product prices as a whole.[446]

7.319. Korea also argues that the [[***]] customer statements and the results of the comprehensive resale price analysis, "in combination", are "sufficient to corroborate that Japanese respondents' low pricing and aggressive marketing is a persistent and prevalent practice that took place across virtually all pneumatic valve transactions whenever SMC Korea competed for the same customer with domestic producers".[447] We have concluded above that the KTC did not adequately explain its findings of price suppression and depression based on: (a) individual instances of "underselling"; and (b) the "strengthened marketing activities" of [[***]], *in light of consistent average price overselling by the dumped imports.*

7.320. We turn now to Korea's argument that the customer statements and the resale price analysis, in combination, explain the KTC's findings of price suppression and depression. In our view, the customer statements, especially those which demonstrate that TPC reduced initial price offers in order to compete with SMC Korea for a particular customer, corroborate the individual cases of "underselling" reported in Exhibit KOR-57. Together they confirm that there was competition between the dumped imports and the domestic like product in the Korean market with regard to certain models and for certain customers. However, these customer statements, even combined with the large number of price comparisons in Exhibit KOR-57, do not adequately explain the KTC's price suppression and depression findings, *in light of the consistent average price overselling by the dumped imports.* As mentioned above, a reasonable and objective investigating authority is expected to assess *how and to what extent* "underselling" in certain competitive sales affected the prices of the domestic like product overall.

7.321. We recall that, even in the market sector where dumped imports "substantially"[448] and "conspicuously"[449] competed with the domestic like product, i.e. the representative models, the average prices of the representative models of dumped imports were significantly higher than the average prices of the representative models of domestic like product, as shown in the graph below. Accordingly, we are not persuaded that the Korean Investigating Authorities adequately explained how the customer statements and the resale price analysis, in combination, supported the KTC's findings of price suppression and depression, in light of the consistent average price overselling by the dumped imports.

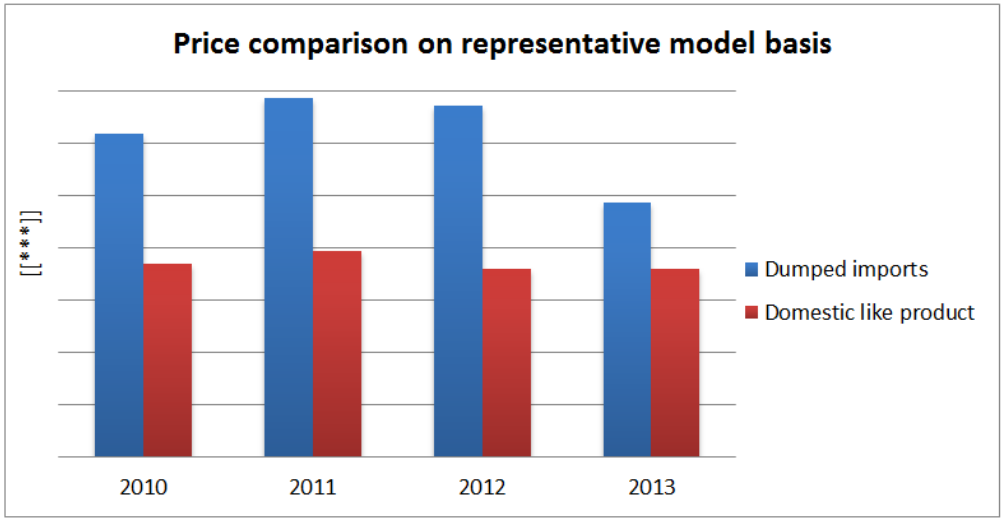
[446] Korea also referred to Exhibits JPN-7, KOR-4, KOR-21, KOR-22, KOR-23, KOR-24, KOR-31, and KOR-32, as evidence that the KTC examined the extent to which the domestic like product were affected by the "strengthened marketing activities". (Korea's response to Panel question No. 90, paras. 43-48). In our view, these documents, read together, are not sufficient to show that the KTC examined the extent to which the domestic like product were affected by the "strengthened marketing activities". Exhibit JPN-7, which is the Investigation Application, contains only unsubstantiated allegations of "predatory dumping price" and price undercutting. (Investigation Application, (Exhibit JPN-7(b)), pp. 3 and 32). Exhibits KOR-4, KOR-21, KOR-22, KOR-23, and KOR-24 contain only generalized statements from a small number of selected customers who testified that [[***]] offers or sells its products at prices similar to or even lower than domestic products. There appears to be certain level of overlap of these customers, e.g. [[***]] with those affected by the [[***]] instances of aggressive marketing and those expressly mentioned in the Final Report. KOR-31 and KOR-32 contain allegations of two domestic producers, Yonwoo and Shin Yeong, that the Japanese respondent undercut their prices.

[447] Korea's response to Panel question No. 88(c), para. 33.

[448] Korea argues that "the representative models of [the dumped imports and the domestic like product] are in more substantial competition with each other". (Korea's first written submission, paras. 106-107; OTI's Final Report, (Exhibit KOR-2(b) (BCI)), p. 15).

[449] Korea's first written submission, para. 106.

Figure 4: Comparison between the average prices of the dumped imports and the domestic like product on representative models basis



Source: Record Data and Analysis on the Representative Model, (Exhibit KOR-58 (BCI)).

7.322. For the reasons above, we find that the Korean Investigating Authorities failed to adequately explain their consideration of the price suppressing and depressing effects of dumped imports in their determination of causation, in light of the undisputed fact that the prices of the dumped imports were higher than those of the domestic like product throughout the period of trend analysis on the basis of both the average price of the product as a whole and the average prices of representative models, and therefore acted inconsistently with Articles 3.1 and 3.5.

7.8.4.2.2.5 Conclusion regarding price

7.323. For the reasons stated above, we conclude that:

a. the KTC acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement by failing to ensure price comparability in the comparison of individual transaction prices of certain models of dumped imports with the average prices of corresponding models of the domestic like product;

b. the different magnitude of price decreases from 2012 to 2013, and the diverging price movements from 2011 to 2012, do not in themselves demonstrate that the KTC's determination of a causal relationship is inconsistent with Articles 3.1 and 3.5; and

c. the Korean Investigating Authorities acted inconsistently with Articles 3.1 and 3.5 by failing to adequately explain their consideration of the price suppressing and depressing effects of dumped imports in their determination of causation, in light of the undisputed fact that the prices of the dumped imports were higher than those of the domestic like product throughout the period of trend analysis in the comparison of both the average prices for the product as a whole, and the average prices of the representative models.

7.8.4.2.3 Impact

7.324. Japan argues that the following three considerations regarding the impact of dumped imports on the domestic industry "disproved" the existence of a causal relationship between the dumped imports and the injury to the domestic industry:

a. there is no logical connection between the effects of dumped imports and the condition of the domestic industry;

b. the KTC failed to examine two specifically required factors; and

c. the KTC ignored certain positive trends.[450]

7.325. We have rejected Japan's argument in support of its Article 3.4 claim that the KTC failed to examine two required economic factors in section 7.7.5.2 above. For the reasons set forth in that section, we similarly reject Japan's argument that the Korean Investigating Authorities acted inconsistently with Article 3.5 by failing to examine two specifically required factors.

7.326. We turn next to Japan's argument that there is no logical connection between the effects of dumped imports and the condition of the domestic industry. There are two aspects to Japan's argument:

a. the KTC failed to link its volume and price effects analyses with the alleged consequent impact of the dumped imports on the domestic industry; and

b. the KTC failed to demonstrate any "explanatory force" of the dumped imports on the state of the domestic industry.

7.8.4.2.3.1 Alleged failure to link the volume and price effects with the state of the domestic industry

7.327. Japan relies in this context on its arguments that the KTC failed to establish any "logical link" between its findings on the volume and price effects under Article 3.2 and its findings on the state of the domestic industry under Article 3.4, in particular with respect to its evaluation of sales, production volume, market share, factors affecting domestic prices, and profits.[451] Japan also argues that in the absence of a proper consideration of the dumped imports' price effects on the domestic like product as a whole, the impact examination in the present case is necessarily inconsistent with Article 3.4.[452]

7.328. We start by recalling that Japan is here asserting an independent claim of inconsistency of the KTC's determination of a causal relationship with Article 3.5. In that context, while Japan references its arguments in support of its claims under Article 3.4 (and Article 3.2), we are not called upon to make any findings under those articles. Rather, we must determine whether Japan has demonstrated that no reasonable and unbiased investigating authority could have made the determination of causation the KTC made in the absence of a "logical link" between its consideration of the volume and price effects of dumped imports and the impact of dumped imports on the domestic industry.

7.329. We recall that nothing in the Anti-Dumping Agreement prescribes any particular methodology for examining the impact of the dumped imports on the domestic industry in the context of a causation determination. Nor does anything in the text of Article 3.5 (or of Articles 3.2 and 3.4) require an investigating authority to establish a logical link between the *consideration* of volume of the dumped imports and the effect of the dumped imports on the prices of the domestic like product under Article 3.2 and the *examination* of the impact of the dumped imports on the state of the domestic industry under Article 3.4. The text of Article 3.5 does link the results of the inquiries under Articles 3.2 and 3.4 to the demonstration that there is a causal relationship between the dumped imports and the injury to the domestic industry.[453] However, the "logical progression of inquiry"[454] does not mean that the examination of impact under Article 3.4 must be linked to the consideration under Article 3.2.[455] These two separate inquires can be undertaken independently of each other, and brought together in the ultimate determination under Article 3.5.[456]

[450] Japan's first written submission, para. 195.
[451] Japan's first written submission, paras. 149-162.
[452] Japan's second written submission, para. 128.
[453] Appellate Body Report, *China – GOES*, paras. 128 and 130 and fn 217.
[454] Appellate Body Report, *China – GOES*, para. 128.
[455] We note that Japan argues that the examination of the impact under Article 3.4 must be a logical advancement from the outcome of the analysis of the price effects and volume of the dumped imports under Article 3.2. (Japan's first written submission, para. 148).
[456] While there may be some overlap between the consideration of the effect of the dumped imports on domestic prices under the second sentence of Article 3.2 and the evaluation of "factors affecting domestic

7.330. Accordingly, we see no basis for the view that in order to properly examine the impact of dumped imports on the domestic industry for purposes of Article 3.4, an investigating authority must link that examination with its consideration of the volume and the price effects of the dumped imports.[457] We reject as a legal matter Japan's position that it has demonstrated inconsistency with Article 3.5 because: (a) the KTC failed to establish a logical link between its evaluation of certain factors having a bearing on the state of the domestic industry and its consideration of the volume of the dumped imports and the effect of the dumped imports on prices under Article 3.2; and (b) the examination of the impact of dumped imports on the domestic industry in the present case is necessarily inconsistent with Article 3.4 as a consequence of the KTC's flawed price effects analysis.[458]

7.331. In addition to its overall argument that the KTC failed to establish a logical link between its evaluation of factors having a bearing on the state of the domestic industry under Article 3.4 with the outcome of the Article 3.2 consideration, Japan makes the following specific arguments concerning five of those factors:

a. concerning sales and production volume, the negative trends in sales and production had nothing to do with declining volume of the dumped imports and were explainable by declining consumption;

b. concerning market share:

   i. the KTC considered domestic industry market share without considering whether dumped imports were actually sold after importation or "[w]ere in the inventory of SMC Korea, the subsidiary of SMC";

   ii. the KTC considered the decrease in domestic industry market share in 2013 without reference to the context of its increase from 2010 to 2012;

   iii. the KTC did not address the relevance of the domestic industry's export performance and the impact of third country imports; and

   iv. the domestic industry's loss of market share was not caused by declining sales volume, but by the fact that domestic sales did not increase as fast as the dumped imports.

c. concerning factors affecting domestic prices, the KTC failed to consider the fact that dumped imports significantly oversold domestic like products; and

d. concerning profits, the KTC ignored the fact that the operating loss of the domestic industry expanded in 2012 when the dumped imports volume decreased and prices increased.

7.332. We note that these arguments simply repeat Japan's arguments made in support of its claims under Articles 3.2 and 3.4. We recall that the inquiries under Articles 3.2 and 3.4 are not the issue before us with respect to Japan's independent claim under Article 3.5. In any event, those inquiries "*contribute*[] to, rather than duplicate[]"[459], the overall determination required under Article 3.5. It is clear that an investigating authority is not required to undertake a fully-reasoned causation and non-attribution analysis in the context of its examination of impact under Article 3.4.

7.333. In any event, in the context of our consideration of whether these alleged flaws "independently" establish that the KTC's determination of causation is inconsistent with Article 3.5,

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prices" under Article 3.4, this does not mean that, as Japan seems to suggest, a flawed price effects analysis will necessarily preclude a proper examination of the impact of the dumped imports on the domestic industry under Article 3.4.

[457] Third-party Brazil supports this view. (Brazil's third-party response to Panel question No. 2, p. 2).

[458] We recall that the claim before us is Japan's independent claim of violation of Articles 3.1 and 3.5, and we consider it unnecessary to make any findings with respect to either Article 3.2 or Article 3.4 in this context.

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

we have addressed this question with respect to certain of the alleged flaws above.[460] We will address Japan's arguments concerning profits below in considering Japan's second causation claim [461], and Japan's arguments concerning consumption, export performance below in considering Japan's third causation claim.[462]

7.334. We now turn to Japan's argument that the KTC's failure to consider whether dumped imports were actually sold after importation or "[w]ere in the inventory of SMC Korea, the subsidiary of SMC" undermines its determination of causation.

7.335. Japan asserts that the KTC improperly included in its consideration of the volume of the dumped imports, dumped imports held in inventory, which necessarily affected the market share figures. According to Japan, dumped imports held in inventory should be excluded from the consideration of whether there has been a significant increase in dumped imports, because they do not compete with the domestic like product. Korea disagrees, arguing that there is no provision in the Anti-Dumping Agreement requiring that an investigating authority exclude from import volume dumped imports that are held in inventory.[463]

7.336. The question under Article 3.5 is whether dumped imports are, through the effects of dumping, causing injury to a domestic industry. "Dumped imports" are those imports for which the investigating authority has made a proper determination of dumping. Article 2.1 of the Anti-Dumping Agreement provides that a product is to be considered as dumped, i.e. "introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than" the normal value. Thus, the relevant imports for purposes of determining causation in this case are Japanese valves which were "introduced into the commerce" of Korea at prices below normal value. We recall that a determination of dumping is made with respect to the product as a whole.[464] There is nothing in the definition of dumping, in the determination of dumping, or the concept of dumped imports, that would support Japan's notion that only dumped imports that have been sold to independent customers in the market of the importing country are to be considered in determining the existence of a causal relationship between dumped imports and injury.[465]

7.337. In our view, the introduction of a product "into the commerce of another country" at less than the normal value (i.e. dumping) occurs when the goods in question have cleared the importing country's customs procedures. It is the introduction of a product "into the commerce of another country" that is relevant, and not whether that product is subsequently stored in inventory for later sale, or immediately sold to an independent buyer. We do not see any basis to introduce any other criterion for defining the term "dumped imports". Nor do we see any reason to interpret the term "dumped imports" in the context of the determination of causation differently than for other provisions of the Anti-Dumping Agreement, and Japan has made no arguments that would suggest a contrary result. Thus, we see no basis to conclude that there was any error in the KTC's failure to exclude dumped imports held in inventory from consideration in its determination of causation.

7.8.4.2.3.2 Alleged failure to demonstrate any explanatory force of the dumped imports on the state of the domestic industry

7.338. Japan argues that the KTC failed to establish the explanatory force of the dumped imports on the state of the domestic industry. Japan asserts that the following factors other than the dumped imports have explanatory force for the state of the domestic industry:

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[460] See sections 7.8.4.2.1 and 7.8.4.2.2.
[461] See section 7.8.4.3.4.
[462] See section 7.8.4.4.
[463] In any event, Korea contends that there was no evidence before the KTC that imports were being held as part of an inventory build-up in line with a change of the safety-stock policy. (Korea's first written submission, paras. 177-181). [[***]]'s inventories are classified into safety, reserved and other inventories. The "safety-stock" is stock of products held for the purpose of securing sufficient quantity in advance for more active sales in the future. (OTI's Final Report, (Exhibit KOR-2(b) (BCI)), p. 108).
[464] Appellate Body Report, *EC – Bed Linen*, para. 53.
[465] Had the drafters of the Anti-Dumping Agreement intended to limit the investigating authority's consideration of the volume of the dumped imports to sales to independent customers, they would have used a different term, e.g. "the volume of the sales of the dumped imports in the importing country".

a. the decline in consumption in 2012 has more explanatory force for the decrease of domestic sales in 2012 than the dumped imports, which also decreased in 2012;

b. the domestic industry's loss of market share in 2013 was caused by the sharp increase of consumption in 2013, rather than by dumped imports, which were a less important explanatory factor;

c. the fact that dumped import prices were higher than those of the domestic like product undermines the explanatory force of those imports for the decline in domestic like product prices in 2013;

d. competition between the two producers in the domestic industry as a result of increased capacity has more explanatory force than the dumped imports for the trends in domestic like product prices; and

e. the explanatory force of the dumped imports for declines in the domestic like product prices is undermined by the fact that domestic prices decreased by 3.6% in 2012 whereas dumped import prices increased by 7%, and domestic prices decreased by only 1.2% in 2013 when the dumped import prices fell by 31.1%.[466]

7.339. Japan's arguments (a), (b), and (d) above allege that factors other than the dumped imports explain the state of the domestic industry better, or with more force, than the impact of dumped imports. Thus, Japan seems to be arguing that the KTC's consideration of the impact of dumped imports in its determination of causal relationship is inconsistent with Article 3.5 because in making that determination, the KTC failed to take into account other factors causing injury to the domestic industry at the same time. However, while we do not preclude that an investigating authority might make a single unified determination of causation and non-attribution under Article 3.5, that is not required, and in any event is not what the KTC did in this case. We recall that Japan has made a separate claim concerning the KTC's non-attribution findings, which we address below. We see nothing in the text of Article 3.5 that would require an evaluation of the effects of other factors in the establishment of a causal relationship between dumped imports and injury in the first instance.

7.340. We have addressed Japan's arguments concerning price overselling and parallel pricing in the context of the KTC's determination of causation above[467], and will not repeat that analysis here.

7.8.4.2.3.3 Alleged failure to properly take into account "positive trends"

7.341. Japan argues that the KTC failed to properly take into account "positive trends" during the period of trend analysis with respect to sales and the ability to raise capital.

7.342. The question before us is whether the Korean Investigating Authorities' determination of causation reflects a proper consideration of these two factors. In addressing this question, we recall that our role is not to undertake a *de novo* review of the evidence that was before the Korean Investigating Authorities. Nor may we simply defer to their conclusions. Rather, we must determine whether the Korean Investigating Authorities' conclusions were those of a reasonable and unbiased investigating authority, supported by a reasoned and adequate explanation in the light of the arguments and evidence before them, and other plausible alternative explanations.[468]

7.343. We recall that in examining the impact of the dumped imports on the state of the domestic industry, the KTC evaluated all of the factors listed in Article 3.4. The KTC found that information regarding two of those factors, sales and investment, and the ability to raise capital, showed increases during the period of trend analysis, i.e. the "positive trends" referred to in

[466] Japan's first written submission, paras. 163-172.
[467] See section 7.8.4.2.2 above.
[468] See, for example, Appellate Body Reports, *US – Tyres (China)*, para. 280; and *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

Japan's arguments.[469] The KTC did not specifically discuss these increases in its overall determination of a causal relationship.

7.344. However, with respect to sales, the KTC had elsewhere in its report observed:

> However, in 2013, when domestic consumption soared by 52.8%, the market share of the like product decreased [[***]]%, while domestic sales thereof increased by 7.6%. This indicates that the like product was materially injured when its market share was lost significantly despite the slight increase in the sales volume.[470]

With respect to investment and ability to raise capital, the KTC had observed that:

> As discussed previously, the domestic industry expanded its investment in facility, in the expectation that economic recovery and the expansion of investment in automation would increase demand, but the domestic and international demand significantly decreased in 2012 due to the fiscal crises in Europe, etc. and the dumped products largely dominated the domestic market, resulting in the failure to increase output in accordance with the expansion of the production capacity.
>
> Accordingly, the domestic industry's demand for investment in facility is expected to shrink significantly for the time being, and it appears that the dumped products are having potentially adverse impact on the domestic industry's investment in facility.
>
> The domestic industry is making efforts for technological development, e.g., by spending more than KRW [[***]] per year since 2011 despite the operating losses, but the ratio of R&D spending to the sales amount increased only in 2011 and has since decreased continuously.
>
> Due to the continued operating loss, the domestic industry's internal capability for investment is dwindling and the demand for investment in facility is shrinking as the capacity utilization of facilities and the market share decrease due to the rapid growth in the import of the dumped products. In sum, it appears that the overall growth of the domestic industry has been significantly undermined.
>
> ...
>
> The continuing operating loss of the domestic industry is weakening its internal capital raising capacity, and the increase in debt caused by such operating loss is weakening the external capital raising capacity as well.[471]

7.345. In light of these statements, which squarely address the relevance of the "positive trends" to which Japan refers in the context of examining the impact of dumped imports on the domestic industry, we cannot agree that the KTC disregarded or downplayed them. The KTC noted and acknowledged the 14% increase in sales from 2010 to 2013, and the 7.6% increase in sales from 2012 to 2013, in the context of a 52.8% increase in consumption. In this context, the KTC noted that the domestic industry lost 11.6 percentage points of market share, almost entirely to dumped imports, and observed that this loss indicated material injury. Thus, in our view, the KTC clearly explained the relevance of increased sales to its overall determination of causation. Similarly, the KTC specifically acknowledged the "sharp increase" in investment in 2011 and 2012, and explained its understanding of the reasons for that increase, as well as its views regarding the

[469] According to the Investigation Report [the OTI's Final Report], the domestic shipment of the like product indicated yearly fluctuations, increasing by 13.4% from [[***]] units in 2010 to [[***]] units in 2011, decreasing by 6.6% to [[***]] units in 2012, and increasing again by 7.6% to [[***]] units in 2013. As such, the shipment in 2013 was [[***]]% higher than that of 2010.
(KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 20 (fn omitted))
According to the Investigation Report [the OTI's Final Report], the investment in facility by the domestic industry was KRW [[***]] in 2010, KRW [[***]] in 2011, KRW [[***]] in 2012 and KRW [[***]] in 2013, showing a sharp increase in 2011 and 2012.
(KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 25 (fn omitted))

[470] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 20.

[471] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), pp. 25-26. (fn omitted)

potential impact of likely declines in domestic industry investment in the future, in light of declining global demand due to the European fiscal crisis and the dominance of dumped imports in the Korean market. Thus, it is clear that the KTC did discuss the increase in domestic industry capacity, and explained the relevance of that fact for its view that further investment might decline.

7.346. For the reasons set out above, we conclude that Japan has failed to demonstrate that the Korean Investigating Authorities acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement by failing to take into account positive trends in certain economic factors.

7.8.4.2.3.4 Conclusion regarding impact

7.347. For the reasons set out above, we conclude that Japan has failed to demonstrate that the Korean Investigating Authorities acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement:

a. by failing to examine two specifically required factors;

b. because: (i) the KTC failed to establish a logical link between the evaluation of certain factors having a bearing on the state of the domestic industry and consideration of the volume of the dumped imports and the effect of the dumped imports on prices under Article 3.2; and (ii) the examination of the impact of dumped imports on the domestic industry in the present case is necessarily inconsistent with Article 3.4 as a consequence of the flawed price effects analysis;

c. because they did not exclude dumped imports held in inventory from consideration in the determination of causation; and

d. by failing to take into account positive trends in certain economic factors.

7.8.4.2.4 Conclusion regarding Japan's first claim

7.348. Accordingly, we conclude that Japan has failed to demonstrate that:

a. the Korean Investigating Authorities' determination of causation is, with respect to the analysis of the volume of dumped imports, and independently of any inconsistencies with Article 3.2, inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement;

b. the Korean Investigating Authorities' determination of causation is, with respect to the analysis of the impact of dumped imports on the domestic industry, and independently of any inconsistencies with Article 3.4, inconsistent with Articles 3.1 and 3.5; and

c. the different magnitude of price decreases from 2012 to 2013, and the diverging price movements from 2011 to 2012, in themselves, establish that the KTC's determination of a causal relationship is inconsistent with Articles 3.1 and 3.5.

7.349. We further conclude that the Korean Investigating Authorities acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement, and independently of any inconsistencies with Article 3.2:

a. by failing to ensure price comparability in the comparison of individual transaction prices of certain models of dumped imports with the average prices of corresponding models of the domestic like product; and

b. by failing to adequately explain their consideration of the price suppressing and depressing effects of dumped imports in their determination of causation, in light of the undisputed fact that the prices of the dumped imports were higher than those of the domestic like product throughout the period of trend analysis in the comparison of both the average prices for the product as a whole, and the average prices of the representative models.

7.8.4.3 Second claim: Alleged failure to properly demonstrate a causal relationship

7.8.4.3.1 The KTC's findings on causation

7.350. The KTC found that significantly increased volumes of dumped imports at significantly decreasing prices in 2013 supressed and depressed the prices of the domestic like product. As a result, the domestic industry lost the market share it had gained up to 2012. In turn, this led to deterioration in the domestic industry's profitability, delay in the recovery of capacity utilization, increased inventory, decreased wages, and deterioration in productivity and growth. The KTC concluded that the deterioration of the state of the domestic industry was caused by the price effects and the volume of the dumped imports, and by the strengthened marketing activities of the related importer of the exporting producers.

7.351. Japan argues that the KTC failed to demonstrate that the dumped imports, through the effects of dumping, were causing injury to the domestic industry. Japan argues that there was insufficient correlation between the volume trends, price trends and profit trends and the state of the domestic industry to support the existence of a causal relationship between the dumped imports and the injury to the domestic industry.

7.8.4.3.2 Volume correlation

7.352. Japan argues that there was "insufficient correlation in key volume trends" for the KTC to demonstrate that the dumped imports were causing injury to the domestic industry. Japan contends that the existence of any causal relationship between the dumped imports and the alleged injury was undermined by the following two facts:

a. the volume and the market share of the dumped imports decreased from 2010 to 2012 (i.e. during the first two years of the three-year period of trend analysis); and

b. the domestic industry's market share remained stable in 2013 as compared with 2010.

7.353. Japan's arguments in support of this aspect of its causation claim are identical to its volume-related arguments under its independent causation claim. We have found, at paragraph 7.258 above, that Japan failed to demonstrate that the Korean Investigating Authorities acted inconsistently with Article 3.5 with respect to their consideration of the volume of dumped imports. On the basis of the same considerations as set out in section 7.8.4.2.1 above, we conclude that Japan has failed to establish that insufficient correlation in key volume trends suffices to demonstrate that a reasonable and unbiased investigating authority could not have properly found the required causal relationship between the dumped imports and injury to the domestic industry in light of the facts and arguments that were before the KTC.

7.354. In addition, we note that the concept of an "insufficient correlation in key volume trends" is not very clearly explained in Japan's argument. It is not apparent from Japan's submissions what Japan considers key volume trends were insufficiently correlated with, nor what it considers would be a "sufficient correlation". In any event, we observe that even assuming that the volume of dumped imports declined while the condition of the domestic industry worsened, a situation we believe would fall within Japan's notion of "insufficient correlation", this would not preclude a finding of injury caused by dumped imports, depending on the other facts considered and the explanations given by the investigating authority.

7.8.4.3.3 Price correlation

7.355. Japan argues that the lack of parallelism between dumped import prices and domestic like product prices does not support the existence of a causal relationship between the dumped imports and the injury allegedly suffered by the domestic industry. Japan notes, in particular, that: (a) dumped import prices increased from 2011 to 2012 while domestic like product prices decreased; and (b) dumped import prices fell sharply from 2012 to 2013 whereas domestic like product prices decreased only slightly.

7.356. Japan's arguments in support of this aspect of its causation claim are identical to its price effects-related arguments under its independent causation claim. We have found, at

paragraph 7.296 above, that Japan failed to demonstrate that the Korean Investigating Authorities acted inconsistently with Article 3.5 with respect to their consideration of the absence of parallel price trends. On the basis of the same considerations as set out in paragraphs 7.273 to 7.296 above, we conclude that Japan has failed to establish that insufficient price correlation suffices to demonstrate that a reasonable and unbiased investigating authority could not have properly found the required causal relationship between the dumped imports and injury to the domestic industry in light of the facts and arguments that were before the KTC.

7.8.4.3.4 Profits correlation

7.357. Japan argues that there was insufficient correlation between dumped imports and trends in domestic industry profits to support the existence of a causal link. Japan contends that the domestic industry incurred losses from 2010 to 2012, when dumped import prices increased and their volumes decreased. According to Japan, when dumped import prices increased in 2012, and their volumes and market share decreased, the domestic industry should have been in good health. Instead, the profit trends of the domestic industry in 2012 and 2013 show that the domestic industry was losing money regardless of the trends in the dumped import volumes and prices.

7.358. With respect to the profits of the domestic industry, the KTC observed:

> The operating profit from domestic sales by the domestic industry remained in deficit during the period of investigation, and the operating loss rate decreased from [[***]]% in deficit in 2010 to [[***]]% in deficit in 2011 and the loss rate widened again to [[***]]% in deficit in 2012 and to [[***]]% in deficit in 2013. …
>
> The deterioration of the operating profit in 2012, after improving in 2011, was a result of the price reduction of the like product and the increase in the operating cost in response to the competition with the dumped products.[472]

The KTC acknowledged that the domestic industry's operating loss worsened from 2011 to 2012, that is, the operating loss ratio increased, at the same time as dumped import prices increased and their volume and market share declined. The KTC explained its view that the increased operating loss ratio was a result not only of the decrease in domestic like product prices (which it elsewhere in its report attributed to the effect of dumped imports), but also of the increase of operating costs in response to competition with the dumped imports.

7.359. Responding to arguments concerning other possible causes of the domestic industry's operating loss, the KTC noted:

> The Respondents argued that the deterioration of the earnings of the domestic industry was attributable to the excessive spending of SG&A expenses, but such expenses of the domestic industry during the period of investigation showed a similar upward trend with that of SMC Korea, which means that the major reason for the increase in such expenses was the competition with the dumped products, for which the marketing activities had been enhanced, e.g., through the expansion of sales organizations, etc. Considering that the operating profit decreased in 2013 despite the reduction in SG&A expenses, such expenses cannot be deemed to be the cause of the worsening operating profit, and the decrease in the price of the like product in response to the reduction of that of the dumped products appears to be the major cause.
>
> Meanwhile, the Respondents argued that the deterioration of the operating profit of the domestic industry was attributable to the increase in the depreciation cost resulting from excessive expansion of facilities. However, despite the increase in the depreciation cost resulting from facility expansion, the total manufacturing costs including the depreciation cost fell as much as [[***]]% from KRW [[***]] per unit in 2010 to KRW [[***]] per unit in 2013, which means that the cost reduction through the facility expansion and investment in enhancement of productivity led to the

[472] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 23.

> decrease in manufacturing costs. Therefore, the argument of the Respondents that the operating profit of the domestic industry worsened due to the facility expansion is not reasonable.[473]

7.360. In our view, the KTC's consideration of the relationship between the operating losses of the domestic industry during the entire POI and the dumped imports is reasonable and grounded in the underlying facts. Moreover, we cannot agree with what appears to be the premise of Japan's argument, that when dumped import prices increase and their volume decreases, the profits of the domestic industry must necessarily improve and there can be no injury caused by dumped imports. We therefore conclude that Japan has failed to establish that insufficient correlation between dumped imports and trends in domestic industry profits suffices to demonstrate that a reasonable and unbiased investigating authority could not have properly found the required causal relationship between the dumped imports and injury to the domestic industry in light of the facts and arguments that were before the KTC.

7.8.4.3.5 Conclusion regarding Japan's second claim

7.361. For the reasons above, we conclude that Japan has failed to demonstrate that the Korean Investigating Authorities acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement by failing to demonstrate that the dumped imports, through the effects of dumping, were causing injury to the domestic industry.

7.8.4.4 Third claim: Alleged failure to conduct a proper non-attribution analysis

7.362. Japan argues that the KTC failed to conduct an objective analysis of certain known factors other than the dumped imports allegedly causing injury to the domestic industry at the same time as dumped imports, and failed to examine at all some other known factors. As discussed at paragraph 7.243 above, our consideration of Japan's non-attribution claim is limited to its allegations regarding those factors that allegedly were inadequately considered by the KTC: (a) third country imports; (b) trends in domestic consumption; and (c) exports by the Korean industry.

7.8.4.4.1 Third country imports

7.363. In its Final Resolution, the KTC stated:

> According to the Investigation Report [the OTI's Final Report], the quantity of the product under investigation imported from countries other than Japan increased from [[***]] units in 2010 to [[***]] units in 2013, but the market share of such product in 2013 was only [[***]]% and its sales price was significantly higher than that of the like product or the dumped products. Accordingly, such product cannot be seen as being in competition with the like product. Therefore, products other than the dumped products have had almost no adverse impact on the domestic industry.[474]

The OTI had examined trends in the volumes, market share and the prices of third country imports during the period of trend analysis, noting that:

> The volume of imports from other countries is minimal in absolute terms although it increased [[***]]% from 2010 to 2013 per year on average.
>
> Imports from other countries increased from [[***]] units in 2010 to [[***]] units in 2011, to [[***]] units in 2012, and to [[***]] units in 2013. Most of the products were imported from Germany and Hungary.
>
> ...
>
> The sales price per unit of the products imported from other countries apart from the dumped products increased [[***]]% from 2010 to 2013 per year on average.

[473] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 23.
[474] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 26. (fn omitted)

> The market share of the products imported from other countries was merely between [[***]]% and [[***]]% during the period of investigation, and their sales prices were higher than those of the like products or the dumped products. Therefore, imports from other countries appear to have had only minimal impacts on the domestic industry.[475]

Thus, referring to the findings in the OTI's Final Report, the KTC concluded that third country imports had almost no impact on the domestic industry because their market share was only [[***]]% and their prices were significantly higher than those of both the dumped imports and the domestic like product.

7.364. Japan takes issues with several aspects of the KTC's examination of and conclusions regarding the effects of third country imports.

7.365. First, Japan contends that the KTC did not refer to the small market share of the third country imports in its Final Resolution. We note in this regard that, in its Final Resolution, the KTC referred to the key factual findings of the OTI. Although the KTC did not repeat the detailed data reported by the OTI in its Final Report, it clearly referred to the small market share of third country imports when it stated that their market share "was only [[***]]% in 2013", which we recall was when dumping was found. Japan's argument is inconsistent with the facts before us.[476]

7.366. Second, Japan argues that the KTC failed to address the impact on domestic like product prices of the 62.2% decrease in third country import prices from 2012 to 2013. Japan's allegation focuses on the last year of the period examined, when third country import prices declined, but ignores the context of the low volume and market share of those imports throughout the period, as well as the overall increase in third country import prices.[477] In this context we are not persuaded that it was unreasonable for the KTC to conclude that the overall impact of the third country imports on the domestic industry was minimal, despite the significant decrease in third country import prices during the last year of the period examined.

7.367. Third, Japan argues that the KTC's assessment of the impact of the third country imports was not objective because the domestic industry lost [[***]] percentage points of market share to the third country imports.[478] In our view, the fact that third country import market share increased by [[***]] percentage points from 2010 to 2013 does not necessarily mean that the third country imports captured this market share from the domestic industry, or from the domestic industry only. Indeed, the data on market share indicate that third country import market share gains were at the expense of dumped imports, and not the domestic industry, corroborating the KTC's finding that third country imports had almost no adverse impact on the state of the domestic industry. From 2010 to 2013, third country imports gained [[***]] percentage points of market share, while dumped imports lost the same [[***]] percentage points of market share, and the market share of the domestic like product remained the same, as seen in the table below:

Table 2: Development in Market share 2010-2013

	2010	2011	2012	2013	Changes 2010-2013
Dumped imports	[[***]]	[[***]]	[[***]]	[[***]]	[[***]]
Domestic industry	[[***]]	[[***]]	[[***]]	[[***]]	[[***]]
Third-country imports	[[***]]	[[***]]	[[***]]	[[***]]	[[***]]

Source: OTI's Final Report, (Exhibit KOR-2(b) (BCI)), p. 81.

7.368. Fourth, Japan argues that the KTC did not compare third country imports with the dumped imports in either absolute terms or by market share. According to Japan, such a comparison would have shown that the increase in third country imports from 2010 to 2013 was 45% of the increase in dumped imports in absolute terms. The mere fact that Japan can posit a comparison that the

[475] OTI's Final Report, (Exhibit KOR-2(b) (BCI)), pp. 81-82.
[476] In any event, we are of the view that an investigating authority need not recite in its determination all the evidence on which it relies in reaching its conclusions, so long as it adequately explains those conclusions and they are supported by the evidence that was before it.
[477] OTI's Final Report, (Exhibit KOR-2(b) (BCI)), p. 81.
[478] Japan's opening statement at the first meeting of the Panel, para. 75.

KTC did *not* undertake, which might have supported a different conclusion, provides no basis for finding error in the KTC's approach and conclusions. Japan would also have to demonstrate that no reasonable and unbiased investigating authority could have failed to undertake the posited comparison in light of the facts and arguments before the KTC in this case. It has not done so. Moreover, while the KTC did not cite all the data that was before the Korean Investigating Authorities, it did specifically refer to the OTI's Final Report in this regard, including a table which showed the volume, market share, and prices of dumped imports, third country imports, and the domestic industry.[479] In any event, we cannot agree with Japan that the relative increase in third country imports from 2010 to 2013 undermines the KTC's finding, in the context of the low volume and high prices of those imports.

7.369. Lastly, Japan argues that the KTC could not have properly found that there was no competition between third country imports and the domestic like product, because it had found that the equally higher priced dumped imports were in competition with the domestic like product. This argument is untenable. In contrast with its consideration of competition between the dumped imports and the domestic like product, the KTC's conclusion that there was no competition between third country imports and the domestic like product was based on the negligible volumes of third country imports and prices that were significantly higher than those of both the domestic like product and the dumped imports.

7.370. We therefore conclude that Japan has not demonstrated that the Korean Investigating Authorities' conclusion regarding the minimal impact of third country imports on the domestic industry is not one that a reasonable and unbiased investigating authority could have reached in light of the evidence on the record and the arguments before the KTC.

7.8.4.4.2 Domestic consumption

7.371. With respect to domestic consumption, the KTC stated:

> As discussed previously, the domestic consumption increased by [[***]]% per year on average throughout the period of investigation; but the overall upward trend was due to the significant increase in 2013 as the figure continuously decreased until 2012.
>
> Domestic consumption decreased by 25.4% between 2010 and 2012, and in 2012 in particular, it decreased by 22.9% compared to the previous year, which may be interpreted to have had adverse impact on the domestic industry. However, during the same period, domestic sales of the domestic industry increased by [[***]]% and its market share increased by [[***]]%, which means that the negative impact of the decrease in the domestic consumption on the domestic industry is unclear.
>
> Meanwhile, domestic consumption increased by 52.8% in 2013, but the sales of the like product increased by only 7.6%, which means that the domestic industry saw almost no positive impact from the increase in domestic consumption, which, as confirmed above, was due to the sharp increase in the import of the dumped products.[480]

7.372. In considering the impact of changes in consumption on the state of the domestic industry, the KTC looked at the period from 2010 to 2012, which showed a decrease in consumption of 25.4%, in contrast with an increase in domestic sales and market share of [[***]]% and [[***]]% respectively. The KTC looked separately at the period from 2012 to 2013, when domestic consumption increased by 52.8%, and domestic sales also increased, but only by [[***]]%. The KTC found that the trends in domestic consumption did not correlate with the trends in domestic sales and domestic industry market share. The KTC concluded that the negative impact of the decrease in consumption in the earlier period was not clear.

7.373. Japan argues that, by finding that it is uncertain whether the decrease in domestic consumption from 2010 to 2012 had a negative impact on the domestic industry, the KTC failed to

[479] OTI's Final Report, (Exhibit KOR-2(b) (BCI)), p. 81.
[480] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 26.

conduct a proper non-attribution analysis. Japan takes issue with the following aspects of the KTC's examination of the impact of changes in domestic consumption:

a. The KTC "misleadingly cited" a 5.9% increase in domestic industry sales from 2010 to 2012 when consumption declined during the same period.[481] The KTC's reliance on this increase over the period 2010 to 2012, is contradicted by the fact that domestic industry sales decreased by 6.6% from 2011 to 2012.[482]

b. The KTC "misleadingly cited" an increase in the domestic industry's market share in 2012. The domestic industry's market share increased because the volume of dumped imports decreased much more than the domestic industry's sales. Therefore the increase in domestic industry market share does not support the KTC's conclusion that the domestic industry was not adversely affected by the sharp decline in consumption.[483]

7.374. In essence, Japan is merely suggesting a different way of looking at the data. Japan's arguments boil down to the following:

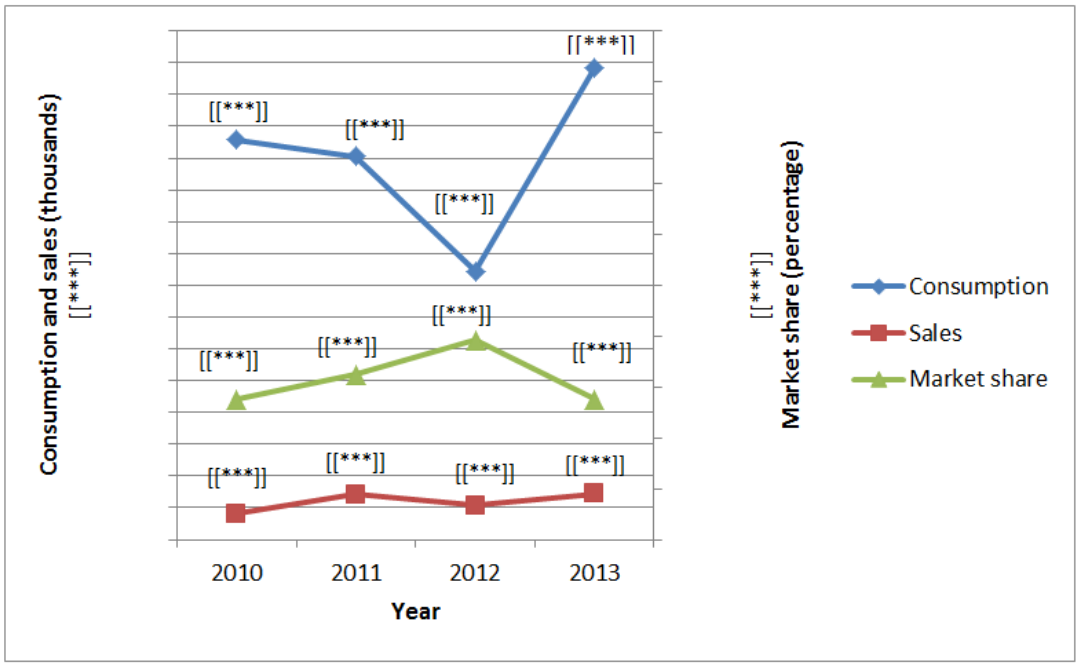
a. Looking at the period 2011-2013, instead of 2010-2012, domestic sales moved in the same direction as consumption, showing that domestic sales were responsive to consumption changes.[484]

b. The fact that the domestic industry's market share increased when consumption decreased from 2010 to 2012 does not necessarily indicate that the domestic industry was not negatively affected by the decline in consumption.[485]

7.375. We recall that merely showing that a different way of looking at the data could support a different conclusion is not enough to demonstrate error in an investigating authority's determination, unless there is some reason to conclude that the proposed different approach was necessary, either as a matter of law, or because the evidence could not be objectively examined otherwise. Japan has demonstrated neither. None of Japan arguments contradicts or otherwise calls into question the reasonableness or objectivity of the finding of the KTC that changes in domestic consumption and the sales and market share of the domestic industry were not correlated, and thus that any negative impact of declines in consumption from 2010 to 2012 on the domestic industry, whose sales and market share increased during that period, were not clear. In our view, the graph below shows the lack of correlation. Accordingly the Korean Investigating Authorities' conclusion in this regard is not unreasonable.

[481] Consumption declined by 25.4% from 2010 to 2012. (KTC's Final Resolution, (Exhibit JPN-4(b)), p. 26).
[482] Japan's first written submission, para. 216.
[483] Japan's first written submission, para. 217.
[484] Japan's second written submission, paras. 178-179.
[485] Japan's first written submission, para. 217.

Figure 5: Trends in consumption and the domestic industry's sales and market share



Source: OTI's Final Report, (Exhibit KOR-2(b) (BCI)), pp. 81-82.

7.376. Japan also argues that the KTC failed to examine the impact of the decrease in consumption on domestic prices in 2012 by looking at the trends in domestic sales by value.[486] According to Japan, when measured by value, the trends in the domestic industry's sales correlated to the changes in consumption.[487] We recall that Article 3.5 does not prescribe any particular methodology for a non-attribution analysis. Therefore there is no textual basis for Japan's view that the Korean Investigating Authorities should have compared trends in domestic consumption with trends in domestic sales by value. Once again, merely showing that a different way of looking at the data could support a different conclusion is not enough to demonstrate error in an investigating authority's determination, unless there is some reason to conclude that the proposed different approach was necessary, either as a matter of law, or because the evidence could not be objectively examined otherwise. We find that the Korean Investigating Authorities did not act unreasonably by not comparing trends in consumption and domestic sales by value.

7.377. For the reasons above, we conclude that Japan has failed to demonstrate that the Korean Investigating Authorities' finding, in the context of its consideration of non-attribution of injury to other factors, that it was uncertain whether the decrease in domestic consumption from 2010 to 2012 had a negative impact on the domestic industry, is one that a reasonable and unbiased investigating authority could not have reached in light of the evidence on the record and the arguments before it.

7.8.4.4.3 The domestic industry's export performance

7.378. Japan argues that the KTC failed to conduct a proper non-attribution analysis concerning the impact of the domestic industry's export performance. According to Japan, its weak export performance contributed to the adverse condition of the domestic industry in 2012 and 2013.[488]

7.379. With respect to the domestic industry's export performance, the KTC stated:

> According to the Investigation Report [the OTI's Final Report], the export volume of the domestic industry showed severe annual fluctuations, with [[***]] units in 2010,

[486] Japan's first written submission, para. 218.
[487] Japan's first written submission, para. 220.
[488] Japan's first written submission, para. 222.

> [[***]] units in 2011, [[***]] units in 2012 and [[***]] units in 2013. Such fluctuations in export appear to have affected the gross sales and production of the like product. However, it cannot be concluded that the export had adverse impact on domestic sales of the like product because in 2011, when the export volume was the highest, the proportion of export to the overall sales was only [[***]]%[489] and the capacity utilization of the domestic industry was low as well.[490]

In its Final Report, the OTI stated:

> The export volume of the domestic industry considerably fluctuated year by year, from [[***]] units in 2010 to [[***]] units in 2011, to [[***]] units in 2012, to [[***]] units in 2013. The drastic changes in exports appear to have substantial effects on the total sales volume of the like products.
>
> ...
>
> The ratio of exports to the total volume of shipment of the domestic industry increased from 10.7% in 2010 to 28.1% in 2011 and then decreased to 6.0% in 2012 and then rose again to 12.9% in 2013.
>
> The ratio of exports to the total volume of shipment of the domestic industry has not changed much except in 2011. Although the ratio in 2013 is slightly higher than that of 2010, it is unreasonable to conclude that the export volume affected domestic sales since the capacity utilization of the domestic industry was below [[***]]%.
>
> Therefore, the fact that domestic sales increased only by a narrow range despite the reduction in domestic sales in 2012 and the sharp increase in domestic demand in 2013 should be viewed to have been caused not by exports but by other factors such as dumping, etc.[491]

7.380. Thus, the KTC concluded that the export performance of the domestic industry did not adversely affect the state of the domestic industry because of the relatively low level of exports compared to total sales and low domestic industry capacity utilization.

7.381. Japan argues that the ratio between exports and total sales is irrelevant to the question of whether export performance affected the state of the domestic industry. According to Japan, the KTC should have examined the ratio between exports and domestic sales or profits.[492] Japan's argument is untenable. We recall that Article 3.5 gives no guidance as to how a non-attribution analysis should be conducted, let alone how to examine whether the domestic industry's export performance is a cause of injury to that industry. We see no reason to conclude, *a priori*, that the ratio between exports and total sales may not be relevant in this regard. Indeed, it seems to us that this may be an important factor, as the higher the ratio, the more impact exports would be expected to have on the overall performance of the domestic industry. If the ratio is low or negligible, this might suggest that regardless of any changes in export performance, there would be relatively little, if any, impact on the overall performance of the domestic industry. Similarly, in our view capacity utilization may also be a relevant factor in this context. If capacity utilization is high, the domestic industry may not be able to fulfill both export and domestic orders, and if it is export oriented, it may prioritize its export market, which may result in loss of domestic sales and market share. However, if the domestic industry's capacity utilization rate is low, the domestic industry could, if market conditions warranted, increase production to meet both domestic and export demand.

7.382. Japan also argues that the export performance of the domestic industry was strongly correlated with the sales and profits of the domestic industry.[493] In our view, while this is true, this correlation alone does not demonstrate that export performance necessarily had an impact on the

[489] This figure appears to be an error in the Final Resolution, in both the original and English versions. The figure in the OTI Final Report appears to be the correct ratio.
[490] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), pp. 26-27.
[491] OTI's Final Report, (Exhibit KOR-2(b) (BCI)), p. 83. (fn omitted)
[492] Japan's second written submission, para. 184.
[493] Japan's second written submission, para. 185.

sales, profits, or overall performance of the domestic industry. In the present case, the KTC concluded that the export performance of the domestic industry had no adverse impact on the domestic industry because of the low ratio of exports to total sales and the industry's low capacity utilization, which would have allowed for increased domestic sales if market conditions had warranted. Japan's arguments do not demonstrate that this conclusion was not reasonable, in light of the facts and arguments on the record.

7.383. For the reasons above, we conclude that Japan has failed to demonstrate that the Korean Investigating Authorities' finding that the export performance of the domestic industry had no adverse impact on the domestic industry is not one that a reasonable and unbiased investigating authority could have reached in light of the evidence on the record and the arguments before it.

7.8.4.4.4 Cumulative effects of the other "known" factors

7.384. Japan argues that the KTC failed to consider the cumulative effect of all known factors other than imports causing injury to the domestic industry. According to Japan, even if some of these factors in isolation do not break the causal link, several of these factors collectively may have broken this link.[494] Korea has not responded to this argument in its submissions.

7.385. Article 3.5 of the Anti-Dumping Agreement provides that:

> The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

7.386. As we have previously noted, Article 3.5 does not contain any guidance on how an investigating authority should conduct its non-attribution analysis. We recall that the obligation to distinguish between the effects caused by dumped imports and the effects caused by other factors does not necessarily imply that dumped imports on their own must be capable of causing material injury.[495] Therefore, it is clear to us that there is no requirement that an investigating authority consider the effects of other factors found to cause injury to the domestic industry on a collective or cumulative basis in addition to examining their individual effects. While there may be cases where, because of the specific factual circumstances, such an assessment may be necessary for an investigating authority to ensure that injuries ascribed to dumped imports are not caused by other factors[496], Japan has failed to demonstrate, or even to argue, that this is such a case.

7.387. The KTC addressed each of the "other factors" raised by interested parties during the investigation and concluded that they did not have adverse impact on the domestic industry. There is no suggestion that the interested parties argued that these factors should be considered on a cumulative basis. Japan has not argued before us that the circumstances of the present case are such that no reasonable and unbiased investigating authority could have reached the KTC's conclusion regarding non-attribution of injury to other factors without examining, on a cumulative basis, whether these factors taken together broke the causal link it had found between dumped imports and injury to the domestic industry.

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[494] Japan's first written submission, paras. 230-231.

[495] Cf. Appellate Body Report, *US – Wheat Gluten*, para. 67. The Appellate Body was referring to the non-attribution language in the *Agreement on Safeguards*, which can provide guidance in interpreting the non-attribution language in Article 3.5 of the *Anti-Dumping Agreement*. (Appellate Body Report, *US – Hot-Rolled Steel*, para. 230).

[496] Appellate Body Report, *EC – Tube or Pipe Fittings*, paras. 190-192. The Appellate Body concluded: "We are therefore of the view that an investigating authority is not required to examine the collective impact of other causal factors, provided that, under the specific factual circumstances of the case, it fulfils its obligation not to attribute to dumped imports the injuries caused by other causal factors".

7.388. For the reasons above, we conclude that Japan has failed to demonstrate that the Korean Investigating Authorities acted inconsistently with Articles 3.1 and 3.5 by failing to consider the cumulative effect of the other known factors causing injury to the domestic industry at the same time as dumped imports.

7.8.4.4.5 Conclusion regarding Japan's third claim

7.389. For the reasons above, we conclude that Japan has failed to demonstrate that the Korean Investigating Authorities acted inconsistently with Articles 3.1 and 3.5 by failing to adequately examine other known factors causing injury to the domestic industry at the same time as dumped imports and the cumulative effect of such other known factors.

7.9 Confidential treatment of information

7.9.1 Main arguments of the parties

7.9.1.1 Japan

7.390. In its panel request, Japan asserts that Korea's measures are inconsistent with Article 6.5 of the Anti-Dumping Agreement "because Korea treated allegedly confidential information provided by the interested parties as confidential without good cause shown". Japan also asserts that Korea's measures are inconsistent with Article 6.5.1 of the Anti-Dumping Agreement "because Korea: (a) failed to require the applicants to furnish non-confidential summaries of their submissions, questionnaire responses, and amendments thereof; and (b) where such summaries were provided, they were not in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence".[497]

7.391. As articulated over the course of the proceedings, Japan claims that Korea acted inconsistently with Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement, with respect to the KTC's treatment of confidential information. More specifically, Japan argues that:

a. the KTC granted confidential treatment to certain information provided by the applicants without requiring a showing of good cause and without conducting an objective assessment to justify the confidential treatment; and

b. with respect to certain documents, the KTC failed to require that submitting parties provide a non-confidential summary of information that was treated as confidential or to show why such a summary could not be provided.[498]

7.392. Japan identifies the application for an anti-dumping investigation filed on 23 December 2013 as "the first and the most problematic example of the inappropriate confidential treatment of information submitted by the applicants".[499] Japan asserts that a significant portion of the key information in that application was treated by the Korean Investigating Authorities as confidential without any explanation why it should be treated as such. Specifically, Japan refers to the following information: (a) the share of total domestic production of the like product represented by the two applicant companies; (b) information on market shares; (c) capacity utilization rates; (d) inventory ratios; (e) operating income margin; (f) information on prices of products from Japan and from other countries; and (g) information about the domestic selling price or the appropriate selling price. According to Japan, the KTC simply assumed that good cause existed for granting confidential treatment and ignored the absence of any public summary.[500]

7.393. Japan argues that the KTC also failed to comply with the requirements of Articles 6.5 and 6.5.1 with regard to subsequent submissions by Korean applicants. It identifies as an example the disclosed version of the applicants' submission provided at the public hearing dated 23 October 2014, from which the following information was deleted without any explanation and

[497] Japan's panel request, p. 2.
[498] Japan's first written submission, paras. 255-256 and 265-269; second written submission, paras. 207-235 and annex II.
[499] Japan's first written submission, para. 266; Investigation Application, (Exhibit JPN-7(b)).
[500] Japan's first written submission, paras. 266-267; Investigation Application, (Exhibit JPN-7(b)).

without any public summary: (a) price fluctuation index of the domestic like products throughout the POI; (b) information regarding the applicants' profitability situation; (c) information regarding the sales and operating profits of two Korean producers (Yonwoo Pneumatic and Shin Yeong Mechatronics); and (d) most of the information regarding the comparison between the actual selling price and the "reasonable" selling price of the applicants' products.[501]

7.394. Finally, Japan identifies the last submission known to Japan, the applicants' rebuttal opinion after the public hearing dated 13 November 2014, from which certain information and discussion (related to operating profits, facility investments, technology development, and manufacturing costs) was deleted and treated as confidential without any reason or non-confidential summaries.[502]

7.395. Japan provides a list, attached as annex III to Japan's first written submission, which identifies 38 elements of information that were treated as confidential, for which the KTC allegedly failed to require and assess whether there was good cause for confidentiality, and for which no or an insufficient non-confidential summary was provided. Of these 38 elements of information, 24 refer to information in the investigation application filed on 23 December 2013; 8 refer to information in the summary of opinions filed by the applicants' attorneys dated 23 October 2014; and 6 refer to information in a rebuttal filed by the applicants' attorneys dated 13 November 2014.[503]

7.9.1.2 Korea

7.396. Korea has invited the Panel to examine *ex officio* whether Japan's claims under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement) are within the Panel's terms of reference.[504]

7.397. Korea also contends that Japan failed to make a *prima facie* case of violation of Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement.[505]

7.398. With respect to Japan's allegation concerning the alleged absence of "good cause", Korea refers to Japan's statement that its claim concerns a "number of instances, including but not limited to the following examples …" Korea argues that it is not in a position to respond to an open-ended allegation concerning an unspecified "number of instances" of breach of Article 6.5. Korea also asserts that Japan's allegations in this regard have not been substantiated in a meaningful manner. In its view, Japan has merely listed a number of items of information in the applicants' submissions and simply asserted that confidential treatment was granted to that information without good cause and non-confidential summaries were not provided.[506]

7.399. More specifically, Korea also argues that, in line with the general practice followed by interested parties in anti-dumping investigations in Korea, of which all parties were aware, the applicants provided non-confidential summaries of their submissions, from which they deleted the information they considered should be accorded confidential treatment. By submitting these summaries, the applicants implicitly asserted that the deleted information fell within the categories of confidential information specifically set forth in the relevant legislation in Korea, or recognized as such in Korea's practice.[507] According to Korea, the KTC objectively assessed whether "good cause" was shown by considering whether the deleted information fell within a category of confidential information enumerated in the relevant Korean legislation. The KTC also considered whether the information for which confidential treatment was requested was by nature

[501] Japan's first written submission, para. 268; Public hearing, Summary of Opinion from Attorneys (Disclosed) (23 October 2014) (Summary of Opinion from Attorneys), (Exhibit JPN-12(b)).
[502] Japan's first written submission, para. 269; Rebuttal Opinion of Applicant Side, Document No. 90731-201411-1 (13 November 2014) (Rebuttal Opinion of Applicant Side), (Exhibit JPN-18(b)).
[503] Japan's first written submission, annex III; Investigation Application, (Exhibit JPN-7(b)); Summary of Opinion from Attorneys, (Exhibit JPN-12(b)); and Rebuttal Opinion of Applicant Side, (Exhibit JPN-18(b)). See also first written submission, para. 266 and fn 300; and second written submission, annex II.
[504] Korea's response to Panel question No. 14. See also second written submission, annex, para. 3.
[505] Korea's first written submission, para. 332.
[506] Korea's first written submission, paras. 333-334.
[507] Korea's first written submission, para. 336. See also second written submission, para. 150.

commercially-sensitive information that is typically not disclosed in the normal course of business and which would likely be treated as confidential in anti-dumping investigations.[508]

7.400. Korea also asserts that the 38 elements of information identified by Japan correspond to information for which confidential treatment is warranted under Korean legislation (Article 15 of the Enforcement Rule of the Customs Act). Accordingly, there was "good cause" to treat this information as confidential.[509]

7.401. Specifically with respect to the 24 pieces of information in the original application which Japan identified, Korea states that the applicants submitted, on 16 April 2014, an additional explanation for not disclosing the information.[510] Concerning the pieces of information for which Japan alleges no or insufficient non-confidential summaries were provided, Korea argues that the applicants submitted non-confidential summaries of the three documents identified by Japan containing the information. According to Korea, these non-confidential summaries were in sufficient detail to permit a reasonable understanding of the substance of the confidential information.[511]

7.402. Korea adds that Japan has failed to explain why the public versions submitted by the applicants were insufficient to permit a reasonable understanding of the confidential information. According to Korea, Japan has not met its burden to make a *prima facie* case in this regard.[512]

7.403. Finally, Korea asserts that Article 6.5.1 of the Anti-Dumping Agreement does not require that a non-confidential summary must be provided for every piece of data included in a submission. In Korea's view, investigating authorities have a reasonable degree of discretion in assessing the sufficiency of non-confidential summaries. Moreover, Japan is not claiming that the due process rights of interested parties were violated or that interested parties did not have a sufficient opportunity to defend their interests. According to Korea, the KTC provided descriptive narratives with respect to all of the information that Japan identified in its communications subsequent to the filing of the submissions, thereby ensuring a proper understanding of the substance of the confidential information. Korea argues that Japan's claim in this regard is, in any event, a purely formalistic argument of harmless error.[513]

7.9.2 Relevant facts

7.404. Article 64 of Korea's Enforcement Decree of the Customs Act is entitled "Request for Cooperation for the Information to the Interested Party". In relevant parts it provides that:

> (2) The Minister of Strategy and Finance or the Trade Commission shall not, without an explicit consent of the provider, disclose such materials that, among the materials submitted pursuant to paragraph 1 of this Article or pursuant to paragraph 4 of Article 59 above, is by nature deemed confidential or is submitted by the applicant or interested party on confidential basis, showing good cause.
>
> (3) The Minister of Strategy and Finance or the Trade Commission may require a person, who provided the materials and requested such materials to be treated as confidential, to furnish non-confidential summaries thereof. In such case, if such person is unable to furnish the summaries, such person shall submit a document stating the reasons why summarization is not possible.
>
> (4) Although the request for confidential treatment pursuant to the paragraph 2 of this Article is deemed improper, if the person providing the materials refuses to disclose such materials without good cause or to submit a non-confidential summaries of such materials pursuant to paragraph 3 of this Article, the Minister of Strategy and Finance

[508] Korea's first written submission, paras. 337-338. See also second written submission, para. 150.
[509] Korea's first written submission, para. 339; Article 15 of the Enforcement Rule of the Customs Act, partially amended through the Ministry of Strategy and Finance Rule No. 588 (30 December 2016) (Article 15 of the Enforcement Rule of the Customs Act), (Exhibit KOR-34(b)).
[510] Korea's first written submission, para. 340.
[511] Korea's first written submission, paras. 341-342.
[512] Korea's first written submission, paras. 343-345.
[513] Korea's first written submission, paras. 346-348.

> or the Trade Commission may disregard such information, unless the accuracy of the information is fully verified.
>
> (5) In deciding whether to investigate or impose the anti-dumping duties pursuant to Article 52 of the Act, the Minister of Strategy and Finance or the Trade Commission may, if any interested party fails to furnish the relevant materials, rejects, or obstructs an investigation conducted by the Trade Commission and it is impracticable to investigate or verify the materials because of other reasons, decide whether to take measures to preclude the dumping on the basis of available information, etc.[514]

7.405. In turn, Article 15 of the Enforcement Rule of the Customs Act, entitled "Information Treated as Confidential in relation to Anti-Dumping Measure", provides that:

> The materials subject to confidential treatment pursuant to paragraph 2, Article 62 [*sic*] of the Enforcement Decree refers to the following materials the disclosure of which may infringe the interests of the provider or the interested parties:
>
> 1. Cost of production
>
> 2. Accounting materials which have not been made public
>
> 3. Name, address and trade volume of the trade partners
>
> 4. Matters concerning the provider of confidential information; and
>
> 5. Other materials adequately deemed as confidential.[515]

7.406. On 23 December 2013, TPC and KCC filed before the KTC an investigation application concerning imports of pneumatic valves from Japan in two versions, public and confidential.[516] In the public version of the application certain sections were redacted by the applicants and specific information was replaced with the letter "X". Specifically, this was the case for information regarding: (a) the share of the subject imports and the domestic product in the Korean market in 2010 and the first half of 2013; (b) the identification of specific producers of the subject imports and Korean affiliates; (c) the identification of specific models, for the purpose of comparing the physical characteristics of relevant products and the calculation of the normal value and the export price; (d) the percentage of domestic production represented by the applicants; (e) costs of production of the products concerned; (f) domestic selling prices; (g) insurance expenses; (h) capacity utilization rates; (i) inventory ratios; (j) equipment investment and research and development plans; (k) employment by the domestic producer; (l) productivity of the domestic producer; (m) prices of raw materials; (n) the sale price of the subject imports in the Korean domestic market and that of the domestic like product; (o) a reasonable selling price; and (p) revenues lost by the applicants.[517]

7.407. In the course of the investigation, the respondent Japanese company SMC complained to the KTC that:

> [I]ts right to procedural justice has been infringed upon, since the Applicant did not provide in its application any information on the increasing/decreasing rates regarding "whether prices of the products subject to investigation have been undercut compared to those of domestic products, whether the products subject to investigation caused a decrease in the prices of the domestic products, whether the product subject to

[514] Article 64 of the Enforcement Decree of the Customs Act, partially amended through Presidential Decree No. 26,957 (5 February 2016) (Article 64 of the Enforcement Decree of the Customs Act), (Exhibit KOR-33(b)). The paragraphs quoted were amended on 29 February 2008.

[515] Article 15 of the Enforcement Rule of the Customs Act, (Exhibit KOR-34(b)). The provision was amended on 1 October 2014.

[516] Investigation Application, (Exhibit JPN-7(b)).

[517] Investigation Application, (Exhibit JPN-7(b)), pp. 3, 17, 19, 21, 23-27, 30, 33, 35, 37-40, 42, 44, 46, 48, and 50-51.

> investigation suppressed the increase of prices of the domestic products, and whether imports of products subject to investigation resulted in a decrease in the revenue."[518]

SMC also invoked Article 6.5 of the Anti-Dumping Agreement and requested the KTC that, if it was unable to provide summaries of the information, it provide reasons for not doing so.[519]

7.408. On 16 April 2014, the applicants sent a letter to the KTC in which they: (a) asserted that the applicants had not deliberately omitted information on increasing/decreasing rates for price undercutting, price depression, and price suppression, when preparing the application, and that the KTC's manual for preparing an application did not include a column for this information; (b) suggested that the responding party refer to the KTC's "report on whether to initiate the investigation on dumping of valves for pneumatic transmissions from Japan and injuries thereof", which included increasing/decreasing rates for these indices; (c) argued that some of the information identified by the responding party is by nature confidential and, pursuant to Article 6.5.1 of the Anti-Dumping Agreement should be treated as such by the authorities, while other information was included in the application and in the KTC's report; and (d) requested the KTC to grant confidential treatment to ten categories of information and provided reasons for each of the categories.[520]

7.409. On 23 October 2014, the attorneys for the applicants filed a summary of opinions.[521] In the public version of this communication, certain sections were redacted and specific information was replaced with the letter "X" or with asterisks "*". Specifically, this was the case for information regarding: (a) profit rates for the applicants in 2012, 2013, and 2014; (b) information on sales and profits for two domestic producers, other than the applicants, who were supporting the investigation; (c) index of the selling price of the domestic like product from 2010 to 2014; and (d) information comparing the prices of certain valve models for the applicant TPC and the responding company SMC.[522]

7.410. On 13 November 2014, the attorneys for the applicants filed a rebuttal opinion.[523] In the public version of this rebuttal opinion, certain sections were redacted and specific information was replaced with asterisks "*" or deleted. Specifically, this was the case for information regarding: (a) correlation between selling prices for subject imports and the domestic like product; (b) comparison between imported products and domestic like products in a 2002 investigation in the United States; (c) operating profits; (d) facility investments; (e) technological development; and (f) manufacturing costs for the applicants.[524]

7.9.3 Panel's terms of reference

7.411. In its request for a preliminary ruling, Korea did not assert that Japan's claims under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement are outside of the Panel's terms of reference and that they should therefore be rejected by the Panel. However, in response to a question from the Panel, Korea invited the Panel to examine on its own whether Japan's procedural claims, including its claims under Articles 6.5 and 6.5.1, comply with the requirements in Article 6.2 of the DSU.[525]

7.412. In its response, Korea referred to the following statement by the Appellate Body:

> [P]anels have to address and dispose of certain issues of a fundamental nature, even if the parties to the dispute remain silent on those issues. In this regard … "[t]he vesting of jurisdiction in a panel is a fundamental prerequisite for lawful panel proceedings."[*] For this reason, panels cannot simply ignore issues which go to the root of their jurisdiction – that is, to their authority to deal with and dispose of

[518] Communication dated 16 April 2014 from the applicants to the KTC, Response concerning the Applicant's Application for the Investigation on Valves for Pneumatic Transmission from Japan (Response concerning the Application), (Exhibit KOR-35(b)).
[519] Response concerning the Application, (Exhibit KOR-35(b)).
[520] Response concerning the Application, (Exhibit KOR-35(b)).
[521] Summary of Opinion from Attorneys, (Exhibit JPN-12(b)).
[522] Summary of Opinion from Attorneys, (Exhibit JPN-12(b)), pp. 12-13 and 17.
[523] Rebuttal Opinion of Applicant Side, (Exhibit JPN-18(b)).
[524] Rebuttal Opinion of Applicant Side, (Exhibit JPN-18(b)), pp. 13, 15, and 17-20.
[525] Korea's response to Panel question No. 14.

matters. Rather, panels must deal with such issues – if necessary, on their own motion – in order to satisfy themselves that they have authority to proceed.[526]

[*fn original][34] Appellate Body Report, *United States – 1916 Act*, *supra*, footnote 32, para. 54.

7.413. We will therefore examine the sufficiency of Japan's panel request with respect to Japan's claims under Articles 6.5 and 6.5.1. We will consider in this regard whether, with respect to these claims and in accordance with Article 6.2 of the DSU, Japan's panel request provides a brief summary of the legal basis of the complaint which is sufficient to present the problem clearly. We will keep in mind in this regard the double function of a panel request: (a) to set the terms of reference for the Panel under Article 7.1 of the DSU and define the scope of the dispute; and (b) to serve the due process objective of notifying the respondent and other WTO Members of the nature of the complainant's case.[527] If Japan's panel request fails to explain succinctly *how* or *why* the measures at issue are considered by Japan to be inconsistent with the WTO obligations in question, it does not satisfy the requirement of Article 6.2 of the DSU. In that case, we must conclude that Japan's claims under Articles 6.5 and 6.5.1 with respect to the confidential treatment of information are not within the scope of the Panel's terms of reference.

7.414. In its panel request, Japan asserts that Korea's measures are inconsistent with: (a) Article 6.5 of the Anti-Dumping Agreement because Korea treated allegedly confidential information provided by the interested parties as confidential without good cause shown; and (b) Article 6.5.1 of the Anti-Dumping Agreement because Korea failed to require the applicants to furnish non-confidential summaries of their submissions and, where such summaries were provided, they were not in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence.

7.415. In our view, on its face the panel request provides a brief but sufficient explanation as to *how* and *why* Japan considers the measures at issue to be violating the specific WTO obligations in question, namely those in Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement. This language is precise enough to serve to both define the basis for the Panel's terms of reference under Article 7.1 of the DSU, and inform other WTO Members, including the respondent, of the nature of the dispute.

7.416. The conclusion above is confirmed when we take into account the scope of the allegations concerning the alleged inconsistencies in the confidential treatment of information advanced in Japan's submissions: (a) that the Korean Investigating Authorities granted confidential treatment to certain information provided by the applicants without requiring a showing of good cause and without conducting an objective assessment to justify the confidentiality; and (b) that, with respect to certain documents, the Korean Investigating Authorities failed to require that submitting parties provide a non-confidential summary of information that was treated as confidential or to show why such a summary could not be provided.

7.417. We note that in its first written submission Japan identified 38 specific elements of information that are the basis of its claims under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement. These specific elements may be seen as part of the arguments advanced by Japan in support of its claims. Indeed, a party alleging a breach of Articles 6.5 and 6.5.1 must articulate its claim by identifying the information or category of information that was allegedly wrongly treated as confidential or for which no non-confidential summary was provided. Otherwise, the responding Member would not be in a position to respond to the complaint. Our analysis will be limited to these specific elements identified by Japan. Because we consider the identification of these specific elements of information as arguments in support of Japan's claims, we do not consider that it was necessary to set them out in the panel request, nor has Korea argued otherwise.

7.418. Accordingly, we conclude that these claims, with respect to the confidential treatment of information under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement, are within the Panel's terms of reference.

[526] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36. See also Korea's response to Panel question No. 14.
[527] Appellate Body Reports, *EC – Bananas III*, para. 142; *US – Carbon Steel*, para. 126.

7.9.4 Evaluation by the Panel

7.9.4.1 Relevant provisions

7.419. Article 6.5 of the Anti-Dumping Agreement provides that:

> Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.

7.420. Article 6.5.1 of the Anti-Dumping Agreement provides that:

> The authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.

7.421. Articles 6.5 and 6.5.1 strike a balance between confidentiality and due process:

> [B]y protecting information where good cause has been shown for confidential treatment, while providing an alternative method for its communication so as to satisfy the right of other parties to the investigation to obtain a reasonable understanding of the substance of the confidential information.[528]

7.422. "Confidential information" is defined in Article 6.5 as information that is: (a) by nature confidential; or (b) provided on a confidential basis by parties to an investigation. In accordance with Article 6.5, "upon good cause shown" an investigating authority must: (a) treat such information as confidential; and (b) *not* disclose such information without the permission of the submitter.

7.423. Showing good cause is thus a "condition precedent for according confidential treatment to information submitted to an authority".[529] As used in Article 6.5, "good cause" means a reason that is sufficient to justify withholding information from both the public and the other parties to the investigation, and that a showing of "good cause" involves "a demonstration of a risk of a potential consequence, the avoidance of which is important enough to warrant the non-disclosure of the information".[530] The requirement to show good cause applies to all information for which confidential treatment is sought, whether it is by nature confidential or submitted on a confidential basis.[531]

7.424. There is no explicit requirement in Article 6.5 that a showing of good cause be made in respect of each individual item of information. Accordingly, depending on the information and the documents in question, good cause may be shown in respect of general categories of information. At the same time, if an investigating authority treats as confidential information in respect of which no good cause has been shown, that investigating authority acts inconsistently with its obligation under Article 6.5.

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[528] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.36.
[529] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.38.
[530] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.37. See also Appellate Body Report, *EC – Fasteners (China)*, para. 537.
[531] "Article 6.5 applies to both information that is confidential by nature, and information that has been submitted to authorities on a confidential basis. … [T]he requirement to show 'good cause' applies to both categories of information". (Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.37). See also Appellate Body Report, *EC – Fasteners (China)*, para. 537.

7.425. Under Article 6.5.1 an investigating authority must require an interested party submitting confidential information:

a. to furnish a non-confidential summary of the information that is in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence; or

b. in exceptional circumstances, where the submitter indicates that confidential information is not susceptible of summary, to provide a statement of the reasons why summarization is not possible.

7.426. Article 6.5.1 applies in respect of information properly treated as confidential under Article 6.5 (i.e. information with respect to which the requirements of Article 6.5 for confidential treatment have been satisfied). Moreover, where non-confidential summaries are provided, they must be in "sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence".

7.9.4.2 Alleged violations of Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement

7.427. Turning to the substance of Japan's claims under Articles 6.5 and 6.5.1, we will consider whether Japan has made a *prima facie* case with respect to the alleged violations. Specifically, the relevant questions in this regard are:

a. whether the KTC granted confidential treatment to certain information provided by the applicants without requiring a showing of good cause and without an objective assessment of that showing to justify the confidential treatment, in a manner inconsistent with Article 6.5; and

b. whether, with respect to certain information, the KTC failed to require that the submitting parties provide a non-confidential summary of information for which confidential treatment was sought, or a showing of why such information was not susceptible of summary.

7.428. As indicated above, we will focus on the 38 elements of information that Japan has identified and alleged were treated as confidential, without the KTC having required and assessed whether there was good cause for such treatment.[532] Accordingly, we need not address Korea's argument that it is not in a position to respond to an open-ended allegation concerning an unspecified "number of instances" of breach of Article 6.5 by the KTC.[533]

7.429. The following facts are undisputed by the parties.

7.430. First, under the relevant Korean legislation (Article 15 of the Enforcement Rule of the Customs Act), the following information is entitled to confidential treatment in anti-dumping investigations, because its disclosure may infringe the interests of the person supplying the information or another interested party: (a) costs of production; (b) accounting materials which have not been made public; (c) name, address, and trade volumes of trade partners; (d) matters concerning the provider of confidential information; and (e) other materials adequately deemed as confidential.[534] The legislation also provides that information that is by nature deemed confidential or that is submitted by the interested party on a confidential basis, showing good cause, shall not be disclosed by the Korean Investigating Authorities without an explicit consent of the provider. The Korean Investigating Authorities may, however, require the person who provided the materials to furnish non-confidential summaries thereof or, alternatively, to submit a document stating the reasons why summarization is not possible. If the person providing the materials refuses to disclose such materials without good cause or to submit a non-confidential summary, the Korean

[532] Japan's first written submission, paras. 266-269 and annex III.
[533] Korea's first written submission, para. 333.
[534] Article 15 of the Enforcement Rule of the Customs Act, (Exhibit KOR-34(b)).

Investigating Authorities may disregard such information, unless the accuracy of the information is otherwise verified.[535]

7.431. Second, the applicants filed "Disclosed", or public, versions of at least three of their written submissions (the investigation application dated 23 December 2013, the summary of opinion from attorneys dated 23 October 2014, and the rebuttal opinion of applicants dated 13 November 2014) from which certain information was redacted either by totally removing it or by replacing it with "X" or asterisks. With respect to these submissions, in the course of the investigation, the responding companies had access only to these redacted versions.

7.432. Third, there is no explicit mention in any of these three written submissions to good cause that would justify confidential treatment of the redacted information. There is also nothing specific in any of these three written submissions linking the redacted information to any of the categories laid out in Article 15 of the Enforcement Rule of the Customs Act.[536] Likewise, there is no specific indication in the relevant documents on record of an assessment by either the KTC or the OTI as to whether good cause had been shown by the applicants to justify confidential treatment of the redacted information.

7.433. Fourth, on 16 April 2014, the applicants sent a communication to the KTC in which they: (a) asserted that some of the information included in the investigation application is by nature confidential and, pursuant to Article 6.5.1 of the Anti-Dumping Agreement should be treated as such by the authorities; and (b) requested the KTC to grant confidential treatment to ten categories of information and provided reasons for such treatment with respect to each of these categories.

7.434. Based on the facts described above, it is apparent that the Korean Investigating Authorities granted confidential treatment to certain information provided by the applicants, allowing responding companies access only to redacted versions of the submissions containing that information. This confidential treatment was granted by the Korean Investigating Authorities without any evidence that a showing of good cause that would justify the confidential treatment had been required from the applicants. Indeed, there is no evidence on record that the applicants made any indication as to the existence of good cause for confidential treatment, nor is there any evidence that the Korean Investigating Authorities requested that such good cause be shown.

7.435. As there was no showing of good cause from the applicants, there was nothing for the Korean Investigating Authorities to consider in granting confidential treatment to the information in question. We note in this regard Korea's assertion that:

> [The] KTC objectively assessed whether there was "good cause" for the deleted information, i.e. whether the information was of the types for which Korean laws afford confidential protection. On the basis of such examination, KTC confirmed the "good cause" for any confidential treatment. In addition, KTC considered that the requested confidential information was by nature "commercially-sensitive 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.[537]

7.436. The Panel finds no evidence in the record to support this assertion. While such a procedure may be sufficient to satisfy the requirements of Article 6.5, in the absence of anything in the submissions themselves, or evidence otherwise on the record, linking the information for which confidential treatment was granted to the categories of confidential information identified in Korean law, we cannot conclude that the Korean Investigating Authorities actually engaged in the asserted procedure.

7.437. The communication dated 16 April 2014, in which the applicants provided reasons for requesting confidential treatment for certain information, was submitted *after* the OTI had granted

[535] Article 64 of the Enforcement Decree of the Customs Act, (Exhibit KOR-33(b)).
[536] Korea's response to Panel question No. 113, para. 104.
[537] Korea's response to Panel question No. 69.

confidential treatment.[538] Moreover, there is no indication in the evidence presented to us to suggest that the Korean Investigating Authorities took the reasons provided by the applicants into account, notwithstanding that confidential treatment, or even took note of the submission.[539]

7.438. We take note of Korea's argument that the 38 items of information identified by Japan fall into the list in Article 15 of the Enforcement Rule of the Customs Act describing types of information to be treated as confidential, and consequently there was good cause to treat this information as confidential.[540] In our view, there is no reason *a priori* why a Member's legislation may not set out specific categories of information for which confidential treatment will normally be granted. In such a case, an investigating authority could, at least in the first instance, rely on the identification of information as falling within one such category in granting confidential treatment.[541] In the present case, however, there is no indication on the record that, in granting confidential treatment, either the applicants specified, or the Korean Investigating Authorities took into account, whether the information in question fell into any of those categories. Moreover, some of the categories described in the legislation are so general (for example: accounting materials which have not been made public; matters concerning the provider of confidential information; or other materials adequately deemed as confidential[542]) that the mere invocation of a specific category might in itself be insufficient to substantiate the alleged good cause for confidential treatment. Moreover, the existence in the legislation of defined categories of information that will normally be treated as confidential does not relieve the investigating authorities of their obligation to determine that good cause has been shown to justify the confidential treatment requested by the submitting party.

7.439. We note in this regard Korea's assertion that:

> [W]hen [the] KTC received information that was considered confidential by the interested parties, it objectively assessed whether there was indeed "good cause" by confirming whether the deleted information fell within a category of confidential information enumerated in the relevant Korean laws.[543]

7.440. As mentioned above, however, there is no evidence on the record linking the information for which confidential treatment was granted to the categories of information warranting confidential treatment identified in Korean law. In this situation, we cannot conclude that the Korean Investigating Authorities actually engaged in a consideration of whether the submitters of the information had shown good cause for confidential treatment of the information in question. Nor has evidence been put before us to suggest that the Korean Investigating Authorities themselves undertook to link the information for which confidential treatment was sought to the categories defined in Korean legislation and thereby determine whether good cause for confidential treatment existed, assuming such a process would be consistent with the requirements of the Anti-Dumping Agreement, a question we need not and do not decide.

7.441. Accordingly, in respect of the 38 items of information identified by Japan, we find that the submitters did not show good cause for the confidential treatment of that information. On that basis, in respect of the information at issue, which was treated as confidential by the Korean Investigating Authorities, we conclude that those authorities did not act consistently with Article 6.5 of the Anti-Dumping Agreement.

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[538] Korea does not argue that this communication predates the KTC's assessment of good cause for the confidential treatment, although it argues that the communication contains additional reasons that would justify the confidential treatment. (Korea's response to Panel question Nos. 65(e) and 117).

[539] For example, a chronology of the investigation contained in the OTI's Final Report does not even list the 16 April 2014 communication from the applicants. (OTI's Final Report, (Exhibit KOR-2(b) (BCI)), pp. 28-29).

[540] Korea's first written submission, paras. 336 and 339; second written submission, para. 153.

[541] Of course, if challenged during the course of an investigation, such confidential treatment might need to be reconsidered by the investigating authority, and the determination would remain subject to review in WTO dispute settlement.

[542] Korea argues that of the 38 items of information identified by Japan, all fall within the category of "accounting materials which have not been made public"; most, if not all are "adequately deemed as confidential"; and 30 are "matters concerning the provider of confidential information". (Korea's response to Panel question No. 113, para. 104).

[543] Korea's second written submission, para. 154. See also first written submission, para. 337.

7.442. With respect to non-confidential summaries, Korea argues that the version of the applicants' submissions from which confidential information was deleted constitutes the non-confidential summary required by Article 6.5.1.[544] Korea argues that this was done "[i]n accordance with the general practice followed by all interested parties in anti-dumping investigations in Korea".[545] Because the applicants did not argue that the confidential information was not susceptible of summary, the question before us is only whether the KTC failed to require that the applicants provide a non-confidential summary of the information for which confidential treatment was sought, and not whether the KTC should have required a showing of why such information was not susceptible of summary.

7.443. We note initially that the Article 6.5.1 obligation to summarize the substance of confidential information applies to all information properly designated as confidential.[546] When information has been treated as confidential inconsistently with Article 6.5, the issue of whether a proper non-confidential summary was provided becomes irrelevant.

7.444. In any event, we note the following. The obligation in Article 6.5.1 falls upon the investigating authorities: "[t]he authorities shall require interested parties providing confidential information to furnish non-confidential summaries …". It is therefore incumbent on the investigating authorities to ensure that, when information is treated as confidential, a proper non-confidential summary is provided by the party submitting the confidential information.[547]

7.445. In this respect, we note that the "Disclosed" versions of the three communications identified by Japan have entire sections from which information was removed. As noted above, in the course of the investigation, the responding companies had access only to these "Disclosed" redacted versions. The information redacted from the submissions includes a significant amount of important data, such as: (a) volumes of domestic production of the like product, including percentages of the domestic production represented by the complainants; (b) volumes of domestic consumption; (c) market shares in the Korean domestic market; (d) import price of the product under investigation; (e) production capacity and utilization by the domestic industry; (f) domestic sales; (g) inventories volumes and ratio for the domestic industry; (h) profitability for the domestic industry; (i) production costs for the domestic industry; (j) investments in equipment and research and development by the domestic industry; (k) employment and wages in the domestic industry; (l) productivity in the domestic industry; (m) cash flow for the domestic industry; (n) prices of raw materials; (o) quantity and value of imports of the product under investigation; and (p) production capacity and utilization by the Japanese industry. In some cases, although the actual data are deleted, changes expressed in percentages are included. There is no narrative in the "Disclosed" version to summarize the specific information deleted from the text.

7.446. Korea argues that Article 6.5.1 does not require that a non-confidential summary must be provided for every piece of data included in a submission. Korea also asserts that Japan is not claiming that the due process rights of interested parties were violated or that interested parties did not have a sufficient opportunity to defend their interests. According to Korea, the KTC provided descriptive narratives with respect to all of the information that Japan identified in its communications subsequent to the filing of the submissions, thereby ensuring a proper understanding of the substance of the information.[548]

7.447. We are unconvinced by these arguments. First, Article 6.5.1 requires that interested parties provide a non-confidential summary of confidential information they submit. In principle, all confidential information must be summarized (or, in exceptional circumstances, an explanation must be provided of why a summary is not possible). While we agree that this does not mean that there must be a non-confidential summary of, for instance, each individual data point reported in a table or chart, a non-confidential summary of the information must nonetheless be provided. Second, if an investigating authority fails to ensure that a non-confidential summary is submitted, there is no requirement under Article 6.5.1 for a complainant before the WTO to demonstrate that the due process rights of interested parties were violated or that interested parties did not have a sufficient opportunity to defend their interests, in order to establish a violation. Third, even

[544] Korea's first written submission, paras. 341-343; response to Panel question No. 65(a).
[545] Korea's first written submission, para. 336.
[546] Panel Report, *China – X-Ray Equipment*, para. 7.341.
[547] Panel Report, *EC – Fasteners (China)*, para. 7.515.
[548] Korea's first written submission, paras. 346-348.

assuming that the Korean Investigating Authorities subsequently provided descriptive narratives of the information treated as confidential, this would not resolve the issue of whether they required the submission of a non-confidential summary from the submitter of the information for which confidential treatment was sought. The subsequent provision of a non-confidential summary by the investigating authority does not absolve it of having failed to comply with Article 6.5.1 in the first instance.

7.448. We do not exclude *a priori* that in some circumstances a redacted version of a document from which the submitting party has deleted certain information may in itself constitute the necessary non-confidential summary of information treated as confidential. Whether such a document satisfies the requirements in Article 6.5.1, and specifically whether it is in sufficient detail to "permit a reasonable understanding of the substance of the information submitted in confidence", is something that would have to be determined on a case-by-case basis.[549]

7.449. In the present case, the documents in question contain entire sections from which the data has been redacted. For example, in some cases tables are provided from which all data was deleted[550]; in other cases, percentage changes are shown in the tables, but the actual figures were deleted.[551] There are also sections of text from which data was redacted.[552] In none of these cases does the document in question contain narrative that attempts to summarize the redacted information. In the complete absence of data, and with no narrative summary with respect to the deleted information, the "Disclosed" versions of the three communications identified by Japan cannot be said to contain a summary in sufficient detail to "permit a reasonable understanding of the substance of the information submitted in confidence".

7.450. Accordingly, we find that the "Disclosed" versions of the three submissions in question (the investigation application dated 23 December 2013, the summary of opinion from attorneys dated 23 October 2014, and the rebuttal opinion of applicants dated 13 November 2014) do not constitute sufficient non-confidential summaries of the information for which confidential treatment was sought by the applicants. By failing to require that the submitting parties provide a sufficient non-confidential summary of the information in question, the Korean Investigating Authorities acted inconsistently with Article 6.5.1 of the Anti-Dumping Agreement.

7.9.5 Conclusion

7.451. For the reasons explained above, we conclude that, with respect to the treatment of confidential information, the Korean Investigating Authorities acted inconsistently with Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement.

[549] Korea's response to Panel question No. 68. Korea argues that there can "be situations when there is no meaningful way of summarizing confidential data and, thus, the only option is to redact such information in full (e.g. by indicating 'XXX'). In such case, the narrative context or percentage trend in the document will be important to determine if the non-confidential document provides a reasonable understanding of the substance of the redacted information. That was the case in this investigation". (Korea's second written submission, para. 155). See also Korea's response to Panel question No. 68. The Panel notes in this respect that Article 6.5.1 provides that when, in exceptional circumstances, information is not susceptible of summary, the interested party must indicate such circumstance and provide a statement of the reasons why summarization is not possible. There is no evidence, nor has Korea argued, that such exceptional circumstances were invoked by the applicants.

[550] See, for example, the tables in Investigation Application, (Exhibit JPN-7(b)), pp. 12, 21, 48-52; and Summary of Opinion from Attorneys, (Exhibit JPN-12(b)), pp. 1, 11, 13, and 17.

[551] See, for example, the tables in Investigation Application, (Exhibit JPN-7(b)), pp. 13, 31-45, and 47; Summary of Opinion from Attorneys, (Exhibit JPN-12(b)), pp. 11 and 18; and Rebuttal Opinion of Applicant Side, (Exhibit JPN-18(b)), pp. 18-19.

[552] See, for example, Investigation Application, (Exhibit JPN-7(b)), pp. 30, 33, 35, 37, 46, and 51; Summary of Opinion from Attorneys, (Exhibit JPN-12(b)), pp. 12 and 17; and Rebuttal Opinion of Applicant Side, (Exhibit JPN-18(b)), pp. 13 and 15.

7.10 Disclosure of essential facts

7.10.1 Main arguments of the parties

7.10.1.1 Japan

7.452. In its panel request, Japan asserts that Korea's measures are inconsistent with Article 6.9 of the Anti-Dumping Agreement "because Korea failed to inform the interested parties of the essential facts under consideration which formed the basis for the decision to impose definitive anti-dumping measures".[553]

7.453. As articulated over the course of the proceedings, Japan claims that the KTC failed to adequately disclose the "essential facts" that formed the basis of its injury determination before making its final determination, in breach of Article 6.9 of the Anti-Dumping Agreement. Disclosure of "essential facts" must be done in a coherent way "that permits an interested party to understand factual basis for each of the intermediate findings and conclusions reached by the authority, such that it is able properly to defend its interests"[554]. In particular, Japan argues that the KTC failed to adequately disclose essential facts in the OTI's Preliminary Report dated 26 June 2014, in the KTC's Preliminary Resolution also dated 26 June 2014, and in the OTI's Interim Report dated 23 October 2014 concerning:

a. price effects, specifically: the alleged "aggressive marketing", the construction of the "reasonable sales price", "system sales"[555], and the interchangeability of the dumped imports and the domestic industry's like product;

b. volume of dumped imports, specifically: the actual volumes and market shares of the dumped imports, volume of the dumped imports relative to domestic production, and the end-point to end-point comparison of the volume of the dumped imports;

c. state of the domestic industry, specifically: capacity utilization, market share, and the profitability of the domestic industry; and

d. causation, specifically: facts relating to any causal relationship and facts relating to other known factors having an impact on the state of the domestic industry such as third countries' imports and the export performance of the domestic industry.[556]

7.454. In response to Korea's arguments, Japan argues that the KTC's Final Resolution dated 20 January 2015 constituted the "final determination" for purposes of Article 6.9 because, in particular: (a) the text of Article 6.9 expressly distinguishes between "a final determination" and "the decision whether to apply definitive measures" as a matter of procedural sequence[557]; (b) the remainder of Article 6 supports this distinction between a "final determination" on various issues and the "decision" to impose duties[558]; (c) references to the phrase "final determination" in the broader context of the Anti-Dumping Agreement, in Articles 2, 3, 6.8 and 9.2, also support the interpretation that "a final determination" under Article 6.9 occurs prior to the decision to impose duties[559]; (d) the purpose of Article 6.9 supports this distinction[560]; (e) this distinction between a "final determination" and the "decision whether to apply definitive measures" is also reflected in Korean investigation documents[561]; (f) the KTC itself was aware that the disclosure of "essential facts" needed to be done prior to the KTC's Final Resolution[562]; and (g) in practice, the MOSF

[553] Japan's panel request, p. 2.
[554] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.130; Japan's first written submission, paras 273-280.
[555] "System sales" is the prevailing method of selling valves in the Korean market. It means sales to end customers of a package that includes three different components of a pneumatic system: pneumatic valves, cylinders, and air units (filters, regulators, and lubricators). (OTI's Final Report, (Exhibit KOR-2(b) (BCI)), pp. 13 and 16-18; Korea's first written submission, para. 43).
[556] Japan's first written submission, paras. 281-297.
[557] Japan's second written submission, para. 238.
[558] Japan's second written submission, para. 239.
[559] Japan's second written submission, para. 240.
[560] Japan's second written submission, para. 241.
[561] Japan's second written submission, para. 242.
[562] Japan's second written submission, para. 243.

almost never makes any substantive changes after the KTC has made its final determinations in anti-dumping investigations[563]. Accordingly, Japan contends that any statements on the KTC Final Determination or the OTI Final Report do not cure Korea's deficient disclosure that occurred before 17 March 2015[564].

7.10.1.2 Korea

7.455. Korea has invited the Panel to examine *ex officio* whether Japan's claim under Article 6.9 of the Anti-Dumping Agreement is within the Panel's terms of reference.[565]

7.456. Korea also contends that Japan failed to make a *prima facie* case of violation of Article 6.9 of the Anti-Dumping Agreement.[566] Korea argues that Japan seems to assume, incorrectly, that the "final determination" for purposes of Article 6.9 (i.e. the decision whether to impose definitive anti-dumping measures) is the KTC's Final Resolution. Korea asserts that, under Korean law, in the Korean anti-dumping process, the final determination rests with the MOSF. Korea argues that: (a) the MOSF has the power to conduct its own anti-dumping investigation pursuant to Article 64 of the Enforcement Decree of the Customs Act[567]; (b) even after the KTC's Final Resolution, interested parties to an anti-dumping investigation in Korea have statutory rights to submit their comments on the KTC's Final Resolution to the MOSF, and the MOSF has the statutory obligation to review and make findings on such comments pursuant to Articles 41 and 44 of the Administrative Procedures Act[568]; (c) the MOSF's investigations are substantive and not at all formalistic, as the MOSF frequently requests additional information from the KTC in order to satisfy itself regarding the conclusion of the investigation, and the MOSF has overruled or changed the KTC's Final Resolution[569]; (d) Articles 60 and 61 of the Enforcement Decree of the Customs Act, which codify Article 5.10 of the Anti-Dumping Agreement, consider that the anti-dumping investigation in Korea is complete only when the MOSF concludes its investigation, not when the KTC issues its Final Resolution[570]; (e) the ordinary meaning of the word "final determination" as used in Article 6.9 of the Anti-Dumping Agreement refers to the ultimate final determination of an anti-dumping investigation that does not allow any further doubt or dispute regarding the existence of dumping, injury and causation, which can only be the MOSF's Final Decision[571]; and (f) given that Article 6.9 makes clear that the purpose of requiring the disclosure of essential facts is to put the parties in a position to adequately defend their interests before definitive anti-dumping measures are taken, a determination is not "final" as long as the parties can still defend their interests, as was the case for the Japanese respondents in the underlying investigation upon the issuance of the KTC's Final Resolution.[572] Korea adds that the KTC's Final Resolution and the OTI's Final Report, both of which are dated 20 January 2015, disclosed all essential facts that formed the basis for the MOSF's final decision whether to apply definitive measures. Korea notes that Japan is not questioning the completeness of the disclosure of essential facts made through the KTC's Final Resolution and the OTI's Final Report.[573]

7.457. Korea also argues that, even assuming that the KTC's Final Resolution and the OTI's Final Report constitute the "final determination" in terms of Article 6.9, the KTC's pre-final determination disclosure (through the OTI's Preliminary Report, the KTC's Preliminary Resolution,

[563] From 1995 to 2016, there have been 86 anti-dumping cases in Korea, but there is only one example where MOSF changed the determination by the KTC (slightly modified the rate of ant-dumping duties). (Japan's second written submission, para. 246; Korea's response to Panel question No. 15 (g)).
[564] Japan's second written submission, para. 258.
[565] Korea's response to Panel question No. 14. See also second written submission, annex, para. 3.
[566] Korea's first written submission, para. 400.
[567] Korea's second written submission, para. 165.
[568] Korea's second written submission, para. 165. Note that footnote 231 of Korea's second written submission mistakenly states that the relevant statutory provisions are Articles 45 and 46 of the Administrative Procedures Act. However, these are simple clerical errors and the correct statutory provisions are Articles 41 and 44 of the Administrative Procedures Act, as can be confirmed by the relevant exhibits, i.e. Exhibit KOR-45 and KOR-46. (See also Korea's comments on Japan's interim review request, para. 86).
[569] Korea's second written submission, para. 166.
[570] Korea's second written submission, para. 167.
[571] Korea's second written submission, para. 168.
[572] Korea's second written submission, para. 169.
[573] Korea's first written submission, paras. 362-368; second written submission, paras. 162 and 165-173; and response to Panel question Nos. 74(a) and (b).

and the OTI's Interim Report) properly informed the interested parties of all essential facts in sufficient time to allow the interested parties to defend their interests.[574]

7.458. Korea adds that Japan failed to substantiate its allegations that: (a) the facts allegedly omitted from these documents were "essential"; and (b) the disclosed information was not sufficient to allow the respondents an opportunity to defend their interests. Korea argues that Japan focuses on relatively minor, intermediate findings and mistakenly suggests that in the context of its claim under Article 6.9, the raw data and evidence supporting each of the findings should have been disclosed to the respondents.[575]

7.459. With respect to Japan's specific allegations concerning price effects, Korea argues that:

a. the term "aggressive marketing" was explained in many parts of the investigative documents and reflected two facts: (i) dumped import prices were lower when in competition with the domestic like product; and (ii) [[***]] used its dominant position to attract distributors or to discourage defection of their distributors. Both facts were disclosed to the interested parties in documents prior to the KTC's Final Resolution;

b. the KTC properly explained the role of the "reasonable sales price" on the basis of the dynamics between the reasonable sales price and the price of the domestic like product; and

c. the issues regarding "system sales" and "interchangeability" were not "essential facts" because they do not form the basis of the KTC's decision to recommend the definitive measures.[576]

7.460. With respect to Japan's specific allegations concerning import volume, Korea argues that:

a. the KTC disclosed the volume of the dumped imports by providing non-confidential summaries in the form of percentage changes. In addition, the respondents knew the actual volumes that they had reported;

b. the KTC disclosed the trends in dumped import market share by providing non-confidential summaries in the form of percentage changes;

c. the share of the dumped imports relative to domestic production is not an essential fact because the KTC did not make any finding in this respect; and

d. the Japanese respondents could arrive at the end-point to end-point changes in the volume of the dumped imports by simply adding up the year-on-year changes disclosed.[577]

7.461. With respect to Japan's specific allegations concerning the state of the domestic industry, Korea argues that:

a. the OTI's Preliminary Report provided information on the domestic industry's capacity and production, which enabled interested parties to obtain capacity utilization by a simple calculation;

b. the OTI's Preliminary Report described that the market share of the domestic industry increased first and then decreased in 2013. Information on the changes in consumption and domestic sales provided a good basis for understanding the extent of the loss of market share in 2013; and

c. the OTI's Interim Report contained information concerning the development of the profitability of the domestic industry.[578]

[574] Korea's first written submission, paras. 369-376.
[575] Korea's first written submission, para. 372.
[576] Korea's first written submission, paras. 377-389.
[577] Korea's first written submission, paras. 390-394.

7.462. With respect to Japan's specific allegations concerning causation, Korea argues that:

a. Japan failed to make a *prima facie* case by simply alleging that no separate section dealing with causation was included in the disclosures prior to the KTC's Final Resolution. The KTC dealt with injury and causation in an integrated manner;

b. the OTI's Preliminary Report and the OTI's Interim Report contained information on the rate of increase of third country imports, the fact that these imports were minimal in absolute terms, and the fact that the prices of third country imports were higher than the prices of both the domestic like product and the dumped imports; and

c. both the OTI's Preliminary Report and the OTI's Interim Report disclosed information on the percentage point changes with respect to the domestic industry's export sales, and information concerning capacity and the possible effect of the domestic industry's export performance on the state of the domestic industry.[579]

7.10.2 Relevant facts

7.10.2.1 Procedural aspects of the decision whether to apply definitive anti-dumping measures in Korea

7.463. Under Korean legislation, the decision whether to apply definitive anti-dumping measures rests with the MOSF. Article 51 of the Customs Act provides:

> If foreign goods are imported at a price below the normal price prescribed by Presidential Decree ("dumping") and such foreign goods are found to fall under any of the following cases as a result of an investigation ("material injury, etc." for the purpose of this provision) and it is deemed necessary to protect the relevant domestic industry, upon a request from a person interested in the domestic industry and prescribed by Presidential Decree, or the relevant Minister, customs duties ("anti-dumping duties"), not exceeding an amount equivalent to a difference between the normal price and the dumping price ("dumping margin"), may be imposed on such foreign goods, supplier or exporting country thereof, in addition to customs duties, *as prescribed by Ordinance of the Ministry of Strategy and Finance*:
>
> 1. Where domestic industry is materially injured or is threatened with material injury;
>
> 2. Where the development of domestic industry is materially retarded.[580]

7.464. Article 61 of the Enforcement Decree of the Customs Act[581] defines the respective areas of competence of the MOSF and the KTC with respect to anti-dumping investigations and the imposition of anti-dumping duties as follows:

a. The KTC:

   i. "[undertakes] investigation of the fact of dumping, the fact of material injury, etc., as specified in Article 52 of the Act";

   ii. "[conducts] a preliminary investigation into whether there is adequate evidence presuming the existence of the fact of dumping and the fact of material injury, etc. caused thereby";

   iii. "[reports] the results thereof to the [MOSF]";

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[578] Korea's first written submission, paras. 395-399.
[579] Korea's first written submission, paras. 400-402.
[580] Article 51 of the Customs Act, (Exhibit KOR-39(b)) (emphasis added). See also Korea's response to Panel question Nos. 15(a) and (g).
[581] Article 61 of the Enforcement Decree of the Customs Act, (Exhibit KOR-40(b)). See also Korea's response to Panel question No. 15(a).

iv. "[terminates] the main investigation thereon" "where the dumping margin or the import quantity of dumping goods falls short of the standards prescribed by Ordinance of the [MOSF] or the material injury, etc. is deemed insignificant";

v. "[commences] a main investigation beginning from the day following the day on which the results of a preliminary investigation are reported … unless special grounds prescribed by Ordinance of the [MOSF] exist";

vi. "[reports] the results of such main investigation … to the [MOSF]"; and

vii. "may extend the investigation period by up to two months" "[w]here necessary to extend the investigation period in connection with the investigation … and any interested person requests the extension of the investigation period presenting good cause".

b. The MOSF:

i. "[determines] whether to take measures prescribed in Article 53(1) of the Act and the substances thereof"[582];

ii. "[determines] whether to impose anti-dumping duties and substances thereof … and [takes] measures to impose anti-dumping duties in accordance with Article 51 of the Act"; and

iii. "where [MOSF] determines that there are special circumstances, [takes] measures to impose anti-dumping duties within 18 months from the date on which the Official Gazette is published".

7.465. The competence of the MOSF to receive and review comments and other opinions on the KTC's Final Resolution is prescribed by the Enforcement Decree of Customs Act and the Administrative Procedures Act. Article 64(1) of the Enforcement Decree of the Customs Act stipulates that the MOSF may, whenever it deems necessary for the investigation under Article 52 of the Act (i.e. anti-dumping investigation), "ask relevant administrative agencies, domestic producers, suppliers, importers and interested parties to provide necessary cooperation, including submission of relevant information, etc."[583] Article 44(1) of the Administrative Procedures Act provides that "[a]ny person may submit his/her opinions about a pre-notified draft legislation". In addition, Article 44(3) of the Administrative Procedures Act requires that an administrative agency respect and address any such submitted opinion, whereas Article 44(4) requires that the administrative agency concerned notify the outcome of its review to the provider of the opinion.[584]

7.466. As described above, on 20 January 2015, based on the OTI's Final Report of the same date, the KTC issued its Final Resolution, in which it: (a) determined that the Korean domestic industry producing the like product was materially injured by reason of the dumping of pneumatic valves from Japan; and (b) recommended to the MOSF the imposition of anti-dumping duties on such imports for five years at the rates therein specified.[585] The full non-confidential texts of OTI's Final Report and the KTC's Final Resolution were notified to domestic producers, importers, and consumers on 17 March 2015.[586]

7.467. On 12 June 2015, MOSF issued a Public Notice of Proposal Draft Rules on the Imposition of Anti-Dumping Duties on Valves for Pneumatic Transmissions Originating from Japan.[587] Japanese

[582] Provisional measures. See Korea's response to Panel question No. 15(a) and (g).
[583] Korea's response to Panel question No. 15 g; Article 64 of Enforcement Decree of the Customs Act, (Exhibit KOR-33(b)).
[584] Article 44 of the Administrative Procedures Act, (Exhibit KOR-45(b)). See also Korea's responses to Panel question No. 16 b, and No. 87(b), para. 12.
[585] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 1.
[586] Notification of final determination on dumping and injury to domestic industry of valves for pneumatic transmissions from Japan, (Exhibit JPN-29(b)).
[587] MOSF, Public Notice 2015-105. See also KTC, Opinion after reviewing the Respondents' Opinion on the Public Notice on the Rule on Imposition of Anti-Dumping Duties on Pneumatic Valves from Japan (5 August 2015) (KTC's Opinion on the Rule), (Exhibit KOR-38(b)), p. 1.

respondents subsequently filed an Opinion before MOSF on the Proposal. In their opinion, they requested MOSF not to impose anti-dumping duties. They advanced substantive objections to the KTC's findings, with respect to issues such as: (a) the substitutability of the products at issue; (b) the scope of the domestic industry; (c) the consideration of the increase in dumped imports; (d) the effect of the dumped products on the price of the like product; (e) the consideration of other indicators pertaining to the domestic industry; and (f) the assessment of other factors affecting the domestic industry. Japanese respondents also raised objections to the procedure followed by the KTC and invited MOSF to consider the negative impact that anti-dumping duties would have on the competitiveness of Korean companies.[588] On 5 August 2015, the KTC filed an opinion with MOSF addressing the arguments advanced by the Japanese respondents.[589] Relying on the KTC's Final Resolution, on 19 August 2015 the MOSF adopted Decree No. 498, entitled "Regulation Concerning the Imposition of Antidumping Duty on Valves for Pneumatic Transmissions Originating from Japan", which imposes anti-dumping duties for five years on the imports of pneumatic valves from Japan at the rates recommended in the KTC's Final Resolution.[590]

7.468. With respect to the facts that have been identified by Japan in support of its claim as not disclosed as required by Article 6.9 of the Anti-Dumping Agreement, the documents mentioned above set forth the information summarized below.

7.10.2.2 Facts regarding price effects

7.469. The KTC's Final Resolution commented on the aggressive marketing activities of one importing company in this way:

> The average sales price of the dumped products was higher due to their price differentiation in accordance with models, option details or customers, but it was found that the sales price of the dumped products was much lower than the average sales price in the case of certain products or customers for which the degree of competition with the domestic industry was fierce, which had the effect of suppressing increases in the price of the like product or causing decreases thereof. It was investigated that SMC Korea [[***]] strengthened marketing activities of SMC Korea, 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 SMC Korea and become forced to decrease the sales price or refrain from increasing prices.[591]

7.470. The KTC referred to the consideration of the marketing practices of the importer in its conclusions:

> [M]aterial injury to the domestic industry can be deemed to have been caused by the price effect of the dumped products … and the increase in the import thereof. It was investigated that in the same process, *the strengthened marketing activities of the importer, a subsidiary of the supplier of the dumped products, also had impact on the domestic industry*.[592]

7.471. The OTI's Final Report, on which the KTC relied in its Final Resolution, states that "the import volume of the dumped products increased in 2013 as a result of the decline in sales prices of the dumped products and SMC Korea's aggressive marketing when domestic demand was

[588] Respondents' Opinion on the Pre-Announcement of Legislation of the Rule (Draft) on Imposition of Anti-Dumping Duties on Valves for Pneumatic Transmissions from Japan, (Exhibit KOR-37(b)).
[589] KTC's Opinion on the Rule, (Exhibit KOR-38(b)).
[590] MOSF's Decree No. 498, (Exhibit JPN-6(b)). See also MOSF's Public Announcement, (Exhibit KOR-3(b) (BCI)).
[591] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 19 on "Review of Effect of the Dumped Products on the Price of the Like Product".
[592] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 27 on "Overall Evaluation". (emphasis added)

rapidly increasing".[593] In considering the effect of the dumped imports on the price of the like product, the OTI noted:

> It was found by the investigation that in case of the dumped products, even the same item was sold at various different prices depending on the competition status or customers, which directly affected sales prices of the like products.
>
> [[***[*]***]][594]

[[***]]

7.472. The OTI's Interim Report of 23 October 2014 also refers to the aggressive marketing practices of importers. "Undercutting of domestic selling price of the dumped imports … and aggressive marketing of the importer of the dumped imports" are identified as factors that may have influenced the increase in imports in 2013.[595] The Report also states that "[t]he increase in the dumped import is likely to have been caused by the decline in the domestic sales price of the dumped imports … and the aggressive marketing of the importer of the dumped imports, etc. while the value of the Japanese yen decreased …".[596]

7.473. Although part of the information was treated as confidential and would not have appeared in the public version of the documents, we find as a matter of fact that the KTC's Final Resolution, the OTI's Final Report, and the OTI's Interim Report all contain a discussion of the alleged aggressive marketing practices of the importing companies and the effect of those practices on the prices of the domestic like product in Korea.

7.474. With respect to the "reasonable sales price", the KTC's Final Resolution states:

> The sales price of the dumped products decreased significantly during the period of investigation, in 2013 in particular, while that of the like product fell only slightly. Apparently, this is because the domestic industry could not reduce the sales price of the like product as much as the rate of price decrease of the dumped products, since the dumped product had been transacted at prices much lower than [their] *reasonable sales price* throughout the period of investigation and the domestic industry had been suffering from the continued operating loss.
>
> The average sales price per unit of the like product required price increase because the price it was lower than the reasonable sales price by KRW [[***]] in 2010, by KRW [[***]] in 2011, by KRW [[***]] in 2012 and by KRW [[***]] in 2013. However, the average sales price was not increased and on the contrary, it even decreased in 2012 and 2013. Such 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 significant 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 period of investigation, and caused the price decrease of the like product in 2013 during which the prices of dumped imports drastically decreased.[597]

In its conclusions on injury, the KTC's Final Resolution states:

> The Commission found that the import of the dumped products increased sharply in 2013 and their price also fell sharply in the same year, thereby suppressing

[593] OTI's Final Report, (Exhibit KOR-2(b) (BCI)), p. 47. (fn omitted)
[594] OTI's Final Report, (Exhibit KOR-2(b) (BCI)), p. 58.
[595] OTI's Interim Report, (Exhibit JPN-3(b)), p. 21 (fn omitted). See also ibid. p. 38.
[596] OTI's Interim Report, (Exhibit JPN-3(b)), p. 29; Korea's first written submission, fn 459.
[597] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), pp. 18-19. (emphasis added)

> increase of the price of the like product, which had already been lower than the *reasonable price*, and even causing the price decrease thereof.[598]

7.475. The OTI's Final Report, on which the KTC relied in its Final Resolution, also refers to the "reasonable sales price" in its consideration of the effect of the dumped imports on prices:

> During the period of investigation, the actual sales price of the like products was lower than the *reasonable sales price* by KRW [[***]] to KRW [[***]] depending on the year. Therefore, there was a great need to increase sales prices. Nevertheless, they could not raise sales price except in 2011.
>
> ...
>
> In particular, in 2013, there was possibility that the sales price could be increased to a realistic level as domestic consumption grew significantly. However, the import of the dumped products increased sharply, and their prices fell drastically, which not only suppressed the price rise of the like products but also caused a price fall thereof, and as a result, the gap between the *reasonable sales prices* and the actual sales prices rather widened.[599]

The OTI's Final Report explains how the "reasonable sales price" was estimated:

> Reasonable sales price = (manufacturing cost per unit + SG&A expenses per unit) / (1 - reasonable operating profit ratio)
>
> ... [[***]][.][600]

7.476. The OTI's Preliminary Report of 26 June 2014 also refers to the reasonable sales price: "[the a]ctual selling price of like products has been sold in price that was lower than the reasonable selling price, XXX Won, XXX Won, and XXX Won, respectively, from 2010 to 2013".[601] The Report states that the "[c]hange of actual selling price of like products was small in spite of fluctuation of the reasonable selling price of like product and of the selling piece of dumped imports in 2012 and 2013".[602]

7.477. The OTI's Preliminary Report includes a table comparing the actual selling price and the reasonable sales price of the like product for the years 2010 through 2013, the price gap between the actual selling price and the reasonable selling price, and the yearly rates of increase or decrease rates for each. The table in the public version of the report shows only the yearly rates of increase or decrease, as the figures for the actual selling price and the reasonable selling price have been redacted as confidential.[603] This Report also explains how the "reasonable sales price" was estimated:

> Reasonable selling price = (Unit cost of Manufacturing + Unit selling and administrative expenses) ÷ (1 - Reasonable operating profit rate)
>
> Reasonable operating profit rate is the operating profit of machines for general purpose (C291) in the country (Source: Notified by the Bank of Korea)
> - (2010) 6.63% → (2011) 6.27% → (2012) 5.73% → (2013) not decided[.][604]

7.478. With respect to "system sales", in addressing the question of like product, the KTC's Final Resolution notes that:

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[598] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 27 on "Overall Evaluation". (emphasis added)
[599] OTI's Final Report, (Exhibit KOR-2(b) (BCI)), pp. 56-57. (emphasis added)
[600] OTI's Final Report, (Exhibit KOR-2(b) (BCI)), p. 57.
[601] OTI's Preliminary Report, (Exhibit JPN-2(b)), p. 75 on "Whether the Selling Price of Dumped Imports Prevented the Price Increase of Like Products".
[602] OTI's Preliminary Report, (Exhibit JPN-2(b)), p. 75.
[603] OTI's Preliminary Report, (Exhibit JPN-2(b)), p. 75.
[604] OTI's Preliminary Report, (Exhibit JPN-2(b)), p. 75.

SMC argued that its products and domestic products are not in competition because its sales method is different from that of domestic producers. According to SMC, it sells its products through the so-called "system sales" together with other components of pneumatic systems, such as cylinders, and provides a "total solution" that combines products and services, such as advance consulting, technical support recommending customized specifications for each customer and prompt after-sales services, etc., while domestic producers primarily sell valves individually (on a stand-alone basis). In response to this, the Applicants argued that the sales methods are not significantly different because domestic producers also conduct system sales and provide technical support and after-sales services to customers, similarly to SMC.

In order to verify the arguments of both parties, the [OTI] defined "system sales"[*] as package sales to end customers that include three of the key components of pneumatic systems, i.e., the pneumatic valve, air unit (filer, regulator and lubricator) and cylinder, based on the opinions of interested parties, and investigated sales methods of both parties. As a result, the [OTI] confirmed that as of 2013, in the case of the product under investigation, [[***]]% in terms of quantity and [[***]]% in terms of amount, was sold through system sales, and that in the case of domestic products, [[***]]% in terms of quantity and [[***]]% in terms of amount, was sold through system sales. Therefore, it is concluded that the substitutability and competitive relationship between the products cannot be denied on the grounds of different sales methods since domestic products are also sold by a sales method similar to that of the product under investigation despite certain difference in degree.

At the on-the-spot investigation of SMC Korea, the [OTI] confirmed that SMC performs accounting and sales management by unit of valves imported, rather than by unit of "system sales." Therefore, individual valves imported are not converted to another product in the unit of system through "system sales", but are merely sold with other components. It is reasonable to consider as a method of sales to enhance synergy effects among its valves and other components by conducting package sales, and such sales method cannot be a basis to deem that the unit or degree of competition is different between the product under investigation and the like product.

In addition, the advance consulting, technical support and after-sales activities for customer argued by the Respondents should be deemed as a part of proactive sales activities to attract new customers and expand sales rather than a unique sales method of the Respondents, and domestic producers were also found to provide similar technical support and after-sales services. Therefore, the substitutability and competitive relationship between the product under investigation and domestic products cannot be denied based on such sales activities.[605]

[*fn original][10] The "system sales" argued by SMC refer to package sales of the components composing pneumatic systems, such as the pneumatic valve, cylinder and air unit, etc., and customers, including equipment companies, purchase such components and build pneumatic systems necessary for manufacturing equipment.

7.479. The OTI's Final Report, on which the KTC relied in its Final Resolution, also refers to the respondents' argument about "system sales" in discussing the question of like product:

Based on the opinions of interested parties, the [OTI] defined the "system sales" as package sales to end customers that include three of the major components of pneumatic systems, i.e., (i) air units (filters, regulators, and lubricators), (ii) pneumatic valves and (iii) cylinders, and conducted an analysis accordingly.

- The [OTI] confirmed that the Applicants, as well as the Respondents, sell their products by unit of pneumatic systems and conduct "system sales" to various customers, including large companies such as [[***]], [[***]], [[***]], and [[***]]

- As of 2013, in case of the product under investigation, [[***]]% in terms of quantity and [[***]]% in terms of amount, was sold through system sales, and in case of

[605] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), pp. 6-7.

> domestic products, [[***]]% in terms of quantity and [[***]]% in terms of amount, was sold through system sales.
>
> ...
>
> At the public hearing, SMC argued that its price negotiation is carried out by system unit, which means that it is not in competition with the Applicants that conduct sales by valve unit in the domestic market. However, according to the accounting materials reviewed during the on-site verification, SMC Korea records sales in its accounting book by valve unit instead of system unit.
>
> - In other words, SMC Korea sells valves in packages of individual items that constitute pneumatic systems, rather than supplying its products under the turn-key method by unit of pneumatic system.
>
> - As discussed above, domestic producers use the identical method of sales, conducting package sales of components that constitute pneumatic systems. Therefore, such method of sales cannot serve as a ground of the argument that the products of SMC are not in direct competition with the like products.
>
> Further, given that both the Applicants and the Respondents do not record the provision of services, including design consulting and after-sale support, as a separate account in their accounting books, but as part of the sales of their products, including cylinders and valves, the provision of such services should be deemed as a method of sales to promote the sales of their own products.
>
> Some customers are also found to purchase valves and cylinders, etc. separately from different producers, and then assemble them.
>
> Given the above mentioned circumstances, the substitutability and competition between the product under investigation and domestic products cannot be denied on the ground of the difference in the method of sales ("system sales") as argued by the Respondents.
>
> Further, TPC among the Applicants used to import and sell products of SMC as SMC Korea (established in 1995) currently does, before parting from SMC and switching to self-production in 1997. Therefore, it is safe to conclude that the products produced by TPC and its method of sales have been similar to those of SMC from the beginning.[606]

7.480. The OTI's Final Report includes a table on system sales of valves for pneumatic transmissions in 2013, comparing the quantity and amount of system sales and sales as individual products for the allegedly dumped imports and the domestic product, and the respective shares of system sales *vis-à-vis* sales as individual products for each.[607] All the figures in the table are bracketed as confidential. "System sales" were not mentioned in the OTI's Preliminary Report, the KTC's Preliminary Resolution or the OTI's Interim Report.

7.481. With respect to "interchangeability", the KTC's Final Resolution notes the respondents' argument that the product under investigation and the domestic product are not substitutable or in competition with each other because of factors such as their different qualities and the perception of customers. The Final Resolution notes in this regard that:

> [The OTI] confirmed from distributors and customers, etc. that the general quality of domestic products is similar to that of the product under investigation, except some specially ordered products, etc., and that these products have been used in substitution for each other.[608]

[606] OTI's Final Report, (Exhibit KOR-2(b) (BCI)), pp. 17-18. (fns omitted)
[607] OTI's Final Report, (Exhibit KOR-2(b) (BCI)), p. 17.
[608] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 4.

7.482. In response to a similar argument by one of the respondents, the KTC's Final Resolution adds:

> The [OTI] has confirmed that although it is true that the number of items (models) is greatly different between the product under investigation and the like product, the number of items (models) of the product under investigation is large because of the addition of detailed options for various customers, and that the number of items (models) with large sales volumes is limited compared to the total number of models. As a result of comparison of the representative characteristics[*] of valves, most SMC's products have been confirmed to be substitutable and in competition with the Applicants' products.
>
> Therefore, the product under investigation and domestic products are deemed to be substitutable and in competition with each other since the characteristics and functions of the product under investigation are mostly identical to those of domestic products although the total number of items (models) is different between them.[609]
>
> [*fn original][8] Products with the same physical characteristics of the following 6 aspects are substitutable: (i) operating method (electrical, manual or air-operate) (ii) number of ports (3, 4, or 5 ports), (iii) valve size, (iv) switching method (single, double, etc.), (v) voltage, and (vi) wiring method (grommet, plug connector, etc.).

7.483. The OTI's Final Report, on which the KTC relied in its Final Resolution, refers to the respondents' argument that the product under investigation and the domestic product are not substitutable or in competition with each other in the following manner:

> The results of on-site verification of interested parties[*], including distributors and domestic customers, show that despite the partial differences in price between the product under investigation and domestic products, they are substitutable with each other in terms of performance, and are actually being used in substitution with each other.
>
> [*fn original][21] [[***]], [[***]], [[***]], [[***]], [[***]], [[***]]
>
> ...
>
> An additional analysis was conducted since SMC, whose products account for about [[***]]% of the product under investigation (as of 2013), denies substitutability and competition between the product under investigation and domestic products on the ground of the variety of its products and the difference in method of sales (system sales).
>
> ...
>
> It is true that the number of models of the product under investigation is significantly larger, given that the number of items (models) of the product under investigation imported to Korea between 2010 and 2013 was [[***]], compared to [[***]] of domestic products.
>
> - However, the reason of such larger number of models of the product under investigation is the addition of detailed options to basic models, while there are only limited number of models with large sales volumes compared to the total number of models.
>
> Comparison of the number of items as of 2013 based on the six representative physical characteristics* shows:
>
> - [[***]] of the models of the Applicants ([[***]]% of sales volume as of 2013) and [[***]] of the Respondents' (SMC) ([[***]]% of imports as of 2013) are

[609] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), pp. 5-6. (fn omitted)

> representative models of which the physical characteristics are identical with each other, and such models can be deemed to be substitutable and in competition with each other.
>
> * (6 physical characteristics) (i) method of operation (electrical, manual, air operated), (ii) number of ports (3, 4, 5), (iii) size of valves, (iv) method of switchover (single, double, etc.), (v) voltage, (iv) method of wiring (grommets, plug connectors, etc.) and other characteristics
>
> …
>
> Based on the item groups (series) under which the representative models fall, [[***]] series in total are substitutable and in competition with each other, and this is equivalent to [[***]]% of sales volumes of the Applicants and [[***]]% of import volumes of the Respondents.
>
> - The remaining [[***]]% of the Respondents' products other than the above mentioned [[***]] series are products of specific specifications produced to the requirements of specific customers. Some of them are substitutable depending on the preference of the relevant customers and can be developed by domestic producers as well if domestic demand for them increases.[610]

7.484. The OTI's Interim Report, in discussing the issue of like product, notes the importer's argument "that the Product under Investigation … differed in the consumer evaluation in terms of physical characteristics and quality (life span of product, material characteristics, consumed electric power, etc.), and, hence, there was almost no chance of interchangeability." The OTI goes on to state that:

> According to the result of on-site verification of interested parties including domestic user, there were certain price differences between the Product under Investigation and the domestic product, but they are interchangeable in terms of physical characteristics and quantity.[611]

7.485. The issue of "interchangeability" is also discussed in the OTI's Interim Report with respect to the respondents' argument that certain products should be excluded from the product under investigation as they could not be produced in Korea or were different from the domestic product "in terms of physical characteristics or usage, [and] therefore [they were not] interchangeable".[612] The OTI notes that to address this argument, it organized an expert advisory group that provided an opinion about the scope of the product under investigation. As a result, the OTI recommended that certain products and models be excluded from the scope of the product under investigation.[613]

7.10.2.3 Facts regarding volume

7.486. With respect to the import volume of the dumped products, the KTC's Final Resolution states:

> According to the [OTI's] Investigation Report,[*] the import volume of the product under investigation ("dumped products") decreased from [[***]] units in 2010, to [[***]] units in 2011, to [[***]] units in 2012, a decline of 9.8% and 32.0% year on year, and then increased to [[***]] units in 2013, an increase of 78.9% year on year. The import volume of 2013 represented an increase of [[***]]% from that of 2010.
>
> The market share of the dumped products in the domestic market also decreased from [[***]]% in 2010 to [[***]]% in 2011, to [[***]]% in 2012 and then sharply

[610] OTI's Final Report, (Exhibit KOR-2(b) (BCI)), pp. 13-16.
[611] OTI's Interim Report, (Exhibit JPN-3(b)), p. 8.
[612] OTI's Interim Report, (Exhibit JPN-3(b)), p. 9.
[613] OTI's Interim Report, (Exhibit JPN-3(b)), pp. 12-13. In its Final Resolution, the KTC stated that the OTI's decision to exclude certain products from the investigation, "which do not fall under the definition of the scope of investigation or have low substitutability with domestic products … is reasonable". (KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 4).

> increased to [[***]]% in 2013. The ratio of the import volume of the dumped products to the domestic production of the like product also decreased from [[***]]% in 2010 to [[***]]% in 2011, to [[***]]% in 2012 and then remarkably increased to [[***]]% in 2013.
>
> Hence, the import of the dumped products decreased both in absolute and relative terms until 2012 and then sharply increased in 2013. Although the market share of the dumped products in 2013 did not reach that of 2010, it is clearly shown that the decreasing trend until 2012 was reversed into a sharp increase of imports in 2013.
>
> On the contrary, the domestic market share of the like product was on continuous rise from [[***]]% in 2010 to [[***]]% in 2011, to [[***]]% in 2012 and then plummeted to [[***]]% in 2013, a similar level to 2010. The sudden decrease of the market share in 2013 appears to have been affected by the dumped products given that the import volume of the dumped products largely increased and their price greatly fell in the same year.[614]

[*fn original][19] Investigation Report, pp. 46-51[.]

7.487. Consideration of the volume of dumped imports was subsequently referred to by the KTC in its conclusions:

> The Commission found that *the import of the dumped products increased sharply in 2013* and their price also fell sharply in the same year, thereby suppressing increase of the price of the like product, which had already been lower than the reasonable price, and even causing the price decrease thereof.
>
> ...
>
> Such material injury to the domestic industry can be deemed to have been caused by the price effect of the dumped products which was confirmed by the final dumping margins at 11.66% - 31.61% *and the increase in the import thereof.*
>
> ...
>
> Based on the comprehensive review of the *import volume* and import price of the dumped products and their impact, and various business indicators of the domestic industry, the Commission determines that the domestic industry has suffered material injury due to the import of the dumped products.[615]

7.488. On whether there was an increase of the dumped imports in absolute terms, the OTI's Interim Report states:

> The volume of dumped imports had increased by XXX% in annual average from 2010 to 2013[.]
>
> - The volume of dumped imports was xxx in 2011 and to xxx in 2012 that were decreased from xxx in 2010 by 9.1% and 32.5%, respectively. However, it was xxx in 2013 that was increased by 75.9% compared to previous year.
>
> - The decrease of volume of dumped imports in the year of 2012 may have been influenced by the decrease of domestic quantity due to the global economic depression began at the end of year 2011[.]
>
> ...

[614] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 14. See also OTI's Final Report, (Exhibit KOR-2(b) (BCI)), pp. 46-51.

[615] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 27 on "Overall Evaluation". (emphasis added)

> - In 2013, the volume of dumped imports had increased 75.9% compared to the previous year, but 'SMC' mentioned that the inventory of SMC Korea had increased due to the change in policy for safe level of inventory of SMC Korea, a subsidiary of SMC, However, it is difficult to explain only as the increase of inventory,
>
> - Undercutting of domestic selling price of the dumped imports (XXX%) and aggressive marketing of the importer of the dumped imports may have influenced along with the drop of Yen value (△20. 5% to Won value in year 2013) in the situation of domestic market expansion by the recovery of economy.[616]

7.489. On whether the volume of dumped imports was relatively increased, the OTI's Interim Report states:

> The market share of the dumped imports was decreased from XXX% in 2010 to XXX% in 2011 and XXX% in 2012, but increased XXX% as XXX% in 2013 compared to the previous year[.]
>
> The market share of the like product increased from XXX% in 2010 to XXX% in 2011 and XXX% in 2012 but became XXX% in 2013 that was decreased by XXX% compared to the previous year.[617]

7.490. The OTI's Interim Report contains tables that show: (a) annual figures for volume of imports of dumped products from 2010 to 2013; and (b) annual figures for imports of dumped products in quantity and amount from 2010 to 2013, including the share of those imports, of other imports, and of the domestic like product, relative to domestic consumption. The only figures available in the public version of the report are the annual rates of increase or decrease.[618]

7.10.2.4 Facts regarding the state of the domestic industry

7.491. With respect to production and capacity utilization, the KTC's Final Resolution states:

> The production capacity for the like product of the domestic industry increased by 44.5% from [[***]] units in 2010 to [[***]] units in 2013. It was found that such increase was attributable to the active expansion of production facilities for the purpose of responding to the expansion of investment in automation equipment by the domestic and international manufacturing sector and the growth of the machine industry, while strengthening productivity and reducing costs.
>
> The production of the domestic industry fluctuated during the period of investigation, increasing by 28.5% from [[***]] units in 2010 to [[***]] units in 2011, but decreasing by 24.7% to [[***]] units in 2012 and then increasing again by 19.3% to [[***]] units in 2013. Such severe fluctuations in the production by year are found to be the outcome of the fluctuations in export volumes as well as the domestic sales.
>
> Capacity utilization of the domestic industry recorded [[***]]% in 2010, [[***]]% in 2011, [[***]]% in 2012 and [[***]]% in 2013, increasing slightly in 2011 and falling below [[***]]% after 2012. The decrease in the capacity utilization by [[***]]% between 2010 and 2013 was due to the fact that the production grew only by [[***]]% while the production capacity increased by [[***]]% during the same period.
>
> As production in 2011 increased by as much as 28.5% over the previous year thanks to the increase both in domestic sales and export, the domestic industry expanded production capacity, expecting that the demand would continue to grow, but the production decreased by [[***]]% and the capacity utilization by [[***]]% in 2012

[616] OTI's Interim Report, (Exhibit JPN-3(b)), pp. 20-21 (fn omitted). See also OTI's Preliminary Report, (Exhibit JPN-2(b)), p. 52.
[617] OTI's Interim Report, (Exhibit JPN-3(b)), p. 21. See also OTI's Preliminary Report, (Exhibit JPN-2(b)), p. 53.
[618] OTI's Interim Report, (Exhibit JPN-3(b)), pp. 21-22. See also OTI's Preliminary Report, (Exhibit JPN-2(b)), pp. 52-54.

since the domestic sales and exports decreased significantly due to the global economic recession. In 2013, despite the rapid growth of domestic consumption, domestic sales of the like product were lower than expected due to the significant increase in imports of the dumped products and accordingly, the capacity utilization improved only slightly to [[***]]%.[619]

7.492. Capacity utilization was subsequently referred to by the KTC in its conclusions:

> Despite the sharp increase in the domestic consumption in 2013, the domestic industry lost most of its market share it had gained up to 2012, due to the sharp growth in the import of the dumped products and the sharp drop in their price. Also, the domestic industry suffered material injury across the overall business indicators, including deterioration of profitability, *delay in the recovery of capacity utilization*, increase in inventory, decrease in wage and deterioration of productivity and growth, etc.[620]

7.493. The OTI's Interim Report refers to output and utilization of capacity in this way:

> Production capacity and output were increased by XXX% and XXX%, respectively, in annual average.
>
> - The increase of production capacity after 2011 was the result of production facility expansion to improve productivity and to reduce cost. An increase of output in 2011 and 2013 seems to be mainly related to an increase of export.
>
> The utilization of capacity was low as XXX% in 2010, XXX% in 2011, XXX% in 2012, and XXX% in 2013. It looks that this is due to the competition with the dumped imports had limited the increase of production while the market size is not expanded than expected[.][621]

7.494. The OTI's Interim Report contains a table that shows annual figures for: (a) production capacity; and (b) output of the domestic industry from 2010 to 2013, as well as utilization of capacity, which is defined as (b)/(a). The only figures available in the public version of the report are the annual rates of increase/decrease.[622]

7.495. With respect to the market share of the domestic industry, the KTC's Final Resolution states:

> The domestic market share of the like product increased from [[***]]% in 2010 to [[***]]% in 2011 and to [[***]]% in 2012 and then rapidly decreased in 2013 to [[***]]%, a similar level with 2010.
>
> In 2011, when domestic consumption decreased by 3.3%, the like product expanded its market share by increasing domestic sales by 13.4%; in 2012, when domestic consumption decreased by as much as 22.9%, the decrease in the domestic sales of the like product was by only 6.6%, while its market share expanded by [[***]]%. Such expansion of the domestic market share by the domestic industry appears to have been enabled by suppressing the increase of, or decreasing, the sales price of the like product through cost reduction.
>
> However, in 2013, when domestic consumption soared by 52.8%, the market share of the like product decreased [[***]]%, while domestic sales thereof increased by 7.6%. This indicates that the like product was materially injured when its market share was lost significantly despite the slight increase in the sales volume.

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[619] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), pp. 21-22. See also OTI's Final Report, (Exhibit KOR-2(b) (BCI)), p. 64.

[620] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 27 on "Overall Evaluation". (emphasis added)

[621] OTI's Interim Report, (Exhibit JPN-3(b)), p. 26. See also OTI's Preliminary Report, (Exhibit JPN-2(b)), p. 57.

[622] OTI's Interim Report, (Exhibit JPN-3(b)), p. 27. See also OTI's Preliminary Report, (Exhibit JPN-2(b)), p. 57.

> It was found that the inventory of the like product at the end of the period recorded [[***]] units in 2010, [[***]] units in 2011, [[***]] units in 2012 and [[***]] units in 2013, falling in 2012 and increasing again in 2013.
>
> To sum up the overall situation during the period of investigation, until 2012, the domestic industry expanded its domestic market share by slightly lowering the price or suppressing increases thereof in the context of shrinking domestic consumption, while in 2013, even in the soaring domestic consumption, the domestic industry saw only slight increases in sales of the like product, losing most of its market share which had been expanded until 2012 due to the sharp decrease in the price of the dumped products and the sharp increase in their imports. The like product decreased the sales price in 2013 to compete with the dumped products, but the ability of the like product to further decrease the sales price was limited by the deterioration in operating loss and therefore, it lost a large portion of the market share.
>
> The sharp increase in the imports of the dumped products caused the domestic companies to lose their market share which they had struggled to expand until 2012, and in terms of the price, the price of the domestic like product was suppressed from increases, or was reduced, in response to the decrease in the price of the dumped products. This clearly inflicted material injury to the domestic industry including the continued operating losses.
>
> The aggressive marketing activities of SMC Korea, together with the price decrease of the dumped products, have also contributed to the decrease in the market share of the like product.[623]

7.496. The domestic industry's market share was subsequently referred to by the KTC in its conclusions:

> Despite the sharp increase in the domestic consumption in 2013, *the domestic industry lost most of its market share it had gained up to 2012*, due to the sharp growth in the import of the dumped products and the sharp drop in their price. …[624]

7.497. The OTI's Interim Report refers to the domestic industry's market share in this way:

> Market share of like product was increased from XXX% in 2010 to XXX% in 2011, and XXX% in 2012 by XXX% and XXX%, respectively, compared to the previous year. However, in 2013, it was XXX% that was decreased by XXX% compared to the previous year.
>
> - Market share of like product has been gradually increased. It seemed that an increase of market share of like product was suppressed due to a rapid increase of dumped imports in 2013.[625]

7.498. The OTI's Interim Report contains tables that show annual figures for market shares of dumped imports, other imports, and the domestic like product from 2010 to 2013, as well as annual rates of increase or decrease. There are no figures available in the public version of the report.[626]

7.499. With respect to the situation of profits of the domestic industry, the KTC's Final Resolution states:

> The operating profit from domestic sales by the domestic industry remained in deficit during the period of investigation, and the operating loss rate decreased from

[623] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), pp. 20-21. See also OTI's Final Report, (Exhibit KOR-2(b) (BCI)), pp. 49, 62-63, and 67.
[624] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 27 on "Overall Evaluation". (emphasis added)
[625] OTI's Interim Report, (Exhibit JPN-3(b)), p. 45. See also ibid. p. 21; and OTI's Preliminary Report, (Exhibit JPN-2(b)), pp. 53, 59, and 72.
[626] OTI's Interim Report, (Exhibit JPN-3(b)), pp. 22, 29, 45, and 49. See also OTI's Preliminary Report, (Exhibit JPN-2(b)), pp. 59, 72, and 76.

[[***]]% in deficit in 2010 to [[***]]% in deficit in 2011 and the loss rate widened again to [[***]]% in deficit in 2012 and to [[***]]% in deficit in 2013. As the operating loss continued, the domestic industry's return on investment as a percentage of the assets invested in the production of the like product recorded negative growth throughout the entire period of investigation.

The deterioration of the operating profit in 2012, after improving in 2011, was a result of the price reduction of the like product and the increase in the operating cost in response to the competition with the dumped products.

The Respondents argued that the deterioration of the earnings of the domestic industry was attributable to the excessive spending of SG&A expenses, but such expenses of the domestic industry during the period of investigation showed a similar upward trend with that of SMC Korea, which means that the major reason for the increase in such expenses was the competition with the dumped products, for which the marketing activities had been enhanced, e.g., through the expansion of sales organizations, etc. Considering that the operating profit decreased in 2013 despite the reduction in SG&A expenses, such expenses cannot be deemed to be the cause of the worsening operating profit, and the decrease in the price of the like product in response to the reduction of that of the dumped products appears to be the major cause.

Meanwhile, the Respondents argued that the deterioration of the operating profit of the domestic industry was attributable to the increase in the depreciation cost resulting from excessive expansion of facilities. However, despite the increase in the depreciation cost resulting from facility expansion, the total manufacturing costs including the depreciation cost fell as much as [[***]]% from KRW [[***]] per unit in 2010 to KRW [[***]] per unit in 2013, which means that the cost reduction through the facility expansion and investment in enhancement of productivity led to the decrease in manufacturing costs. Therefore, the argument of the Respondents that the operating profit of the domestic industry worsened due to the facility expansion is not reasonable.

Further, the Respondents argued that the operating profit of domestic producers who did not participate in this investigation, such as [[***]] and [[***]], improved during the period of investigation, and therefore, if such producers had been included, there would have been no injury to the operating profit of the domestic industry.

The Office of Investigation conducted additional investigation into the business status of [[***]] and [[***]] with the cooperation of the two companies and found that the sales volume and operating profit of both companies increased in 2011 but the trends similar to the business indicators of the Applicants occurred in 2012 and 2013, with their sales volume and sales amount decreasing and the operating profit worsening. Further, the operating profit of the two companies decreased as much as [[***]]% in 2013 due to the adverse impact of the sharp increase in the import of the dumped products and the significant decrease in the sales price thereof. Accordingly, the inclusion of [[***]] and [[***]] would not significantly change the overall trends of the injury indicators of the domestic industry.[627]

7.500. Profitability was subsequently referred to by the KTC in its conclusions:

> [T]he domestic industry suffered material injury across the overall business indicators, including *deterioration of profitability*, delay in the recovery of capacity utilization, increase in inventory, decrease in wage and deterioration of productivity and growth, etc.[628]

7.501. The OTI's Interim Report refers to the situation of the domestic industry's profits in this way:

[627] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), pp. 23-24 (fn omitted). See also OTI's Final Report, (Exhibit KOR-2(b) (BCI)), pp. 63 and 67-71.

[628] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 27 on "Overall Evaluation". (emphasis added)

> The operating profit rate had decreased from XXX% in 2010 to XXX% in 2011 reducing deficit however, the deficit got bigger from XXX% in 2012 to XXX% in 2013.
>
> - Due to the decrease of domestic selling price of dumped imports, decrease of selling price of domestic industry was unavoidable, and it showed the consistent deteriorated status of domestic industry causing increase of cost expenditure to promote competitiveness with the dumped imports.[629]

7.502. The OTI's Interim Report contains tables that show annual figures for operating profits from 2010 to 2013, as well as annual rates of increase or decrease. The tables also include figures on: (a) sales amounts; (b) cost of goods sold; (c) profits from sales; and (d) selling and administrative expenses. There are no figures available in the public version of the report, except for the annual rates of increase or decrease column; in the case of operating profits, this column contains only comments on whether there was an increase or a decrease in deficit in the respective year.[630]

7.10.2.5 Facts regarding causation

7.503. With respect to the situation of imports other than the ones under investigation, the KTC's Final Resolution states that:

> According to the [OTI's] Investigation Report, the quantity of the product under investigation imported from countries other than Japan increased from [[***]] units in 2010 to [[***]] units in 2013, but the market share of such product in 2013 was only [[***]]% and its sales price was significantly higher than that of the like product or the dumped products. Accordingly, such product cannot be seen as being in competition with the like product. Therefore, *products other than the dumped products have had almost no adverse impact on the domestic industry*.[631]

7.504. The OTI's Final Report, on which the KTC relied in its Final Resolution, contains a table that shows annual figures for import volumes, market shares and sales prices, as well as rates of change from 2010 to 2013 for: (a) other countries; (b) dumped products; and (c) like products. All figures in the table are bracketed as confidential, except for the rates of change for import volumes and sales prices.[632]

7.505. The OTI's Interim Report refers to the situation of the volume and price of imports other than the dumped imports in this way:

> Quantity imported from other countries other than dumped imports had been increased by XXX% on an annual average from 2010 to 2013. However, imported quantity was small in absolute term.
>
> - Quantity imported from other countries was gradually increased from XXX in 2010 to XXX in 2011, XXX in 2012, and XXX in 2013, and a significant part of them was from German [*sic*] and Hungary.
>
> ...
>
> Unit selling price of imports from other countries other than dumped imports had been increased by XXX% on an annual average from 2010 to 2013.
>
> Market share of imports from other countries during the Period of Investigation was only XXX ~ XXX%, and the selling price was higher than the price of like product and

[629] OTI's Interim Report, (Exhibit JPN-3(b)), p. 32. See also OTI's Preliminary Report, (Exhibit JPN-2(b)), p. 61.
[630] OTI's Interim Report, (Exhibit JPN-3(b)), p. 32. See also ibid. p. 36; and OTI's Preliminary Report, (Exhibit JPN-2(b)), pp. 61 and 64.
[631] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 26 (emphasis added; fn omitted). See also OTI's Final Report, (Exhibit KOR-2(b) (BCI)), pp. 62 and 81-82.
[632] OTI's Final Report, (Exhibit KOR-2(b) (BCI)), p. 81.

> the price of dumped imports. Therefore, it seemed that the effect of importation from other countries on domestic industry was negligible.[633]

7.506. The OTI's Interim Report contains a table that includes annual figures for the imported quantities, market shares, and selling prices of imports other than the dumped imports from 2010 to 2013, as well as annual rates of increase or decrease. There are no figures available in the public version of the report, except for the information on the annual rates of increase or decrease column for imported quantities and selling prices.[634]

7.507. With respect to the situation of export sales by the Korean domestic industry, the KTC's Final Resolution states that:

> The production of the domestic industry fluctuated during the period of investigation, increasing by 28.5% from [[***]] units in 2010 to [[***]] units in 2011, but decreasing by 24.7% to [[***]] units in 2012 and then increasing again by 19.3% to [[***]] units in 2013. *Such severe fluctuations in the production by year are found to be the outcome of the fluctuations in export volumes as well as the domestic sales*.
>
> ...
>
> As production in 2011 increased by as much as 28.5% over the previous year *thanks to the increase both in domestic sales and export*, the domestic industry expanded production capacity, expecting that the demand would continue to grow, but the production decreased by [[***]]% and the capacity utilization by [[***]]% in 2012 *since the domestic sales and exports decreased significantly due to the global economic recession*.
>
> ...
>
> *According to the Investigation Report, the export volume of the domestic industry showed severe annual fluctuations, with [[***]] units in 2010, [[***]] units in 2011, [[***]] units in 2012 and [[***]] units in 2013. Such fluctuations in export appear to have affected the gross sales and production of the like product. However, it cannot be concluded that the export had adverse impact on domestic sales of the like product because in 2011, when the export volume was the highest, the proportion of export to the overall sales was only [[***]]% and the capacity utilization of the domestic industry was low as well*.[635]

7.508. The OTI's Final Report, on which the KTC relied in its Final Resolution, contains tables that include annual figures for export volumes, domestic shipments and the ratio of export volumes to domestic shipments, as well as rates of change from 2010 to 2013. All figures in the table are bracketed as confidential, except for the rates of change for export volumes and domestic shipments.[636]

7.509. The OTI's Interim Report refers to the situation of the export sales by the Korean domestic industry in this way:

> The increase of production capacity after 2011 was the result of production facility expansion to improve productivity and to reduce cost. An increase of output in 2011 and 2013 seems to be mainly related to an increase of export.
>
> ...
>
> Export had been increased by XXX% in annual average from 2010 to 2013.

[633] OTI's Interim Report, (Exhibit JPN-3(b)), pp. 48-49. See also OTI's Preliminary Report, (Exhibit JPN-2(b)), p. 76.
[634] OTI's Interim Report, (Exhibit JPN-3(b)), p. 49. See also OTI's Preliminary Report, (Exhibit JPN-2(b)), p. 76.
[635] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), pp. 21-22 and 26-27 (emphasis added; fn omitted). See also OTI's Final Report, (Exhibit KOR-2(b) (BCI)), pp. 60-61, 64, and 83.
[636] OTI's Final Report, (Exhibit KOR-2(b) (BCI)), pp. 61 and 83.

> - XXX in 2010 and XXX in 2011 that was increased by 197.9% compared to the previous year. However, in 2012, it became XXX that were decreased by 77.1% compared to the previous year and became XXX in 2013 that was increased by 101.5% compared to the previous year.
>
> - It looks that the increase of export in year 2011 and 2013 is the export increase to China, and the export decrease in 2012 seems to be caused by the global market depression due to the global economic depression
>
> ...
>
> Export quantity* of domestic industry was increased from XXX in 2010 to XXX in 2011 by 197.9% compared to the previous year. However, in 2012, it was decreased as XXX by 77.1% compared to the previous year. In 2013, it was XXX that was increased by XXX % compared to the previous year.
>
> * Export quantity of XXX that TPC exports to China
> : ('10) XXXea → ('11) XXXea → ('12) XXXea → ('13) XXXea
>
> - Total export proportion of total sales in domestic industry was increased from XXX% in 2010 to XXX% in 2011 and was decreased to XXX% in 2012 and then increased to XXX% in 2013.
>
> Export proportion in the total sales in domestic industry was around XXX%, and utilization of capacity of domestic industry was significantly below than the reasonable utilization of capacity. Therefore, it was difficult to regard that export influenced on the domestic sales of domestic industry.[637]

7.510. The OTI's Interim Report contains tables that show annual figures for exported quantities, total domestic sales, and the ratio of export volumes to total domestic sales from 2010 to 2013, as well as annual rates of increase or decrease. There are no figures available in the public version of the report, except for the information on the annual rates of increase or decrease column for export volumes and domestic sales.[638]

7.10.3 Panel's terms of reference

7.511. In its request for a preliminary ruling, Korea did not assert that Japan's claim under Article 6.9 of the Anti-Dumping Agreement are outside of the Panel's terms of reference and that they should therefore be rejected by the Panel. However, in response to a question from the Panel, Korea invited the Panel to examine on its own whether Japan's procedural claims, including its claim under Article 6.9, comply with the requirements in Article 6.2 of the DSU.[639]

7.512. For the reasons set out in paragraphs 7.411 to 7.413 above, we will examine the sufficiency of Japan's panel request with respect to Japan's claim under Article 6.9. We will consider in this regard whether, with respect to this claim and in accordance with Article 6.2 of the DSU, Japan's panel request provides a brief summary of the legal basis of the complaint which is sufficient to present the problem clearly. If Japan's panel request fails to explain succinctly *how* or *why* the measures at issue are considered by Japan to be inconsistent with the WTO obligations in question, it does not satisfy the requirement of Article 6.2 of the DSU. In that case, we must conclude that Japan's claim under Article 6.9 with respect to the investigating authorities' obligation to inform interested parties of the essential facts under consideration is not within the scope of the Panel's terms of reference.

7.513. In its panel request, Japan asserts that Korea's measures are inconsistent with Article 6.9 of the Anti-Dumping Agreement "because Korea failed to inform the interested parties of the

[637] OTI's Interim Report, (Exhibit JPN-3(b)), pp. 26-27 and 50. See also OTI's Preliminary Report, (Exhibit JPN-2(b)), pp. 57-58 and 77-78.
[638] OTI's Interim Report, (Exhibit JPN-3(b)), pp. 28 and 50. See also OTI's Preliminary Report, (Exhibit JPN-2(b)), pp. 58 and 78.
[639] Korea's response to Panel question No. 14.

essential facts under consideration which formed the basis for the decision to impose definitive anti-dumping measures".

7.514. On its face, the panel request merely repeats the language of Article 6.9. It does not identify the essential facts allegedly not disclosed or set out any elements that would allow the respondent or other Members to have any understanding of the scope of the claim. A mere paraphrase of the language of Article 6.9 does not explain *how* or *why* Japan considers the measures at issue to be inconsistent with the specific obligation in this provision, with respect to the alleged failure to disclose essential facts under consideration. More specifically, it does not explain *how* or *why* Japan considers that the Korean Investigating Authorities failed to inform interested parties of essential facts which formed the basis for the decision to impose definitive anti-dumping measures in the investigation at issue. Japan's claim is essentially generic – nothing in the panel request links the claim to the particular circumstances of the investigation at issue.

7.515. Accordingly, we find that Japan's panel request, with respect to the claim under Article 6.9 of the Anti-Dumping Agreement, is not sufficient to present the problem clearly. Such language is not precise enough to define the basis for the Panel's terms of reference under Article 7.1 of the DSU, or to inform other WTO Members, including the respondent, of the nature of the dispute.

7.516. Our conclusion is confirmed when we take into account the broad and diverse scope of the allegations concerning the alleged failure by the KTC to disclose essential facts under consideration with respect to: (a) price effects, specifically: the alleged practices of aggressive marketing, the construction of the "reasonable sales price", the interchangeability of the dumped imports and the domestic industry's like product, including with respect to the importance of "system sales" in this regard; (b) the volume of dumped imports, specifically: the actual volumes and market shares of the dumped imports, the volume of the dumped imports relative to domestic production, and the end-point to end-point comparison of the volume of the dumped imports; (c) the condition of the domestic industry, specifically: capacity utilization, market share, and the profitability of the domestic industry; and (d) causation, specifically: facts relating to any causal relationship and facts relating to other known factors having an impact on the state of the domestic industry such as third countries' imports and the export performance of the domestic industry.

7.10.4 Conclusion

7.517. For the reasons explained above, we conclude that Japan's claim under Article 6.9 of the Anti-Dumping Agreement, concerning the alleged failure to inform interested parties of essential facts which formed the basis for the decision to impose definitive anti-dumping measures, is not properly within the Panel's terms of reference, and we will neither consider it further nor resolve it.

7.11 Public Notice

7.11.1 Main arguments of the parties

7.11.1.1 Japan

7.518. In its panel request, Japan asserts that Korea's measures are inconsistent with Article 12.2 of the Anti-Dumping Agreement "because Korea failed to provide in sufficient detail the findings and conclusions reached on all issues of fact and law the investigating authorities considered material". Japan also asserts that Korea's measures are inconsistent with Article 12.2.2 of the Anti-Dumping Agreement "because Korea failed to make available all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures".[640]

7.519. As articulated over the course of the proceedings, Japan's claims that Korea acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement are linked to its claims concerning price effects and non-attribution.[641] Specifically, Japan argues that the KTC acted inconsistently with Articles 12.2 and 12.2.2 by failing to provide in its published report adequate explanations for, or to address contrary evidence with respect to, the following findings:

[640] Japan's panel request, p. 2.
[641] Japan's second written submission, para. 278.

a. With respect to price effects:

   i. that the subject imports and the domestic industry's like product were interchangeable; and

   ii. that depression and suppression of the prices of the like product of the domestic industry occurred because of the effects of subject imports.

b. With respect to non-attribution:

   i. that third countries imports did not have any negative impact on the state of the domestic industry;

   ii. that decreasing consumption did not have any negative impact on the state of the domestic industry;

   iii. that its changing export performance did not have any negative impact on the state of the domestic industry;

   iv. that the expanded capacity of the domestic industry and intensified domestic competition did not have any negative impact on the state of the domestic industry; and

   v. that the cumulative effects of above-mentioned factors do not break the causal link.[642]

7.520. In Japan's view, the public notice of the KTC's Final Resolution failed to provide sufficiently detailed explanations regarding factual and legal issues which led to the imposition of the measures.[643] Japan argues that the KTC should have, at a minimum, disclosed non-confidential summaries of the confidential information concerning the above-mentioned explanations.[644]

7.11.1.2 Korea

7.521. Korea has invited the Panel to examine *ex officio* whether Japan's claims under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement are within the Panel's terms of reference.[645]

7.522. Korea argues that, with respect to these claims, Japan has simply repeated its arguments in support of its Articles 3 and 6.9 claims and has failed to establish a *prima facie* case of inconsistency with Articles 12.2 and 12.2.2.[646] According to Korea, the KTC's Final Resolution and the OTI's Final Report, which were annexed to the published MOSF Final Decision, set forth in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the Korean authorities. These documents also contain all relevant information on the matters of fact and law which led to the imposition of the anti-dumping measures.[647]

7.523. In Korea's view, Japan's Articles 12.2 and 12.2.2 claims in practice challenge the substance of several findings by the Korean authorities, rather than the sufficiency of the public notice with respect to the relevant information or issues of facts and law considered material by the KTC for those findings.[648]

7.524. In response to Japan's specific allegations, Korea refers to its rebuttal of Japan's substantive claims under Article 3.[649]

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[642] Japan's first written submission, paras. 298 and 303-315.
[643] Japan's first written submission, paras. 299-302.
[644] Japan's first written submission, paras. 316-317.
[645] Korea's response to Panel question No. 14. See also second written submission, annex, para. 3.
[646] Korea's first written submission, para. 429.
[647] Korea's second written submission, para. 179.
[648] Korea's first written submission, paras. 418 and 427; second written submission, paras. 183-184.
[649] Korea's first written submission, paras. 420-423.

7.11.2 Relevant facts

7.525. The public announcement of MOSF Decree No. 498, that contains the Decision to Apply Anti-Dumping Duties on the Pneumatic Transmission Valves from Japan, incorporates as annexes the KTC's Final Resolution and the OTI's Final Report.[650]

7.526. We have already described in some detail the KTC's Final Resolution and the OTI's Final Report and the findings and conclusions reached by the Korean Investigating Authorities on the issues identified by Japan as set forth therein.

7.527. As described above[651], with respect to whether the subject imports and the domestic like product were interchangeable, both the KTC's Final Resolution and the OTI's Final Report, on which the KTC's Final Resolution is based, refer to the respondents' arguments that the product under investigation and the domestic product are not substitutable or in competition with each other. Both documents conclude that the product under investigation and the domestic like product are deemed to be substitutable and in competition with each other, and explain the reasons for this conclusion.

7.528. With respect to whether the effect of the dumped imports was to depress and suppress domestic like product prices in the Korean market, the KTC's Final Resolution notes the KTC's finding "that the dumped products suppressed price increases of the like product and caused decreases thereof" and explains the reasons for this finding.[652]

7.529. With respect to the impact of third country imports on the state of the Korean domestic industry, the KTC's Final Resolution, after noting the figures for imports of the product under investigation from countries other than Japan, as well as their sales prices and the market share of those imports in the Korean market, concludes that "products other than the dumped products have had almost no adverse impact on the domestic industry".[653]

7.530. With respect to the issue of the impact of changes in domestic consumption on the Korean domestic industry, the KTC's Final Resolution notes that domestic consumption decreased in 2011 and 2012 and then increased in 2013. The Final Resolution also records the manner in which the market share of the domestic like product in the Korean market fluctuated over the same period. The KTC states that:

> [D]uring the period of investigation, until 2012, the domestic industry expanded its domestic market share by slightly lowering the price or suppressing increases thereof in the context of shrinking domestic consumption, while in 2013, even in the soaring domestic consumption, the domestic industry saw only slight increases in sales of the like product, losing most of its market share which had been expanded until 2012 due to the sharp decrease in the price of the dumped products and the sharp increase in their imports. The like product decreased the sales price in 2013 to compete with the dumped products, but the ability of the like product to further decrease the sales price was limited by the deterioration in operating loss and therefore, it lost a large portion of the market share.[654]

7.531. With respect to the impact of changes in the export performance of domestic producers on the Korean domestic industry, the KTC's Final Resolution, after noting the volumes of production and exports of the domestic industry from 2010 to 2013, concludes that:

> [Although] severe fluctuations in the [annual domestic production are] the outcome of the fluctuations in export volumes as well as the domestic sales.
>
> ...

[650] MOSF's Public Announcement, (Exhibit KOR-3(b) (BCI)), p. 2. See also Korea's first written submission, para. 417.
[651] See paras. 7.481-7.485 above.
[652] See paras. 7.262-7.263 above.
[653] See paras. 7.503-7.506 above.
[654] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 21. See also OTI's Final Report, (Exhibit KOR-2(b) (BCI)), pp. 49, 62-63, and 67; and paras. 7.495-7.498 above.

> [I]t cannot be concluded that the export had adverse impact on domestic sales of the like product because in 2011, when the export volume was the highest, the proportion of export to the overall sales was [low] and the capacity utilization of the domestic industry was low as well.[655]

7.532. With respect to the increase in domestic industry capacity, the KTC's Final Resolution notes that:

> The production capacity for the like product of the domestic industry increased by 44.5% from [[***]] units in 2010 to [[***]] units in 2013. It was found that such increase was attributable to the active expansion of production facilities for the purpose of responding to the expansion of investment in automation equipment by the domestic and international manufacturing sector and the growth of the machine industry, while strengthening productivity and reducing costs.[656]

7.533. In considering whether dumped imports caused injury, the KTC's Final Resolution adds, with respect to the increase in domestic industry capacity:

> As discussed previously, the domestic industry expanded its investment in facility, in the expectation that economic recovery and the expansion of investment in automation would increase demand, but the domestic and international demand significantly decreased in 2012 due to the fiscal crises in Europe, etc. and the dumped products largely dominated the domestic market, resulting in the failure to increase output in accordance with the expansion of the production capacity.[657]

7.11.3 Panel's terms of reference

7.534. In its request for a preliminary ruling, Korea did not assert that Japan's claims under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement are outside of the Panel's terms of reference and that they should therefore be rejected by the Panel. However, in response to a question from the Panel, Korea invited the Panel to examine on its own whether Japan's procedural claims, including its claims under Articles 12.2 and 12.2.2, comply with the requirements in Article 6.2 of the DSU.[658]

7.535. For the reasons set out in paragraphs 7.411 to 7.413 above, we will examine the sufficiency of Japan's panel request with respect to Japan's claims under Articles 12.2 and 12.2.2. We will consider in this regard whether, with respect to these claims and in accordance with Article 6.2 of the DSU, Japan's panel request provides a brief summary of the legal basis of the complaint which is sufficient to present the problem clearly. If Japan's panel request fails to explain succinctly *how* or *why* the measure at issue is considered by Japan to be inconsistent with the WTO obligations in question, it does not satisfy the requirement of Article 6.2 of the DSU. In that case, we must conclude that Japan's claims under Articles 12.2 and 12.2.2 with respect to the investigating authorities' obligations regarding public notice of their final determination are not within the scope of the Panel's terms of reference.

7.536. In its panel request, Japan asserts that Korea's measures are inconsistent with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement because Korea: (a) "failed to provide in sufficient detail the findings and conclusions reached on all issues of fact and law the investigating authorities considered material by the investigating authorities [*sic*]"; and (b) "failed to make available all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures".[659]

7.537. On its face, the panel request merely repeats the language of Articles 12.2 and 12.2.2. It does not identify which are the findings and conclusions that Korea failed to provide in sufficient

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[655] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), pp. 21 and 27. See also OTI's Final Report, (Exhibit KOR-2(b) (BCI)), pp. 60-61, 64, and 83; and paras. 7.507 to 7.510 above.
[656] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 21. See also OTI's Final Report, (Exhibit KOR-2(b) (BCI)), p. 65; and paras. 7.491-7.494 above.
[657] KTC's Final Resolution, (Exhibit KOR-1(b) (BCI)), p. 25.
[658] Korea's response to Panel question No. 14.
[659] Japan's panel request, p. 2.

detail through the public notice of its final determination, in a manner that would allow the respondent or other Members to have any understanding of the scope of the claims. Similarly, the panel request does not identify which are the matters of fact and law and the reasons which led to the imposition of final measures with respect to which Korea failed to make available all relevant information reached on all issues of fact and law. A mere paraphrase of the language of Articles 12.2 and 12.2.2 does not explain *how* or *why* Japan considers the measure at issue to be inconsistent with the specific obligations in these provisions. More specifically, it does not explain *how* or *why* Japan considers that the Korean Investigating Authorities failed to give proper public notice of its final determination. Japan's claims are essentially generic – nothing in the panel request links the claims to the particular circumstances of the investigation at issue.

7.538. Accordingly, we find that Japan's panel request, with respect to the claims under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement, is not sufficient to present the problem clearly. The language of the panel request is not precise enough to define the basis for the Panel's terms of reference under Article 7.1 of the DSU, or to inform other WTO Members, including the respondent, of the nature of the dispute.

7.539. Our conclusion is confirmed when we take into account the broad and diverse scope of the allegations concerning the alleged failure by the Korean Investigating Authorities to set forth or make available their findings and conclusions with respect to both: (a) price effects, specifically: that the subject imports and the domestic industry's like product were interchangeable; and that price depression and price suppression occurred because of the subject imports; and (b) non-attribution, specifically: that third countries imports did not have a negative impact on the state of the domestic industry; that decreasing consumption did not have a negative impact on the state of the domestic industry; that the changing export performance did not have a negative impact on the state of the domestic industry; that the expanded capacity of the domestic industry and intensified domestic competition did not have a negative impact on the state of the domestic industry; and that the cumulative effects of the above-mentioned factors did not break the causal link.

7.11.4 Conclusion

7.540. For the reasons explained above, we conclude that Japan's claims under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement, concerning the alleged failure by the Korean Investigating Authorities to give proper public notice of their final determination, are not properly within the Panel's terms of reference, and we will neither consider them further nor resolve them.

7.12 Consequential claims

7.12.1 Main arguments of the parties

7.12.1.1 Japan

7.541. Japan argues that, in light of the violations of 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's anti-dumping measures on pneumatic valves from Japan are also inconsistent with Article 1 of the Anti-Dumping Agreement and with Article VI of the GATT 1994. In Japan's view, this is because Article 1 of the Anti-Dumping Agreement provides that each of the provisions under the Anti-Dumping Agreement "governs" the application of Article VI of the GATT 1994.[660]

7.12.1.2 Korea

7.542. Korea responds that, because all other claims advanced by Japan are to be rejected, these consequential claims cannot stand.[661] Korea also asserts that a violation of Article 6.5, 6.5.1, 6.9, 12.2, or 12.2.2 of the Anti-Dumping Agreement would not likely result in a violation of Article VI of the GATT 1994. In Korea's view, this is because Article 1 of the Anti-Dumping Agreement differentiates between "the circumstances provided for in Article VI of GATT 1994", which regulates the application of anti-dumping measures, and the initiation and conduct of

[660] Japan's first written submission, para. 319; response to Panel question No. 82, paras. 180-181.
[661] Korea's first written submission, para. 431.

investigations which must be "in accordance with the provisions of [the Anti-Dumping Agreement]". According to Korea, the procedural aspects of anti-dumping investigations are not specified in Article VI of GATT 1994, but are covered instead by the provisions of the Anti-Dumping Agreement. Those matters would "conceivably fall outside the scope of Article VI of GATT 1994".[662]

7.12.2 Panel's terms of reference

7.12.2.1 Evaluation by the Panel

7.543. In its request for a preliminary ruling, Korea did not assert that Japan's consequential claims with respect to Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994 are outside of the Panel's terms of reference and that they should therefore be rejected by the Panel. We recall, however, that in response to a question from the Panel, Korea invited the Panel to examine on its own whether Japan's procedural claims comply with the requirements in Article 6.2 of the DSU.[663] This invitation by Korea did not specifically extend to Japan's consequential claims.

7.544. Given that we have examined the sufficiency of Japan's panel request with respect to all the other claims raised by Japan, in order to properly establish our jurisdiction we consider it appropriate to do the same with respect to these consequential claims.

7.545. Accordingly, we will examine the sufficiency of Japan's panel request with respect to Japan's consequential claims. We will consider in this regard whether, with respect to these claims and in accordance with Article 6.2 of the DSU, Japan's panel request provides a brief summary of the legal basis of the complaint which is sufficient to present the problem clearly. If Japan's panel request fails to explain succinctly *how* or *why* the measure at issue is considered by Japan to be inconsistent with the WTO obligations in question, it does not satisfy the requirement of Article 6.2 of the DSU. In that case, we must conclude that Japan's consequential claims are not within the scope of the Panel's terms of reference.

7.546. In its panel request, Japan asserts that Korea's measures are inconsistent with Article 1 of the Anti-Dumping Agreement and with Article VI of the GATT 1994, "[a]s a consequence of the apparent breaches of the [Anti-Dumping Agreement] described above". On its face, the panel request merely asserts that the violation of other provisions listed in the panel request results in an automatic breach of Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994.

7.547. Article 1 of the Anti-Dumping Agreement provides in relevant part that "[a]n anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement".[664] This provision establishes a single, distinct obligation, namely that anti-dumping measures may only be applied: (a) under the circumstances provided for in Article VI of GATT 1994; and (b) pursuant to investigations initiated and conducted in accordance with the provisions of the Anti-Dumping Agreement. Accordingly, the imposition of anti-dumping measures either in circumstances different from those provided for in Article VI of GATT 1994 or pursuant to investigations which have not been initiated or conducted in accordance with the provisions of the Anti-Dumping Agreement would result in a consequential violation of Article 1 of the Anti-Dumping Agreement. As Japan has claimed that, in several aspects, the measures at issue were imposed by Korea pursuant to an investigation that was not initiated or conducted in accordance with specified provisions of the Anti-Dumping Agreement, the language of Japan's panel request, although brief, is sufficient to connect the challenged measure with the provision at issue (Article 1 of the Anti-Dumping Agreement) so that the respondent party and other Members are aware of the nature of the complaint.

7.548. In contrast, Article VI of GATT 1994 does not contain one single, distinct obligation, but a number of obligations regarding the imposition of anti-dumping and countervailing duties. As we have noted before, to the extent that a provision contains multiple obligations, a panel request must specify which of them is being challenged. As Japan's panel request does not identify which

[662] Korea's response to Panel question No. 82.
[663] Korea's response to Panel question No. 14.
[664] Fn omitted.

of the obligations in Article VI of GATT 1994 would be violated as a consequence of the alleged violations of specified provisions of the Anti-Dumping Agreement, the panel request is not in our view sufficient to present the problem clearly. The language used is not precise enough to define the basis for the Panel's terms of reference under Article 7.1 of the DSU, or to inform other WTO Members, including the respondent, of the nature of the dispute.

7.12.2.2 Conclusion

7.549. For the reasons explained above, we conclude that Japan's consequential claim under Article 1 of the Anti-Dumping Agreement is within the Panel's terms of reference. In contrast, Japan's consequential claim under Article VI of GATT 1994 is not properly within the Panel's terms of reference, and we will neither consider it further nor resolve it.

7.12.3 Evaluation by the Panel

7.550. Article 1 of the Anti-Dumping Agreement provides that:

> An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated[*] and conducted in accordance with the provisions of this Agreement. The following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations.
>
> ---
>
> [*fn original][1] The term "initiated" as used in this Agreement means the procedural action by which a Member formally commences an investigation as provided in Article 5.

7.551. We have already concluded that, with respect to the measure at issue, the Korean Investigating Authorities acted inconsistently with the following provisions of the Anti-Dumping Agreement: (a) Articles 3.1 and 3.5, as a result of flaws in their consideration of the effect of the dumped imports on prices in the domestic market in determining causation; (b) Article 6.5, having treated information provided by the applicants as confidential without good cause shown for such treatment; and (c) Article 6.5.1, with respect to the failure to require that submitting parties provide a sufficient non-confidential summary of information for which confidential treatment was sought.

7.552. Accordingly, we conclude that, in respect of the inconsistencies described above, the measure at issue was imposed pursuant to an investigation that was not conducted fully in accordance with the provisions of the Anti-Dumping Agreement. As noted above, the imposition of anti-dumping measures pursuant to investigations which have not been initiated and conducted in accordance with the provisions of the Anti-Dumping Agreement necessarily results in a consequential violation of Article 1 of the Anti-Dumping Agreement.

7.12.4 Conclusion

7.553. For the reasons explained above, we conclude that the Korean Investigating Authorities also acted inconsistently with Article 1 of the Anti-Dumping Agreement as a consequence of and to the extent of the inconsistencies we have already found with respect to the Anti-Dumping Agreement.

8 CONCLUSIONS AND RECOMMENDATION

8.1 Conclusions

8.1. Having considered Korea's request for a preliminary ruling and the responses thereto, as well as its invitation that the Panel consider *ex officio* whether others of Japan's claims are properly within its terms of reference, we find that, with respect to the following, Japan's panel request fails to provide a brief summary of the legal basis of the complaint which is sufficient to present the problem clearly. We therefore conclude that the following are *not* within the Panel's terms of reference and we neither consider nor resolve them in this report:

a. Japan's claim under Articles 3.1 and 4.1 of the Anti-Dumping Agreement, concerning the definition of the domestic industry;

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

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

d. Japan's claim under Articles 3.1 and 3.4 of the Anti-Dumping Agreement concerning the impact of the dumped import on the state of the domestic industry, with the exception of the allegations that the Korean Investigating Authorities failed to evaluate two of the specific factors listed in Article 3.4 (the ability to raise capital or investments, and the magnitude of the margin of dumping);

e. Japan's claim under Articles 3.1 and 3.5 of the Anti-Dumping Agreement, concerning the alleged failure by the Korean Investigating Authorities to consider adequately all known factors other than the dumped imports that were injuring the domestic industry at the same time, with the exception of the allegations concerning whether the Korean Investigating Authorities considered certain known factors in isolation and dismissed them without an adequate examination;

f. Japan's claim under Article 6.9 of the Anti-Dumping Agreement, concerning the alleged failure by the Korean Investigating Authorities to inform interested parties of essential facts which formed the basis for the decision to impose definitive anti-dumping measures;

g. Japan's claims under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement, concerning the alleged failure by the Korean Investigating Authorities to give proper public notice of their final determination; and

h. Japan's consequential claim under Article VI of the GATT 1994.

8.2. We find that, with respect to the following, Japan's panel request does provide a brief summary of the legal basis of the complaint which is sufficient to present the problem clearly. We therefore conclude that the following *are properly within* the Panel's terms of reference:

a. Japan's claim under Articles 3.1 and 3.4 of the Anti-Dumping Agreement concerning the alleged failure of the Korean Investigating Authorities to evaluate two of the specific factors listed in Article 3.4, i.e. the ability to raise capital or investments, and the magnitude of the margin of dumping;

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

c. Japan's claim under Articles 3.1 and 3.5 of the Anti-Dumping Agreement, concerning the alleged failure by the Korean Investigating Authorities to demonstrate any causal relationship between the dumped imports and the injury to the domestic industry;

d. Japan's claim under Articles 3.1 and 3.5 of the Anti-Dumping Agreement concerning the alleged failure of the Korean Investigating Authorities to examine certain known factors adequately and their examination of those factors in isolation;

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

f. Japan's consequential claim under Article 1 of the Anti-Dumping Agreement.

8.3. With respect to those of Japan's claims that are within our terms of reference as set forth in paragraph 8.2 above, we conclude that Japan has *not* demonstrated that the Korean Investigating Authorities acted inconsistently with:

a. Articles 3.1 and 3.4 of the Anti-Dumping Agreement with respect to their evaluation of the investment and funding ability of the domestic industry and of the magnitude of the margin of dumping;

b. Articles 3.1 and 3.5 of the Anti-Dumping Agreement with respect to their conclusion that the dumped imports, through the effects of dumping, were causing injury to the domestic industry; and

c. Articles 3.1 and 3.5 of the Anti-Dumping Agreement with respect to their examination of known factors other than the dumped imports that were injuring the domestic industry at the same time.

8.4. With respect to those of Japan's claims that are within our terms of reference as set forth in paragraph 8.2 above, we further conclude that Japan *has demonstrated* that the Korean Investigating Authorities acted inconsistently with:

a. Articles 3.1 and 3.5 of the Anti-Dumping Agreement in their causation analysis as a result of flaws in their analysis of the effect of the dumped imports on prices in the domestic market;

b. Article 6.5 of the Anti-Dumping Agreement with respect to their treatment of information provided by the applicants as confidential without requiring that good cause be shown; and

c. Article 6.5.1 of the Anti-Dumping Agreement with respect to their failure to require that the submitting parties provide a sufficient non-confidential summary of the information for which confidential treatment was sought.

d. As a consequence of and to the extent of the inconsistencies described above, Korea's anti-dumping measures on imports of pneumatic valves from Japan are also inconsistent with Article 1 of the Anti-Dumping Agreement.

8.5. Pursuant to Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, to the extent Korea has acted inconsistently with certain provisions of the Anti-Dumping Agreement, we conclude that Korea has nullified or impaired benefits accruing to Japan under that Agreement.

8.2 Recommendation

8.6. Pursuant to Article 19.1 of the DSU, having found that Korea acted inconsistently with certain provisions of the Anti-Dumping Agreement, we recommend that Korea bring its measures into conformity with its obligations under that Agreement.

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