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KOREA – SUNSET REVIEW OF ANTI-DUMPING DUTIES ON STAINLESS STEEL BARS

REPORT OF THE PANEL

Addendum

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

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS553/R.

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ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 23 April 2019

General

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

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

Confidentiality

2. (1) The deliberations of the Panel and the documents submitted to it shall be kept confidential. Members shall treat as confidential information that is submitted to the Panel which the submitting Member has designated as confidential.

(2) Nothing in the DSU or in these Working Procedures shall preclude a party or third party from disclosing statements of its own positions to the public.

(3) If a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

(4) Parties and third parties shall treat business confidential information in accordance with the procedures set forth in the Additional Working Procedures of the Panel Concerning Business Confidential Information.

Submissions

3. (1) Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel.

(2) Each party shall also submit to the Panel, before the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

(3) Each third party that chooses to make a written submission before the first substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel.

(4) The Panel may invite the parties or third parties to make additional submissions during the proceeding, including with respect to requests for preliminary rulings in accordance with paragraph 4 below.

Preliminary rulings

4. (1) If Korea considers that the Panel should make a ruling before the issuance of the Report that certain measures or claims in the panel request or the complainant's first written submission are not properly before the Panel, the following procedure applies. Exceptions to this procedure shall be granted upon a showing of good cause.

a. Korea shall submit any such request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel.

Japan shall submit its response to the request before the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request.

b. The Panel may issue a preliminary ruling on the issues raised in such a preliminary ruling request before, during or after the first substantive meeting, or the Panel may defer a ruling on the issues raised by a preliminary ruling request until it issues its Report to the parties.

c. If the Panel finds it appropriate to issue a preliminary ruling before the issuance of its Report, the Panel may provide reasons for the ruling at the time that the ruling is made, or subsequently in its Report.

d. Any request for such a preliminary ruling by the respondent before the first meeting, and any subsequent submissions of the parties in relation thereto before the first meeting, shall be served on all third parties. The Panel may provide all third parties with an opportunity to provide comments on any such request, either in their submissions as provided for in the timetable or separately. Any preliminary ruling issued by the Panel before the first substantive meeting on whether certain measures or claims are properly before the Panel shall be shared with all third parties.

(2) This procedure is without prejudice to the parties' right to request other types of preliminary or procedural rulings during the proceeding, and to the procedures that the Panel may follow with respect to such requests.

Evidence

5. (1) Each party shall submit all evidence to the Panel no later than during the first substantive meeting, except evidence necessary for purposes of rebuttal, or evidence necessary for answers to questions or comments on answers provided by the other party. Additional exceptions may be granted upon a showing of good cause.

(2) If any new evidence has been admitted upon a showing of good cause, the Panel shall accord the other party an appropriate period of time to comment on the new evidence submitted.

6. (1) If the original language of an exhibit or portion thereof is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of the exhibit or relevant portion or parts thereof into the WTO working language of the submission. The Panel may grant reasonable extensions of time for the translation of exhibits upon a showing of good cause.

(2) Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next submission or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by an explanation of the grounds for the objection and an alternative translation.

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

(2) Each party shall provide an updated list of exhibits (in Word or Excel format) together with each of its submissions, oral statements, and responses to questions.

(3) If a party submits a document that has already been submitted as an exhibit by the other party, it should explain why it is submitting that document again.

(4) If a party includes a hyperlink to the content of a website in a submission, and intends that the cited content form part of the official record, the cited content of the website shall be provided in the form of an exhibit.

Editorial Guide

8. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions (electronic copy provided).

Questions

9. The Panel may pose questions to the parties and third parties at any time, including:

a. Before any meeting, the Panel may send written questions, or a list of topics it intends to pursue in questioning orally during a meeting. The Panel may ask different or additional questions at the meeting.

b. The Panel may put questions to the parties and third parties orally during a meeting, and in writing following the meeting, as provided for in paragraphs 15 and 21 below.

Substantive meetings

10. The Panel shall meet in closed session.

11. The parties shall be present at the meetings only when invited by the Panel to appear before it.

12. (1) Each party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

13. Each party shall provide to the Panel the list of members of its delegation no later than 5.00 p.m. (Geneva time) three working days before the first day of each meeting with the Panel.

14. A request for interpretation by any party should be made to the Panel as early as possible, preferably at the organizational stage, to allow sufficient time to ensure availability of interpreters.

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

a. The Panel shall invite Japan to make an opening statement to present its case first. Subsequently, the Panel shall invite Korea to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. If interpretation is needed, each party shall provide additional copies for the interpreters before taking the floor.

b. Each party should avoid lengthy repetition of the arguments in its submissions. Each party is invited to limit the duration of its opening statement to not more than 75 minutes. If either party considers that it requires more time for its opening statement, it should inform the Panel and the other party at least 10 days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to the other party.

c. After the conclusion of the opening statements, the Panel shall give each party the opportunity to make comments or ask the other party questions.

d. The Panel may subsequently pose questions to the parties.

e. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Japan presenting its statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its closing statement, if available.

f. Following the meeting:

i. Each party shall submit a final written version of its opening statement no later than 5.00 p.m. (Geneva time) on the first working day following the meeting. At the same time, each party should also submit a final written version of any prepared closing statement that it delivered at the meeting.

ii. Each party shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the other party to which it wishes to receive a response in writing.

iii. The Panel shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the parties to which it wishes to receive a response in writing.

iv. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the time-frame established by the Panel before the end of the meeting.

16. The second substantive meeting of the Panel with the parties shall be conducted in the same manner as the first substantive meeting with the Panel, except that Korea shall be given the opportunity to present its oral statement first. If Korea chooses not to avail itself of that right, it shall inform the Panel and the other party no later than 5.00 p.m. (Geneva time) three working days before the meeting. In that case, Japan shall present its opening statement first, followed by Korea. The party that presented its opening statement first shall present its closing statement first.

Third party session

17. Each third party may present its views orally during a session of the first substantive meeting with the parties set aside for that purpose.

18. Each third party shall indicate to the Panel whether it intends to make an oral statement during the third-party session, along with the list of members of its delegation, in advance of this session and no later than 5.00 p.m. (Geneva time) three working days before the third-party session of the meeting with the Panel.

19. (1) Each third party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each third party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

20. A request for interpretation by any third party should be made to the Panel as early as possible, preferably upon receiving the working procedures and timetable for the proceeding, to allow sufficient time to ensure availability of interpreters.

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

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

b. The Panel shall first hear the oral statements of the third parties. Each third party making an oral statement at the third-party session shall provide the Panel and other participants with a provisional written version of its statement before it takes the floor. If interpretation

of a third party's oral statement is needed, that third party shall provide additional copies for the interpreters before taking the floor.

c. Each third party should limit the duration of its statement to 15 minutes, and avoid repetition of the arguments already in its submission. If a third party considers that it requires more time for its opening statement, it should inform the Panel and the parties at least 10 days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to all third parties for their statements.

d. After the third parties have made their statements, the parties shall be given the opportunity to pose questions to any third party for clarification on any matter raised in that third party's submission or statement.

e. The Panel may subsequently pose questions to any third party.

f. Following the third-party session:

   i. Each third party shall submit the final written version of its oral statement, no later than 5.00 p.m. (Geneva time) on the first working day following the meeting.

   ii. Each party may send in writing, within the timeframe to be established by the Panel before the end of the meeting, any questions to a third party or parties to which it wishes to receive a response in writing.

   iii. The Panel may send in writing, within the timeframe to be established by the Panel before the end of the meeting, any questions to a third party or parties to which it wishes to receive a response in writing.

   iv. Each third party choosing to do so shall respond in writing to written questions from the Panel or a party, within a timeframe established by the Panel before the end of the meeting.

Descriptive part and executive summaries

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

23. Each party shall submit two integrated executive summaries. The first integrated executive summary shall summarize the facts and arguments as presented to the Panel in the party's first written submission, its first oral statement, and if possible, its responses to questions following the first substantive meeting. The second integrated executive summary shall summarize its second written submission, its second oral statement, and if possible, its responses to the second set of questions and comments thereon following the second substantive meeting. The timing of the submission of these two integrated executive summaries shall be indicated in the timetable adopted by the Panel.

24. Each integrated executive summary shall be limited to no more than 15 pages.

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

26. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions, if relevant. The executive summary to be provided by each third party shall not exceed six pages. If the document(s) comprising a third-party submission and/or oral statement does not exceed six pages in total, this will serve as the executive summary of that third party's arguments unless the

third party submits a separate integrated executive summary or otherwise indicates that it does not wish those document(s) to serve as its executive summary.

Interim review

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

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

Interim and Final Report

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

Service of documents

30. The following procedures regarding service of documents apply to all documents submitted by parties and third parties during the proceeding:

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

b. Each party and third party shall submit 1 paper copy of its submissions and 1 paper copy of its Exhibits to the Panel by 5.00 p.m. (Geneva time) on the due dates established by the Panel. The DS Registrar shall stamp the documents with the date and time of submission. The paper version submitted to the DS Registry shall constitute the official version for the purposes of submission deadlines and the record of the dispute. If any documents are in a format that is impractical to submit as a paper copy, then the party may submit such documents to the DS Registrar by email or on a CD-ROM, DVD or USB key only.

c. Each party and third party shall also send an email to the DS Registry, at the same time that it submits the paper versions, attaching an electronic copy of all documents that it submits to the Panel, preferably in both Microsoft Word and PDF format. All such emails to the Panel shall be addressed to DSRegistry@wto.org, and copied to other WTO Secretariat staff whose email addresses have been provided to the parties during the proceeding. If it is not possible to attach all the Exhibits to one email, the submitting party or third party shall provide the DS Registry with 1 copies of the Exhibits on USB keys, CD-ROMs or DVDs.

d. In addition, each party and third party is invited to submit all documents through the Digital Dispute Settlement Registry (DDSR) within 24 hours following the deadline for the submission of the paper versions. If the parties or third parties have any questions or technical difficulties relating to the DDSR, they are invited to consult the DDSR User Guide (electronic copy provided) or contact the DS Registry at DSRegistry@wto.org.

e. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve any submissions in advance of the first substantive meeting with the Panel directly on the third parties. Each third party shall serve any document submitted to the Panel directly on the parties and on all other third parties. A party or third party may serve its documents on another party or third party by email or other electronic format acceptable to the recipient without having to serve a paper copy, unless the recipient party or third party has previously requested a paper copy in writing. Each party and third party shall confirm, in writing, that copies have been served on the parties and third parties, as appropriate, at the time it provides each document to the Panel.

f. Each party and third party shall submit its documents with the DS Registry and serve copies on the other party (and third parties if appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel.

g. As a general rule, all communications from the Panel to the parties and third parties will be via email. In addition to transmitting them to the parties by email, the Panel shall provide the parties with a paper copy of the Interim Report and the Final Report.

Correction of clerical errors in submissions

31. The Panel may grant leave to a party or third party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request should identify the nature of the errors to be corrected, and should be made promptly.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES ON BUSINESS CONFIDENTIAL INFORMATION

Adopted on 23 April 2019

The following procedures apply to any business confidential information (BCI) submitted in the course of the Panel proceedings in DS553.

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

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

   b. any other information designated as such by the party submitting it, unless the Panel decides it should not be treated as BCI for purposes of these Panel proceedings based on an objection by a party pursuant to paragraph 3 below.

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

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

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

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

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

7. The party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx, xxx.xx]]. The first page or cover of the document shall state "Contains Business Confidential Information", and

each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page.

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

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

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

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

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

ANNEX A-3

INTERIM REVIEW

1 INTRODUCTION

1.1. Articles 15.2 and 15.3 of the DSU provide:

> 2. Following the expiration of the set period of time for receipt of comments from the parties to the dispute, the panel shall issue an interim report to the parties, including both the descriptive sections and the panel's findings and conclusions. Within a period of time set by the panel, a party may submit a written request for the panel to review precise aspects of the interim report prior to circulation of the final report to the Members. At the request of a party, the panel shall hold a further meeting with the parties on the issues identified in the written comments. If no comments are received from any party within the comment period, the interim report shall be considered the final panel report and circulated promptly to the Members.
>
> 3. The findings of the final panel report shall include a discussion of the arguments made at the interim review stage. The interim review stage shall be conducted within the time-period set out in paragraph 8 of Article 12.

1.2. We set out below a "discussion of the arguments made at the interim review stage" as required by Article 15.3 of the DSU, including an overview of each party's specific review requests, the other party's position on those requests, and our evaluation. We have revised certain aspects of the Interim Report in the light of these requests. In addition, we have made certain changes to improve the clarity and accuracy of the Final Report and to correct typographical and non-substantive errors, including those suggested by the parties. Some of the paragraph and footnote numbers in the Final Report have changed due to these revisions. The numbering of paragraphs and footnotes referred to below pertain to those of the Interim Report and differences *vis-à-vis* the Final Report are indicated in parentheses where appropriate. In instances where a party made the same substantive review request across multiple aspects of the Interim Report, we have addressed that request only with respect to the first paragraph or passage (i.e. "precise aspect") for which it arose.

1.3. We do not include a discussion of the comments made by Korea as part of the interim review process regarding its "promising appeal" if its desired changes were not made to the Interim Report.[1] We declined to take account of these comments because they did not pertain to a "precise aspect" of the Interim Report, and because revising the Interim Report in anticipation of one party's litigation strategy would not accord with our duty to make an *objective* assessment of the law and facts before us, as required by Article 11 of the DSU. We are cognisant of the broader systemic context in which Korea makes reference to its "promising appeal". But this broader context does not mean that we can or should revise our assessment of the law or facts due to an indication by one party that it may pursue an appeal if such revisions are not made.[2]

2 SPECIFIC REQUESTS FOR REVIEW SUBMITTED BY THE PARTIES

2.1 Paragraph 7.41

2.1. Japan requests the Panel to revise paragraph 7.41 of the Interim Report to remove the suggestion that, according to Japan, a panel can never take into account "implicit" findings, analyses,

[1] Korea's comments on Japan's comments on the Interim Report, pp. 2, 10-11. See also Korea's comments on the Interim Report, para. 6.

[2] See, by analogy, Panel Reports, *China – Broiler Products (Article 21.5 – US)* para. 7.354; *Brazil – Retreaded Tyres*, para. 7.276.

or considerations that are not expressed in the text of an authority's determination.[3] Korea objects to Japan's request, arguing that the current drafting accurately reflects Japan's position.[4]

2.2. We have decided not to grant Japan's request. In its interim review request, Japan contends that "explanations or examinations [that] were not explicitly stated in such published reports" are not relevant to a panel's analysis because either (a) "they were not actually made by the authorities"; or (b) "the fact that they were not explicitly referenced in the published reports indicates that the authorities considered them not to be substantially relevant" and thus are not germane to a panel's assessment in WTO proceedings.[5] Japan is therefore essentially reasserting its proposition that panels can never take into account "implicit" findings, analyses, or considerations that are not expressed in the text of an authority's determination, as already reflected in the relevant sentence of paragraph 7.41 of the Interim Report and the cited aspects of Japan's arguments in footnote 98.

2.2 Paragraph 7.63

2.3. Korea requests the Panel to reflect, in paragraph 7.63 of the Interim Report, two additional aspects of its case relating to the remedial effects of the anti-dumping duties and to price undercutting by the dumped imports.[6] Korea also seeks an acknowledgement that its arguments, as Korea cited in paragraph 7.63, pertained to the cumulative assessment undertaken by the KIA. Japan objects to Korea's request, arguing that the KIA's determination encompassed a decumulative assessment and that the two additional arguments whose inclusion Korea requests relate to Japan-specific considerations rather than the KIA's cumulative assessment.[7]

2.4. We have decided not to grant Korea's request. Korea's cumulation-related arguments (including price undercutting *during the POR* as distinct from *upon the removal of the anti-dumping duties*) are not relevant to paragraph 7.63 because section 7.5.3.1 pertains to the drop in *Japanese* prices *upon the removal of the duties* and because the Panel exercises judicial economy over Japan's cumulation claim and Korea's cumulation-related rebuttals at paragraphs 7.229-7.230 of the Interim Report. Additionally, it is unnecessary to reflect Korea's argument on remedial effects in paragraph 7.63, since this is already addressed in footnote 244 (footnote 243 of the Final Report) and, subsequently, in paragraphs 7.91 and 7.93 of the Interim Report.

2.3 Paragraphs 7.65-7.67

2.5. Korea requests the Panel to delete or reconsider paragraphs 7.65-7.67 of the Interim Report because they reflect a *de novo* analysis by the Panel concerning the role of price in the Korean SSB market.[8] Japan objects to Korea's request, arguing that the evaluation in these paragraphs is not *de novo* and that Korea is relitigating arguments that have already been rejected.[9]

2.6. We have decided not to grant Korea's request. Korea's request is based on an incorrect premise. Paragraphs 7.65-7.67 do not contain an "analysis"[10] by the Panel, but are instead descriptive in nature. Paragraph 7.64 indicates clearly that paragraphs 7.65-7.67 provide an overview of the "relevant background, record evidence, and findings by the KIA". To the extent that Korea takes issue with any *analysis* of the role of price that may be reflected in the Interim Report, we note that Korea made additional interim review requests with respect to paragraphs 7.73 and 7.76 of the Interim Report, and we address those requests below.

2.4 Paragraph 7.68

2.7. Korea requests the Panel to delete or reconsider paragraph 7.68 of the Interim Report because, contrary to the characterization of its argument in that paragraph, Korea did not intend to make a

[3] Japan's comments on the Interim Report, para. 7.41.
[4] Korea's comments on Japan's comments on the Interim Report, pp. 3-4.
[5] Japan's comments on the Interim Report, para. 5.
[6] Korea's comments on the Interim Report, paras. 8-9.
[7] Japan's comments on Korea's comments on the Interim Report, paras. 14-15.
[8] Korea's comments on the Interim Report, paras. 10-13.
[9] Japan's comments on Korea's comments on the Interim Report, paras. 16-18.
[10] Korea's comments on the Interim Report, para. 11.

general statement about price-sensitivity.[11] Japan objects to Korea's request, arguing that the Panel correctly cited Korea's own argument.[12]

2.8. We have decided to grant Korea's request. The evidence considered at paragraphs 7.65-7.67 of the Interim Report demonstrate that Korea was wrong to argue that "the only evidence on the record was that sales in particular basic grades, such as grade 304, were price sensitive".[13] Indeed, as discussed further below, Korea itself introduced evidence in the present proceedings concerning the findings of earlier reviews and the original investigation, which indicated that there was price-sensitivity across the Korean SSB market generally. We accept Korea's request because Korea now tells us that it did not intend to make a general statement about price-sensitivity through its quoted remark, and because its quoted remark was plainly incorrect.

2.5 Paragraph 7.73 – "price is the most important factor in purchasing decisions"

2.9. Korea requests the Panel to revise the sentence in paragraph 7.73 that "Korea explains that the KIA's findings in the third sunset review rest on its conclusion in earlier reviews and the original investigation that price is the most important factor in purchasing decisions".[14] According to Korea, the statement referred to by the Panel pertained to Korea's description of the KIA's finding in the second sunset review, and the KIA "never made such a finding in the third sunset review".[15] Moreover, Korea contends that this statement related to the "likeness" finding in the second sunset review, and Korea's reference to this statement was aimed at rebutting the alleged distinction between general-purpose and special steel by drawing on the "essentially standardized process for producing SSBs which are like products".[16] Korea also asserts that this statement did not have the "categorical meaning now given to it by the Panel", insofar as other non-price factors also played a role in consumers' purchasing decisions.[17] Japan requests the Panel to reject Korea's request, and points to various instances where Korea relied on the KIA's findings in past reviews to support the KIA's determination in the third sunset review, including its finding in the second sunset review that price was the most important factor in purchasing decisions.[18]

2.10. We have decided not to grant Korea's request. Given the significance of the issues raised by Korea to our resolution of Japan's claim on price and volume effects, we explain our decision to reject Korea's request in detail. First, we address whether Korea did, in fact, "explain" to the Panel during the proceedings that "the KIA's findings in the third sunset review rest on its conclusion in earlier reviews and the original investigation that price is the most important factor in purchasing decisions". Second, we elaborate upon why we accepted Korea's explanation in that regard.

2.11. In its first written submission, Korea stated that, whilst "the findings and analyses underpinning the original investigation and the previous reviews are not subject to challenge in this dispute", Korea "finds it important to recount briefly some of the relevant facts and findings reached by the Korean authorities in the original investigation and the previous reviews", "in order to put this dispute in a proper context".[19] In particular, as part of its "recounting" of the "relevant facts and findings" from the second sunset review, Korea explained as follows:

> As for the price of the imports from Japan, the OTI confirmed that the average resale price in Korea was KRW [[***]] per ton (after the anti-dumping duty), which was higher than the average price of the like domestic products at KRW [[***]] per ton. This price change, prompted by the continued imposition of anti-dumping duty, may be the most important reason for the Japanese imports' loss of market share in Korea during the relevant POR, especially in light of the fact that the "price was the most important factor for the consumers in making a decision to purchase".

[11] Korea's comments on the Interim Report, para. 15.
[12] Japan's comments on Korea's comments on the Interim Report, para. 19.
[13] Korea's second written submission, para. 128.
[14] Interim Report, para. 7.73. (fn omitted)
[15] Korea's comments on the Interim Report, paras. 18-19.
[16] Korea's comments on the Interim Report, para. 20.
[17] Korea's comments on the Interim Report, paras. 20-21.
[18] Japan's comments on Korea's comments on the Interim Report, paras. 21-22.
[19] Korea's first written submission, para. 60.

> As for the competitive relationship among the dumped imports and with the like domestic products, the OTI again relied on numerous sources and investigative analyses as indicated in the various parts of its report. For example, the OTI confirmed that "[t]he dumped imports along with the domestic products have passed the broadly recognized specification standards in the global market [e.g. Korean Industrial Standards, Japanese Industrial Standards, American Society for Testing and Materials, etc.] and in terms of quality, Japan and Korea have received outstanding reviews". The OTI noted that the Japanese and Korean SSBs possess relatively higher quality, but confirmed that there was "no difference in function and component" between the dumped imports and the like domestic products, and that "they are interchangeably used". In fact, it was confirmed that price was the most important factor for purchasers' buying decisions.[20]

2.12. As extracted below at paragraph 2.21, the finding in the second sunset review that "price was the most important factor for the consumers in making a decision to purchase" was one of three points listed in a section of the KIA's likeness analysis entitled "Quality and Consumers' Evaluation".[21] On the relationship between the third sunset review and the earlier reviews and original investigation *vis-à-vis* the "consumer evaluation" assessment, Korea stated in its first written submission that:

> Following its acknowledgement that the KTC in the first and second sunset reviews maintained the cumulative assessment of the original investigation, the OTI confirmed that the "physical characteristics, manufacturing process, distribution market, purpose of use, consumer evaluation, etc., of the dumped imports and like product products are same or similar to that of the original investigation". The OTI thus found, as alleged by the applicants, that the competitive relationship among the dumped imports and with the like domestic products remained unchanged in the third sunset review as compared to the original investigation and the first and second reviews. Nothing on the record contradicted this general and reasoned conclusion.[22]

2.13. Korea also explained in its first written submission that:

> Japan argues that Korea blindly relied on the fact that cumulation was made in the previous investigation and reviews of SSBs, and did not sufficiently consider and address the facts from the POR of the third sunset review. This is wholly inaccurate. The KTC found that the same reasons justifying the cumulative assessment of imports in the prior investigation and reviews applied to the third sunset review as well. Indeed, it was confirmed that the physical characteristics, manufacturing process, distribution channel, purpose of use, consumers' evaluation, etc., of the imports and the like domestic product remained the same or similar to that of the original investigation as well as the first and second sunset reviews. In addition, the OTI confirmed that the products at issue had obtained certification of compliance with international standards, which confirmed their physical similarities. Thus, the KTC did not fail to examine the relevant information for the POR of the third sunset review, but rather its examination of the record facts *confirmed* the similarity to earlier investigation and reviews, in which cumulation was applied, and thus was one intermediate factual finding in support of the decision to cumulate. Japan has not challenged the original investigation or the subsequent sunset reviews, which are thus deemed to be WTO consistent.
>
> …
>
> For purposes of this decision, an important intermediary factual finding by the KTC in the third sunset review was that the imports and the domestic SSBs constituted "like" products. This finding had been consistently made since the original investigation through the previous sunset reviews. The finding of "likeness", based among others on customer statements and evaluations, grade/specification designation under globally-recognized certification standards, manufacturing processes, distribution channels, price, functions and purported uses, etc., confirmed that the products as sold

[20] Korea's first written submission, paras. 84-85. (fns omitted; italics and underlining added)
[21] OTI's final report (second sunset review), (Exhibit KOR-11 (BCI)), p.9.
[22] Korea's first written submission, para. 92. (fn omitted; emphasis added)

> in the Korean market shared sufficient similarities to be competing. Thus, the competitive overlap among the dumped imports and with the like domestic products was very significant.[23]

2.14. In summary, Korea explained in its first written submission that the finding in the second sunset review that "price was the most important factor for the consumers in making a decision to purchase" comprised part of the "relevant facts and findings" to understanding the KIA's determination in the third sunset review. Korea also explained that, as part of the KIA's determination in the third sunset review, the KIA "confirmed" the "similarity" between the second and third sunset reviews regarding (*inter alia*) "consumers' evaluation", which was the portion of the second sunset review in which the aforementioned finding was made. Korea also explained that the KIA's "likeness" assessment in the third sunset review was consistent with the second sunset review, including its aspects on "customer statements and evaluations" and "price". In that regard, we reiterate that the finding in the second sunset review that "price was the most important factor for the consumers in making a decision to purchase" was contained in a section of the KIA's likeness analysis entitled "Quality and Consumers' Evaluation". Finally, Korea explained that the KIA's likeness finding comprised an "important intermediary factual finding" in determining the competitive relationship amongst the relevant products.[24]

2.15. Following its first written submission, the Panel posed a number of questions to Korea that pertained to these aspects of its case. In response to one question from the Panel, Korea extracted certain "excerpts" from the KIA's determination in the third sunset review which, according to Korea, "sufficiently demonstrate that the KTC/OTI certainly and undoubtedly placed on the record of the third sunset review and considered the relevant facts and determinations from the previous proceedings in the context of its third sunset reviews".[25] One such "excerpt" extracted by Korea was the KIA's likeness finding on page 9 and footnote 17 of the OTI's final report in the third sunset review, which clearly incorporated the "Quality and Consumers' Evaluation" assessment of the second sunset review into the third sunset review as shown by Korea's "excerpt":

> (P. 9) In the original investigation, the first sunset review and <u>the second sunset review</u>, domestic products and the dumped imports were determined to constitute like products.[[17]]
>
> [17] Resolution of the Korea Trade Commission No. 2013-18 (dated 24 July 2013): "Domestic products have remained the same as in the original decision and the first sunset review and are identical with the dumped imports in product name, definition, purpose of use, physical characteristics, manufacturing process, etc. According to the review report, the dumped imports along with the domestic products have passed the broadly recognized specification standards in the global market (Korean Industrial Standards (KS), Japanese Industrial Standards (JIS), American Society for Testing and Materials (ASTM)) and have the same product name, definition, physical characteristics, <u>quality and consumer evaluations</u>, purpose of use, etc. and are interchangeably used and therefore, are deemed to constitute like products."[26]

2.16. The footnote extracted in this "excerpt" provided by Korea, which is part of the KIA's likeness determination in the third sunset review, is a quotation from the KIA's determination in the second sunset review that expressly references the "Quality and Consumers' Evaluation" portion of the likeness assessment in second sunset review. To emphasize, *Korea* submitted this "excerpt" to the Panel to illustrate instances where the KIA "considered the relevant facts and determinations from the previous proceedings in the context of its third sunset review".

2.17. In response to another question from the Panel, Korea stated that "[i]n the third sunset review, therefore, the KTC <u>confirmed</u> based on the record evidence pertaining to the third POR that the relevant situations have not substantially changed from the PORs of the previous proceedings", again citing page 9 of the OTI's final report containing the likeness finding as an example in this regard.[27] As Korea explained it, the KIA's likeness finding in the third sunset review was tantamount

[23] Korea's first written submission, paras. 148 and 150. (fns omitted; italics original; underlining added)
[24] Korea's first written submission, paras. 150-151 and 159-160.
[25] Korea's response to Panel question No. 4.
[26] Korea's response to Panel question No. 4 (quoting OTI's final report (Exhibit KOR-5.c), p. 9 (emphasis added)).
[27] Korea's response to Panel question No. 5, fn 20.

to a "confirmation" that the same or similar considerations continued to be valid *vis-à-vis* the second sunset review (as well as the first sunset review and the original investigation).

2.18. In response to a further question from the Panel, Korea stated as follows:

> In addition, the record demonstrates that the Korean authorities went beyond merely relying on such an established industrial norm and practice. Indeed, the KTC made various other analyses based on, inter alia, the consumers' evaluation, market overlap, distribution channel/market overlap, purpose of use, similarity of physical characteristics and manufacturing process, interchangeability, etc., to further confirm the competitive relationship among the dumped imports and between the dumped and domestic products throughout the course of the proceeding.
>
> As for the pinpoint references about such "repeated confirmations", Korea draws the Panel's attention to the following record excerpts, among many others:
>
> …
>
> OTI's Final Report (Second Sunset Review), Exhibit KOR-11 (BCI):
>
> (P. 9) The dumped imports along with the domestic products have passed the broadly recognized specification standards in the global market) and in terms of quality, Japan and Korea have received outstanding reviews. Products from Japan and Korea have a high tensile strength and hardness; however, the dumped imports and domestic products can be interchangeably used. It has been investigated that price was the most important factor for the consumers in making a decision to purchase. The dumped imports and domestic products have mass-production systems in place [] and they are interchangeably used as there is no difference in function and component.[28]

2.19. Thus, in response to this question, Korea again posited the KIA's finding in the second sunset review that "price was the most important factor for the consumers in making a decision to purchase" as having been "confirmed" by the KIA in the third sunset review as part of its assessment of likeness and the competitive relationship amongst the relevant products.

2.20. In its second written submission, Korea persisted with this explanation. Korea noted that the KIA's third sunset review determination "referred to its findings on the condition of competition in the original investigation, and first and second sunset reviews", provided an overview of the interconnected relationship between the respective findings, and concluded that the KIA found "the competitive relationship among the dumped imports and with the like domestic products remained unchanged in the third sunset review as compared to the original investigation and the first and second reviews", including explicitly with respect to the "consumer evaluation" aspect of the second sunset review *vis-à-vis* the third sunset review.[29]

2.21. To recall, the sentence in paragraph 7.73 about which Korea complains states that "Korea explains that the KIA's findings in the third sunset review rest on its conclusion in earlier reviews and the original investigation that price is the most important factor in purchasing decisions". We are not persuaded by Korea's suggestion that, according to its position during the proceedings, the referenced conclusion was limited to the second sunset review and the KIA never relied on it for the *third* sunset review, and that this sentence "put unduly words in the mouth of the KIA [and] Korea".[30] As the foregoing overview illustrates, the sentence at issue in paragraph 7.73 neither "misrepresents" Korea's statements during the proceedings nor takes them "out of context".[31] Indeed, elsewhere in its interim review requests, Korea "requests the Panel to also reflect the KIA's explicit finding pursuant to the applicable laws that the dumped imports as well as the dumped and domestic products are in [a] competitive relationship with each other as there has been no essential change in the competitive environment between the Japanese and Korean products".[32] This accords with Korea's statement in its second written submission that the KIA found that "the

[28] Korea's response to Panel question No. 6(a). (emphasis added; fns omitted)
[29] Korea's second written submission, paras. 115-118.
[30] Korea's comments on the Interim Report, para. 21.
[31] Korea's comments on the Interim report, paras. 19 and 21.
[32] Korea's comments on the Interim Report, para. 49.

competitive relationship among the dumped imports and with the like domestic products remained unchanged in the third sunset review as compared to the original investigation and the first and second reviews".[33] By contrast, in the context of the present review request, Korea contends that the "Panel uses a statement in Korea's first written submission in which it was summarizing some of the findings of the *second* sunset review on the question of the competitive relationship between the various like products and takes it out of context to suggest that this was the finding made by the KIA in the *third* sunset review".[34] As we see it, either there was "no essential change" in the "competitive relationship" as between the second and third sunset reviews, or there was such a change in the "competitive relationship", but both propositions cannot simultaneously be true as Korea seems to contend.

2.22. We turn now to explain the basis of our acceptance of the explanation offered by Korea during the proceedings that is referred to in the sentence at issue in paragraph 7.73. First, we note that Japan accepted Korea's explanation in this regard.[35] Second, our review of the text of the KIA's determination in the third sunset review indicated that, consistent with Korea's explanation, the determination incorporated the KIA's finding from the second sunset review regarding price as the most important factor in purchasing decisions. In particular, the KIA based its "likeness" determination in the third sunset review on the finding that "[i]n the original investigation, the first sunset review and the second sunset review, domestic products and the dumped imports were determined to constitute like products".[36] In support of that statement, the KIA extracted and quoted the passage set out above (paragraph 2.15) from its determination in the second sunset review. This passage, as quoted in the third sunset review, was taken from the KTC's final resolution in the second sunset review, and is based on the OTI's final report in the second sunset review ("[a]ccording to the review report…"), including the section of that report pertaining to "Quality and Consumers' Evaluation". Indeed, the "Quality and Consumers' Evaluation" section is explicitly referenced in the passage from the second sunset review that is quoted by the KIA in the third sunset review. In turn, the section of OTI's final report in the second sunset review entitled "Quality and Consumers' Evaluation" stated:

> B. Quality and Consumers' Evaluation
>
> ○ The dumped imports along with the domestic products have passed the broadly recognized specification standards in the global market) and in terms of quality, Japan and Korea have received outstanding reviews.
>
> - Products from Japan and Korea have a high tensile strength and hardness; however, the dumped imports and domestic products can be interchangeably used.
>
> - It has been investigated that price was the most important factor for the consumers in making a decision to purchase.[37]

2.23. In short, (a) the KIA concluded, in the likeness section of the OTI's final report in the second sunset review entitled "Quality and Consumers' Evaluation" that "price was the most important factor for the consumers in making a decision to purchase"; (b) the KIA then relied upon this "Quality and Consumers' Evaluation" assessment in the KTC's final resolution in the second sunset review as part of its likeness finding; and (c) as the basis for its likeness finding in the third sunset review, the KIA explicitly cited this aspect of the KTC's final resolution in the second sunset review, including the KTC's reference to "Quality and Consumers' Evaluation" in that review.

[33] Korea's second written submission, para. 118.
[34] Korea's comments on the Interim Report, para. 19. (italics original; underlining added)
[35] See, e.g. Japan's response to Panel question No. 19(c), para. 113.
[36] OTI's final report, (Exhibit KOR-5.c (BCI)), p. 9. See also KTC's final resolution, (Exhibit KOR-4.b (BCI)), p. 6, in which the KIA cited these aspects of the OTI's final report in stating that "[a]ccording to the Final Report, domestic products have remained the same as in the original investigation, the first sunset review, and the second sunset review". (fn omitted)
[37] OTI's final report (second sunset review), (Exhibit KOR-11.b (BCI)), p. 9. (fn omitted; emphasis added)

2.24. In our view, by explicitly quoting and relying upon the second sunset review's "Quality and Consumers' Evaluation" assessment in the third sunset review, the KIA incorporated the finding from that assessment that "price was the most important factor for the consumers in making a decision to purchase". We thus accepted Korea's explanation on that point.

2.25. Korea also suggests that the sentence at issue in paragraph 7.73 misconstrues its position by affording a "categorical meaning" to the "price as the most important factor" finding that was never intended by Korea, nor by the KIA.[38] Rather, Korea contends that the KIA found that price was "among" the most important factors alongside other non-price factors such as perceptions of quality, as opposed to price alone being the most important factor. For Korea, differing pricing levels do not imply a lack of competition between products.[39]

2.26. Korea's understanding in this regard reflects a misreading of the Interim Report. Neither the sentence at issue in paragraph 7.73, nor the Interim Report generally, affords a "categorical meaning" to the KIA's reliance on the consideration that price was the most important factor in purchasing decisions. On the contrary, the footnote appended to the sentence at issue states:

> We note that Korea sought to contextualize this finding by explaining (*inter alia*) that "[t]he statement that price was the most important factor does not mean that it is the only factor or that the lowest price always prevails". (Korea's response to Panel question No. 20(e)(v)). We address the relevance of that matter below at paras. 7.74, 7.78, and 7.80.

2.27. The subsequent sentence in paragraph 7.73 is also caveated with a footnote that states:

> As mentioned in para. 7.74, Korea also stated that the KIA found that there could be price differences based on factors such as quality and reputation.

2.28. In turn, paragraph 7.74 of the Interim Report (i.e. immediately following paragraph 7.73) opens with the sentence: "[h]owever, Korea also explains that perceptions of quality, credibility, and technical superiority were found by the KIA to lead to price differences". Subsequently, in paragraph 7.80, we expressly "accept Korea's contention that the KIA did not find price to be the only factor affecting purchasing decisions", and we further "accept Korea's point that 'that cheaper priced products will [not] always win the buyer'". At paragraph 7.109 of the Interim Report, we summarize our understanding in the following terms:

> We recall that the KIA considered the SSB market to be a price-sensitive market in which price was the most important factor in consumers' purchasing decisions and in which consumers preferred low-priced products, albeit modulated by price premiums for Japanese and Korean products and price discounts for Indian and Chinese products.

2.29. We would draw Korea's attention to the aforementioned aspects of the Interim Report, which demonstrate unambiguously that no "categorical meaning" was ascribed to the sentence in paragraph 7.73 that "Korea explains that the KIA's findings in the third sunset review rest on its conclusion in earlier reviews and the original investigation that price is the most important factor in purchasing decisions."

2.30. For the foregoing reasons, we see no reason to make revisions to the sentence at issue in paragraph 7.73. We likewise reject requests made by Korea with respect to paragraphs 7.77, 7.78, 7.85, 7.99, 7.102, and 7.109 that are substantially the same as the present request.[40]

2.6 Paragraph 7.73 – "within a given grade"

2.31. Korea requests the Panel to replace the sentence "[a]ccording to Korea, the importance of price in purchasing decisions arises from the interchangeability of certified products within a given grade" with "competition among SSBs generally takes place based on grades, but that there is

[38] Korea's comments on the Interim Report, para. 20.
[39] Korea's comments on the Interim Report, paras. 12, 20-21, and 40.
[40] Korea's comments on the Interim Report, paras. 40, 42, 57, 61, 69, and 78.

inter-grade competition as each SSB grade has possible alternative grades".[41] According to Korea, its position during the proceedings was that there was "interchangeability" between "all 'covered SSB products'", and therefore Korea made any price related comments "in the context of whether the products were in the market and competing with one another".[42] Japan objects to Korea's request on the basis that the language used by the Panel already reflects the possibility that there can be inter-grade competition, whilst also reasonably characterizing Korea's position that competition "generally" and "mostly" occurs on a grade-by-grade basis.[43]

2.32. We have decided not to grant Korea's request. The sentence at issue accurately depicts Korea's position during the proceedings. Even in its requests for interim review, Korea continues to argue that "Japanese products competed with Korean like products and third country products on a grade by grade basis and nothing in the record suggested otherwise".[44] Korea's statement in this regard is consistent with the position that it repeatedly articulated during the proceedings. As a sample of Korea's statements on this point during the proceedings:

> As Japan so much stressed, SSBs products generally compete with each other on the basis of their grades or specifications.[45]
>
> SSB orders are placed based on designated grades or specifications, and as long as the ordered products are properly certified for that certain grade or specification, the products are generally deemed substitutable with products with the same or comparable designation.[46]
>
> SSBs are internationally traded commodities, which share physical similarities and fungibility in use (thus the market competition), and the interchangeability is presumed among comparable product specifications as long as they are certified by globally recognized standards.[47]
>
> [T]he KTC's finding about "competitive relationship" is based mainly on the well-established industrial norm and practice that *SSB products certified for corresponding grade/specification* are in competitive relationship with each other.[48]
>
> Korea confirms that all dumped imports and like domestic products are in competitive relationship *as long as* they are certified for corresponding grade/specification under internationally-recognized standard. Yes, competition takes place based on grades, but it cannot be denied that products falling within same grade category are in competitive relationship with each other to the extent they are likewise certified.[49]
>
> Korea confirms that no adjustments were made to the Japanese product prices. Because competition takes place *always* between SSB products with corresponding grade certification, there can be no difference between the Japanese and Korean SSB products on steel quality, product type, grade, or product mixes.[50]
>
> [T]he OTI confirmed that the competition within SSB products takes place based on their steel grade, because SSBs with different steel grade has different uses in general. Note that it has been repeatedly stressed that there is one more hurdle to clear in order to enter truly into this competitive relationship – the products must be certified for that particular grade under the internationally recognized certificate standard.[51]

[41] Korea's comments on the Interim Report, para. 23.
[42] Korea's comments on the Interim Report, para. 22.
[43] Japan's comments on Korea's comments on the Interim Report, paras. 24-25.
[44] Korea's comments on the Interim Report, para. 8.
[45] Korea's first written submission, para. 56. (emphasis added)
[46] Korea's first written submission, para. 57. (emphasis added)
[47] Korea's first written submission, para. 153. (emphasis added)
[48] Korea's response to Panel question No. 6(a). (italics original; underlining added)
[49] Korea's response to Panel question No. 6(b)(ii). (italics original; underlining added)
[50] Korea's response to Panel question No. 19(a). (italics original; underlining added)
[51] Korea's response to Panel question No. 20(f)(vii). (emphasis added)

> It is also undisputable that SSB customers place orders based on internationally-certified grades. It would be absurd to argue that price comparability is not ensured between two SSB products with the same certified grade specification. Therefore, when a demand arises for a certain grade of SSB, competition ensues almost immediately, and the producers compete with each other on the basis of their production capacity which can be readily converted specifically into the ordered SSB products.[52]
>
> But, as the Korean authorities found, and as Korea has repeatedly confirmed, competition generally takes place among the SSB products within the same grade (to the extent that the products are certified for the grade under the internationally-recognized standards). Indeed, even Japan acknowledges that SSBs generally compete with each other based on grades or specifications. … Purchasers rely on certificates under such internationally recognized standards when placing orders, and it is well established that SSBs produced in accordance with such standards are fungible and thus in competitive relationship with one another. This finding of interchangeability and substitutability were thus between the same specification/grade of the covered SSB products.[53]
>
> Given that competition among SSB products takes place based on grade, such certificate standards effectively serves to certify the competitive relationship among the SSB products. As an example, if two producers each manufacture SSB product with the same steel grade "100", and both products are properly certified for that certain grade/specification under same or corresponding standards, then the two products are certifiably in a competitive relationship in the market.[54]
>
> For SSBs, competition generally takes place between the same or comparable grades.[55]
>
> Even Japan acknowledges that SSBs generally compete with each other based on grades or specifications[.][56]

2.33. At the oral hearings, Korea told us directly that "SSBs generally compete with each other based on grades or specifications"[57] and that "SSBs are ordered, produced, and sold 'on-demand', based on [internationally-recognized standards for] grade specifications".[58] We are therefore not persuaded by Korea now asserting that the interchangeability of SSBs is unrelated to their grade or specification. Of course, Korea did at times offer certain qualifications to its general statement that competition in the SSB market takes place on a grade-by-grade basis, for instance:

> Korea believes that the OTI's statement quoted in the Panel's question, by itself, basically answers the question: "within the same steel grade", products compete against each other. That is, because "[s]tainless steel bars have different uses depending on the steel grade", they generally compete with each other based on grades or specifications. However, that does not mean that SSBs of different grades do not compete.[59]
>
> It is also undisputed that SSBs compete with each other mostly based on grades as certified under the relevant industrial standards, although competition can sometimes also take place among different SSB grades (as certified) as well.[60]
>
> While competition among SSBs generally takes place based on grades, as certified by widely recognized industrial standards, it does not mean that differently graded SSBs

[52] Korea's second written submission, para. 100. (fn omitted; emphasis added)
[53] Korea's response to Panel question No. 36(a). (fns omitted; emphasis added)
[54] Korea's response to Panel question No. 37. (emphasis added)
[55] Korea's response to Panel question No. 64(e). (emphasis added)
[56] Korea's second written submission, paras. 76 and 170. (emphasis added)
[57] Korea's opening statement at the first meeting of the Panel, para. 32.
[58] Korea's opening statement at the second meeting of the Panel, para. 44.
[59] Korea's response to Panel question No. 28. (fn omitted; emphasis added)
[60] Korea's second written submission, para. 21. (fn omitted; emphasis added)

> do not compete with each other. As demonstrated above, each SSB grade has possible alternative grades; as a matter of fact, inter-grade competitions do take place.[61]

2.34. In recognition of these qualifications, we appended footnote 192 (now footnote 191 in the Final Report) to paragraph 7.73, in which "[w]e note that Korea also contended that, for some grades, there can be inter-grade competition". This was an appropriate acknowledgement that, whilst Korea contended that competition "generally" and "mostly" occurred on a grade-by-grade basis, Korea also considered that it is "possible" for competition to occur between grades in some instances.

2.35. Of particular relevance to the present interim review request is that Korea linked its position that competition occurred on a grade-by-grade basis to its explanation of the dynamics of price competition in the SSB market. For instance, Korea explained that "[i]t is well-established that SSB products with same grade (as certified) are fungible and, therefore, competition takes place mainly on price".[62] As another example, the following passage illustrates how Korea explained that the KIA's findings on price premiums and price discounts were predicated on the conditions of competition "within the same steel grade":

> First, the OTI confirmed that the competition within SSB products takes place based on their steel grade, because SSBs with different steel grade has different uses in general. Note that it has been repeatedly stressed that there is one more hurdle to clear in order to enter truly into this competitive relationship – the products must be certified for that particular grade under the internationally recognized certificate standard.
>
> Next, the OTI explained the nature of the SSB competition: "within the same steel grade", there are products that have relatively high credibility and quality and there also are products that have high price competitiveness. Because they are within the same grade, their competitive relationship is confirmed.
>
> So, this finding articulately captures the common sense that Korea so keenly and repeatedly stressed above: products with relatively lesser market perception and quality would compete against products with relatively higher market perception and quality based on their price competitiveness (e.g. price discounts).[63]

2.36. Indeed, when read in the context of Korea's reliance on price as the most important factor in purchasing decisions and consumers' preference for low-priced products, albeit modulated by price discounts and price premiums for certain products, it stands to reason that the preponderance of grade-by-grade competition/interchangeability leads to price dynamics being observed on a grade-by-grade basis, as Korea suggested during the proceedings.

2.37. In light of the foregoing discussion, we see no reason to revise the sentence in paragraph 7.73 that "[a]ccording to Korea, the importance of price in purchasing decisions arises from the interchangeability of certified products within a given grade". Korea was both consistent and clear in articulating this position during the proceedings, and we see no basis for Korea to now suggest otherwise.

2.7 Paragraph 7.73 and footnote 192 – inter-grade competition

2.38. Korea requests the Panel to revise the sentence in footnote 192 to paragraph 7.73 (now footnote 191 in the Final Report) that "Korea also contended that, for some grades, there can be inter-grade competition", and to reference paragraph 229 of its second written submission in this passage. Korea contends that the placement and framing of this sentence in footnote 192 suggests that this "was a mere side argument of Korea when, in fact, it was one of Korea's main

[61] Korea's second written submission, para. 98. (fn omitted; emphasis added)
[62] Korea's response to Panel question No. 64(c)(ii). (emphasis added)
[63] Korea's response to Panel question No. 20(f). (fns omitted)

contentions".[64] Korea points to its statement during the proceedings that "[m]ost, if not all, grades have possible alternative grades".[65] Japan objects to Korea's request.[66]

2.39. We have decided not to grant Korea's request. We have set out our understanding of Korea's case in this regard above at paragraphs 2.32-2.36. Moreover, Korea has not identified any passage in the text of the KIA's determination in which the KIA found explicitly that there was inter-grade competition for all SSBs. This is significant, because the text of the KIA's determination reveals quite a different understanding, namely that "[s]tainless steel bars have different uses depending on the steel grade, and within the same steel grade, Korean and Japanese products have high credibility in quality and Indian and Chinese products have high price competitiveness".[67] Accordingly, paragraph 7.73 and footnote 192 of the Interim Report accurately reflect Korea's position during the proceedings as supported by the text of the KIA's determination, and we see no reason to revise this aspect of the Interim Report.

2.8 Paragraph 7.74

2.40. Korea requests the Panel to delete the phrase "within a given grade" from the following sentence in paragraph 7.74: "[h]owever, Korea also explains that perceptions of quality, credibility, and technical superiority were found by the KIA to lead to price differences within a given grade". According to Korea, "nowhere is there a statement about grade-specific price differences" in footnote 197 appended to this sentence.[68] For Korea, the KIA's finding about price premiums and price discounts applied "across *all* SSB products (across all grades, for that matter) and not with respect to specific grades".[69] Japan makes no comment on Korea's request.

2.41. We have decided to grant Korea's request. Korea is correct insofar as none of the citations in footnote 197 (now footnote 196 in the Final Report) explicitly reference Korea's position about grade-specific price differences, and Japan does not oppose Korea's request. Whilst granting the request, we reiterate that we do not accept the premise underlying Korea's request. As described at paragraphs 2.32-2.37 above, Korea clearly took the position during the proceedings that the KIA's finding on price premiums and price discounts concerned price dynamics for SSBs *within a given grade*. Indeed, in one of Korea's descriptions of the KIA's finding in this regard, Korea stated that "[t]he authorities started with the description of the industry as a 'massive process industry' and noted that there existed different steel grades and that within the same steel grades, Korean and Japanese products have high credibility in quality and Indian products have high price competitiveness".[70] Korea's assertion that it never drew a link between competition taking place on a grade-by-grade basis in the SSB market and the presence of price premiums/price discounts is contradicted by the plain connections made in this quotation as well as in those extracted at paragraphs 2.32-2.37 above.

2.9 Paragraph 7.75 – "Japanese" prices

2.42. Korea requests the Panel to delete the term "Japanese" from the following sentence in paragraph 7.75: "Japan contends that the KIA erred by considering that the removal of the anti-dumping duties from Japanese prices would weaken the price competitiveness of domestic like products". According to Korea, Japan's case was based on a cumulative analysis by the KIA, and not on a Japanese-specific analysis of price developments.[71] Japan objects to Korea's request on the basis that the sentence at issue correctly recognized that Japan's arguments included the KIA's Japan-specific analysis.[72]

2.43. We have decided not to grant Korea's request. Japan's case concerning price and volume effects clearly encompassed the KIA's Japan-specific analysis and alleged failures by the KIA to properly account for the particular circumstances of the Japanese exporters. This is reflected in the

[64] Korea's comments on the Interim Report, para. 25.
[65] Korea's comments on the Interim Report, para. 25 (referring to second written submission, fn 17).
[66] Japan's comments on Korea's comments on the Interim Report, paras. 24-25.
[67] OTI's final report, (Exhibit KOR-5.c (BCI)), p. 55. (emphasis added)
[68] Korea's comments on the Interim Report, para. 27.
[69] Korea's comments on the Interim Report, para. 27. (emphasis original)
[70] Korea's response to Panel question No. 11. (emphasis added)
[71] Korea's comments on the Interim Report, para. 28-29.
[72] Japan's comments on Korea's comments on the Interim Report, paras. 27-29.

citations in footnote 200 to paragraph 7.75 of the Interim Report (now footnote 199 of the Final Report).

2.10 Paragraphs 7.75-7.76 – "average" prices

2.44. Korea requests the Panel to insert the term "average" as an adjective for the term "price" in paragraphs 7.75 and 7.76.[73] Japan opposes Korea's request.[74]

2.45. We have decided not to grant Korea's request. Korea offers no compelling reason to make the requested revision. The term "price" in these paragraphs is being used in relation to descriptions of Japan's argument. In terms of the Panel's analysis, the Interim Report already addresses the nature of these prices as averages at paragraphs 7.70-7.72, 7.77, 7.78, and 7.81, and footnotes 208, 215, 233, and 236 (now footnotes 207, 214, 232 and 235 in the Final Report).

2.11 Paragraph 7.76 – "consumers prefer low-priced products"

2.46. In a similar vein to its request to revise the first sentence of paragraph 7.73 ("price is the most important factor in purchasing decisions"), Korea requests the Panel to revise the last sentence in paragraph 7.76. This sentence states, in relevant part, that "according to Korea, the KIA's determination on the competitive relationship amongst SSB products encompassed its finding from the original investigation that 'consumers prefer low-priced products'". Korea acknowledges that it referred to this finding from the original investigation in its submissions to the Panel, but contends that the Panel "uses a very general reference" by Korea that the "original finding was repeatedly and consistently confirmed in the first, second, and third sunset reviews" to suggest that Korea and the KIA made categorical findings about low-priced products always being preferred.[75] According to Korea, it did not make such an argument during the proceedings, nor did the KIA reach such a finding in the third sunset review. Rather, in the third sunset review, the KIA found that the competitive relationship was characterized by the Japanese and Korean products' "quality" and the Indian and Chinese products' "price competitiveness". Indeed, Korea refers to its argument during the proceedings that "[t]he fact that price is an important consideration does not mean that the lowest-priced product always gets the sale of course, otherwise Indian products would have a 100% market share".[76] Japan opposes Korea's request because the statement at issue is merely a citation from Korea's own submissions, and the Panel cannot be faulted for accepting and using Korea's own characterization of the KIA's finding on this point.[77]

2.47. We have decided not to grant Korea's request. Given the significance of the issues raised by Korea to our resolution of Japan's claim on price and volume effects, we explain our decision to reject Korea's request in detail. First, we address whether Korea did, in fact, explain to the Panel during the proceedings that "the KIA's determination on the competitive relationship amongst SSB products encompassed its finding from the original investigation that 'consumers prefer low-priced products'". Second, we elaborate upon why we accepted Korea's explanation in that regard.

2.48. In response to a question from the Panel, Korea stated as follows:

> In addition, the record demonstrates that the Korean authorities went beyond merely relying on such an established industrial norm and practice. Indeed, the KTC made various other analyses based on, inter alia, the consumers' evaluation, market overlap, distribution channel/market overlap, purpose of use, similarity of physical characteristics and manufacturing process, interchangeability, etc., to further confirm the competitive relationship among the dumped imports and between the dumped and domestic products throughout the course of the proceeding.
>
> As for the pinpoint references about such "repeated confirmations", Korea draws the Panel's attention to the following record excerpts, among many others:

[73] Korea's comments on the Interim Report, para. 30.
[74] Japan's comments on Korea's comment on the Interim Report, para. 30.
[75] Korea's comments on the Interim Report, para. 31.
[76] Korea's comments on the Interim Report, para. 32 (quoting Korea's response to Panel question No. 64(c)).
[77] Japan's comments on Korea's comments on the Interim Report, para. 31.

OTI's Final Report (Original Investigation), Exhibit KOR-9 (BCI):

> (P. 48) The Applicants submitted documents stating that the dumped imports and domestic products have obtained certification of the broadly recognized standards in the global market and the products with the same specifications have identical physical characteristics [] According to the results of response analysis and on-site verification, both the dumped imports and domestic products have obtained certification of the broadly recognized standards in the global market; they are similar to each other in terms of quality and consumers' evaluation; and the importers and consumers prefer low-priced products [] According to the result of response analysis and on-site verification, both the dumped imports and domestic products have obtained certification of the broadly recognized standards in the global market; both products with the same specifications have identical or similar function and component; and they are in a mutually competitive relationship in the domestic market.[78]

2.49. Thus, in response to the Panel's question, Korea posited the KIA's finding in the original investigation that "consumers prefer low-priced products" as having been "confirmed" by the KIA in the third sunset review as part of its assessment of the competitive relationship amongst the relevant products. If Korea did not intend to characterize the third sunset review determination as encompassing this finding, we would not expect Korea to extract and quote it upon describing those aspects that were "confirmed" by the KIA in the third sunset review.

2.50. In its first written submission and subsequently, Korea also explained that the KIA's finding in the original investigation concerning the competitive relationship amongst SSBs "was repeatedly and consistently confirmed in the first, second, and third sunset reviews".[79] Korea now asserts that this only meant that "these products are standardized like products, and are in competition with each other", and nothing further should be read into its assertions in that regard.[80] But, in articulating this contention during the proceedings, Korea explicitly referenced the "consumers' evaluation" aspect of this finding in the original investigation, which Korea argued remained "the same or similar" in the third sunset review.[81] The significance of Korea's reliance on the continuing applicability of the "consumers' evaluation" aspect of the original determination lies in the fact that the section entitled "Quality and Consumers' Evaluation" in that determination contains the assessment that "consumers prefer low-priced products":

> ○ Quality and Consumers' Evaluation
>
> - According to the results of response analysis and on-site verification, both the dumped imports and domestic products have obtained certification of the broadly recognized standards in the global market; they are similar to each other in terms of quality and consumers' evaluation; and the importers and consumers prefer low-priced products.[82]

2.51. Thus, not only did Korea extract and quote this portion of the section in the original determination as having been "confirmed" by the KIA in the third sunset review, but it also stated on numerous occasions during the proceedings that the findings of this section remained "unchanged" and "the same or similar" *vis-à-vis* the third sunset review. It is untenable for Korea to now assert that it never conveyed to the Panel that "the KIA's determination on the competitive relationship amongst SSB products encompassed its finding from the original investigation that 'consumers prefer low-priced products'".

2.52. We accepted Korea's explanation that the KIA's determination in the third sunset review encompassed this finding because its explanation aligns with the text of the KIA's determination. In particular, the KIA's third sunset review determination states that the "[p]hysical characteristics, manufacturing process, distribution market, purpose of use, consumers' evaluation, etc. of the dumped imports and domestic like products are the same or similar to those of the original

[78] Korea's response to Panel question No. 6(a). (emphasis added; fns omitted)
[79] See, e.g. Korea's first written submission, para. 121; response to Panel question No. 6(a); and second written submission, paras. 115-119.
[80] Korea's comments on the Interim Report, para. 31.
[81] Korea's first written submission, paras. 58, 92, and 117-119; second written submission, paras. 115-118, and 169.
[82] OTI's final report (original investigation), (Exhibit KOR-9.b (BCI)), p. 48.

investigation".[83] To recall, the finding that "consumers prefer low-priced products" is contained in the "Quality and Consumers' Evaluation" section of the original determination, which Korea explained was "confirmed" in the third sunset review. Korea now suggests that the KIA cannot have incorporated the finding that "consumers prefer low-priced products" into the third sunset review because that finding was "based on consumer surveys obtained in the original investigation in 2004 and was relevant to the likeness of the products."[84] We disagree. The plain text of the KIA's determination suggests that the KIA engaged in a comparative assessment of the evidence on "consumers' evaluation" obtained during the third sunset review *vis-à-vis* the original investigation, and found that it remained "the same or similar".[85] The record evidence before us on consumers' evaluation of price-sensitivity during the third sunset review, including as set out in paragraphs 7.65-7.68 of the Interim Report, accords with that understanding.[86] Korea has not drawn our attention to any evidence on consumers' evaluation that suggests the contrary.

2.53. Finally, Korea is wrong to suggest that, by accepting Korea's explanation that the third sunset review determination encompassed the finding that "consumers prefer low-priced products", we somehow rejected its contention that "lowest-priced product [does not] always get the sale" due to price premiums and price discounts for certain products.[87] On the contrary, in paragraph 7.80, we expressly "accept Korea's contention that the KIA did not find price to be the only factor affecting purchasing decisions", and we further "accept Korea's point that 'that cheaper priced products will [not] always win the buyer'". At paragraph 7.109, we summarize our understanding in the following terms:

> We recall that the KIA considered the SSB market to be a price-sensitive market in which price was the most important factor in consumers' purchasing decisions and in which consumers preferred low-priced products, albeit modulated by price premiums for Japanese and Korean products and price discounts for Indian and Chinese products.

2.54. We would draw Korea's attention to the aforementioned aspects of the Interim Report, which demonstrate – contrary to Korea's assertion – that the Interim Report takes due account of its argument that the lowest price does not always win the buyer, in addition to its explanation that the KIA's determination encompassed the finding that "consumers prefer low-priced products".

2.12 Paragraphs 7.77, 7.78, 7.82, and 7.83

2.55. Korea requests the Panel to reconsider the findings made in paragraphs 7.77, 7.78, 7.82, and 7.83 regarding "price pressure" and the weakening of domestic price competitiveness.[88] According to Korea, the "undeniable competitive relationship among the covered products from Korea and Japan" means that "there will certainly be increased price pressure upon removal of the anti-dumping duties due to the narrowing margin of the on-average price differential between the Japanese and Korean products".[89] Korea also contends that the KIA's "actual" finding in this regard was not that "Japanese prices would weaken the price competitiveness of domestic like products", but was instead the "obvious" and "factual" statement that the drop in Japanese prices would lead to a corresponding recovery in the price competitiveness of Japanese products.[90] Further, Korea contends that "the Panel's finding effectively introduces a legal requirement in Article 11.3 under which any POR-bound price differential that exceeds [the] currently applicable anti-dumping duty margin necessarily calls for a separate analysis on the 'price' competition between the dumped and domestic products *following* the removal of the anti-dumping duty".[91] Japan objects to Korea's request, noting that the KIA itself made an analysis of price effects central to its

[83] OTI's final report, (Exhibit KOR-5.c (BCI)), pp. 9 and 33 (emphasis added). See also KTC's final resolution, (Exhibit KOR-4.b (BCI)), p. 11; and KTC's submission of review to MOSF, (Exhibit KOR-48.b (BCI)), p. 4.
[84] Korea's comments on the Interim Report, para. 31.
[85] See, e.g. KTC's submission of review to MOSF, (Exhibit KOR-48.b (BCI)), p. 4. Indeed, Korea advanced this same understanding during the proceedings. (Korea's first written submission, para. 148).
[86] See also Application, (Exhibit JPN-4.b), p. 46; and Minutes of public hearing (24 November 2016), (Exhibit KOR-19.b (BCI)), pp. 20 and 31.
[87] Korea's comments on the Interim Report, paras. 31-32.
[88] Korea's comments on the Interim Report, para. 39.
[89] Korea's comments on the Interim Report, para. 34.
[90] Korea's comments on the Interim Report, paras. 35-36.
[91] Korea's comments on the Interim Report, para. 37. (emphasis original)

determination and that the KIA explicitly found that Japanese prices would weaken the price competitiveness of Korean SSBs if the anti-dumping duties were lifted.[92]

2.56. We have decided not to grant Korea's request. It is useful to recall the KIA's description of its chosen methodology for its likelihood-of-injury determination:

> In order to decide whether any material injuries to the domestic industry will continue or recur upon termination of anti-dumping duties, the Commission reviewed, based on the Final Report, production capacity in the supplying country of the dumped imports, the outlook on the volume of dumped imports and the price level thereof upon termination of anti-dumping measures.[93]

2.57. It is apparent that a key aspect of the KIA's methodology was to examine "the price level [of dumped imports] upon termination of anti-dumping measures". This aspect of the KIA's methodology led to the KIA's findings that:

> [O]nce the anti-dumping measures are terminated, this would bring a drastic fall in the price of the dumped imports from Japan at KRW [[***]] per ton in 2015, which would also result in a [*sic*] increase in price competitiveness in the domestic market.
>
> …
>
> Where the anti-dumping measures are terminated, it is predicted that a steep fall in the price of the dumped imports (Japanese △ [[***]]%) will lead to an increase in exports to Korea and weaken the price competitiveness of Like Products.[94]

2.58. These findings formed part of the KIA's final conclusion that:

> [I]t is highly likely that once the anti-dumping measures are terminated, a drop in the price of the dumped imports and an increase in volume of the dumped imports will again cause recurrence of material injury to the domestic industry, such as a downturn in sales and deterioration in operating profitability.[95]

2.59. For Korea to now suggest that the *Panel* is "reading [in] a requirement to conduct a post-expiry 'price effects' analysis into Article 11.3"[96] ignores the fact that such an analysis was part of the methodology *chosen by the KIA*. It is only because the KIA's intermediate and final conclusions rested upon this aspect of its chosen methodology, and because Japan challenges those intermediate and final conclusions, that we are called upon to examine them. Korea now tells us that an authority need not undertake a post-expiry "price effects" analysis "unless it has been first substantiated by the interested parties that such price differential would undermine the established competitive relationship between the dumped and domestic products".[97] But once an authority itself chooses a methodology that involves a post-expiry "price effects" analysis and proceeds to base its likelihood-of-injury determination on the conclusions derived from that methodology, the hypothetical circumstances under which such an analysis might be legally "required" under Article 11.3 become irrelevant. Rather, in such circumstances, what matters for the purposes of a panel's resolution of a claim is that the authority's determination is based on such a methodology and that the outcome has been challenged by a complainant. Additionally, we recall that the Interim Report does not find that the application and outcome of this aspect of the KIA's methodology *in isolation* gives to a violation of Article 11.3. Rather, section 7.5.3.4 examines whether the KIA's intermediate finding in this regard is so central to the KIA's final conclusion that it invalidates that final conclusion.

[92] Japan's comments on Korea's comments on the Interim Report, paras. 34-37.
[93] KTC's final resolution, (Exhibit KOR-4.b (BCI)), p. 18. (emphasis added)
[94] KTC's final resolution, (Exhibit KOR-4.b (BCI)), pp. 21-22; OTI's final report, (Exhibit KOR-5.c (BCI)), pp. 63 and 67.
[95] KTC's final resolution, (Exhibit KOR-4.b (BCI)), p. 23; OTI's final report, (Exhibit KOR-5.c (BCI)), p. 67.
[96] Korea's comments on the Interim Report, para. 37.
[97] Korea's comments on the Interim Report, para. 38.

2.60. In essence, Korea is asking us to ignore (a) the KIA's unambiguous explanation that its chosen methodology would encompass examining "the price level [of dumped imports] upon termination of anti-dumping measures"; and (b) the outcome of that aspect of its methodology, namely that the Japanese pricing level upon the termination of the duties "will lead to an increase in exports to Korea and weaken the price competitiveness".[98] But panels in anti-dumping disputes must base their assessment on whether or not an *authority's* determination is inconsistent with the Anti-Dumping Agreement.[99] We cannot now pretend that the KIA never chose to include a post-expiry "price effects" analysis in its methodology, nor that its likelihood-of-injury determination never encompassed the conclusions arising from that aspect of its chosen methodology. If we were to do as Korea requests, we would be impermissibly second-guessing the rationale upon which the KIA's determination was reached.[100]

2.61. In short, the post-expiry "price effects" of Japanese SSBs in the Korean market is addressed in the Interim Report *not* because the KIA was under a legal requirement to do so under Article 11.3, but because the KIA's determination rested on a methodology encompassing this kind of analysis, and because Japan challenged the part of the KIA's determination arising from that facet of its methodology. This is reflected clearly in paragraph 7.78 and footnote 192 of the Interim Report (now footnote 191 of the Final Report). Korea now asserts that "the Panel considered that the KIA should have at least considered the price differential after the deduction of the anti-dumping duties in its likelihood-of-injury analysis"[101], but the foregoing discussion illustrates how Korea's assertion in this regard misreads the Interim Report and the KIA's determination. It was the KIA that chose to examine the Japanese pricing level after the deduction of the anti-dumping duties and whether that pricing level would lead to the weakening of Korean price competitiveness and to an increase in Japanese exports to Korea. By examining the impact of the post-expiry Japanese pricing level on Korean price competitiveness, the KIA opted to compare Japanese and Korean prices, including whether the expiry of the duties would leave Japanese prices at a level that would be adverse to Korean price competitiveness. Accordingly, it is incorrect to state that "the Panel considered that the KIA should have at least considered the price differential…".[102] Instead, it was *the KIA* that considered that the comparison between Korean and post-expiry Japanese prices should form part of its methodology.

2.62. Korea also contends that "the Panel's interim finding operates to *effectively* introduce a legal test imposing such an *a priori* obligation on the part of the investigating authority to proactively undertake a forward-looking price effect analysis whenever there exists a post-expiry overselling based on the POR-bound price differential".[103] Korea seems to derive this understanding from the assessment in the Interim Report that further analysis would be required by the KIA to substantiate how an average Japanese price that is [[***]] higher than Korean prices would "weaken the price competitiveness" of the Korean domestic industry. Korea asks:

> Unless the Panel is inclined to render a legal finding that any anti-dumping margin non-negligibly exceeding the POR-bound price differential necessarily calls for a proactive price effect analysis in a forward-looking analysis, on what basis is the Panel going to draw a line? Here, nothing on the record offers a viable standard for determining the margin of post-expiry overselling that would constitute a plausible trigger-point for such an *a priori* requirement, nor supports a notion that a close to [[***]]% of post-expiry overselling would otherwise constitute such a trigger-point.[104]

2.63. Again, in terms of "on what basis is the Panel going to draw a line", we emphasize that our reference point was the KIA's determination. In particular, as Korea explained[105], the KIA found that price was the most important factor in consumers' decision-making and consumers preferred

[98] KTC's final resolution, (Exhibit KOR-4.b (BCI)), p. 22.
[99] Article 17.6 of the Anti-Dumping Agreement.
[100] Panel Report, *China – GOES*, para. 7.542 and fn 522; Appellate Body Report, *Japan – DRAMs (Korea)*, para. 135.
[101] Korea's comments on Japan's comments on the Interim Report, pp. 6-7. (emphasis added)
[102] Korea's comments on Japan's comments on the Interim Report, pp. 6-7. (emphasis added)
[103] Korea's comments on Japan's comments on the Interim Report, p. 14. (italics original; underlining added)
[104] Korea's comments on Japan's comments on the Interim Report, pp. 14-15.
[105] See above in relation to Korea's interim review requests concerning paragraphs 7.73 and 7.76 of the Interim Report.

low-priced products, albeit modulated by price premiums for Japanese and Korean SSBs and price discounts for Indian and Chinese SSBs. These findings by the KIA led to our conclusion that, as part of an "unbiased and objective" evaluation of the facts, we would expect the KIA to address how Korean price competitiveness would be weakened by average Japanese prices that would remain almost [[***]] higher than average Korean prices even if the anti-dumping duties were lifted. This was particularly so since the KIA found both Japanese *and* Korean SSBs to command a price premium in the market. Accordingly, the presence of price premiums and price discounts could not explain (based on the KIA's reasoning) how Japanese SSBs would weaken Korean price competitiveness whilst remaining [[***]] higher (see further paragraph 7.81 of the Interim Report).

2.64. It is noteworthy that Korean now asserts – as extracted above – that "nothing on the record offers a viable standard for determining the margin of post-expiry overselling that would constitute a plausible trigger-point for such an *a priori* requirement". If there was no "viable standard" on the record that could explain whether or not a [[***]] higher Japanese price would adversely affect Korean price competitiveness, then one may reasonably ask the question as to how the KIA determined that such a pricing level "will lead to an increase in exports to Korea and weaken the price competitiveness of Like Products".[106] This question precisely encapsulates the shortcoming identified by Japan in the KIA's determination on this point. On one hand, the KIA found that price was the most important factor in purchasing decisions with consumers preferring low-priced products, but on the other hand it found that [[***]] higher Japanese prices would weaken Korean price competitiveness. The KIA's determination offers no analysis or explanation as to how the latter was plausible in light of the former. This is the basic reason for which we conclude that the KIA failed to engage in an "unbiased and objective" evaluation of the facts in section 7.5.3.1 as reflected in paragraphs 7.76-7.78 and 7.84-7.85.

2.65. But it is also pertinent to point out that, whilst Korea now argues that "nothing on the record offers a viable standard for determining" the price at which Japanese imports may be harmful or inconsequential to Korean price competitiveness, Korea took a differing position during the proceedings, for example:

> It is also absurd to posit that Japanese "general-purpose" products were meeting "demand for products that do not exist" in the Korean market simply because they sell more of these products in Thailand. There clearly were substantial volumes of imports of "general-purpose" SSBs from Japan over the POR, which alone increased by 60.5% between 2014 and 2015. <u>If anything, the relatively more limited sales of such "general-purpose" SSBs from Japan to Korea compared with Thailand can be explained by the 15% anti-dumping duty imposed by Korea on these price-sensitive products. The removal of this duty would make these products more attractive again, just as they were prior to the imposition of the duties</u>.[107]

2.66. As Korea explains it, the "price sensitivity" of the products at issue explains why a 15% anti-dumping duty applied by Korea would lead to fewer sales in Korea and more sales in Thailand. Korea made a similar point in its first written submission as part of its "recount[ing]" of the "relevant facts and findings reached by the Korean authorities in the original investigation and the previous reviews":

> As for the price of the imports from Japan, the OTI confirmed that the average resale price in Korea was KRW [[***]] per ton (after the anti-dumping duty), which was higher than the average price of the like domestic products at KRW [[***]] per ton. <u>This price change, prompted by the continued imposition of anti-dumping duty, may be the most important reason for the Japanese imports' loss of market share in Korea during the relevant POR, especially in light of the fact that the "price was the most important factor for the consumers in making a decision to purchase"</u>.[108]

2.67. In this instance, Korea tells us that a [[***]] higher average Japanese price was "the most important reason" for the decrease in Japanese imports due to the price-sensitivity of the market. And yet, Korea now suggests that a [[***]] higher average Japanese pricing level "will lead to an increase in exports to Korea and weaken the price competitiveness of Like Products", despite

[106] KTC's final resolution, (Exhibit KOR-4.b (BCI)), p. 22.
[107] Korea's second written submission, para. 80. (fn omitted; underlining added)
[108] Korea's first written submission, para. 84. (fn omitted)

simultaneously contending that "nothing on the record offers a viable standard" for ascertaining the point at which Japanese prices are harmful or inconsequential to Korean price competitiveness.

2.68. In summary, the Interim Report does not introduce a post-expiry "price effects" analysis as a legal requirement under Article 11.3 in paragraph 7.77. Rather, the Interim Report examines the KIA's post-expiry "price effects" analysis because this analysis comprised part of the KIA's chosen methodology and because Japan challenges aspects of the KIA's determination based on the application of that aspect of its methodology. We fault the KIA in section 7.5.3.1 of the Interim Report because the KIA found that the average Japanese pricing level upon the removal of the anti-dumping duties "will lead to an increase in exports to Korea and weaken the price competitiveness of Like Products" despite remaining [[***]] higher than average Korean prices in the context of a market in which price is the most important factor in purchasing decisions and in which consumers prefer low-priced products. Specifically, we agreed with Japan that the KIA failed to provide any explanation or analysis that would bridge the logical gap between the KIA's respective findings on these points. Korea has offered no compelling reason to revise our assessment. Korea is effectively requesting us to ignore the KIA's chosen methodology and to disregard the importance placed by the KIA on the post-expiry "price effects" of the Japanese imports, but we have no basis for doing so.

2.13 Paragraph 7.78

2.69. Korea makes two requests with respect to paragraph 7.78 of the Interim Report. First, Korea requests the Panel to correct the sentence "Korea appears to accept that the KIA never undertook such an analysis" in light of paragraph 7.79 in which the Panel recounts that "Korea suggests a number of ways in which the KIA did indeed address this apparent contradiction".[109] Second, Korea requests that footnote 217 reflect the applicants' argument that there was a "very high risk" that the Japanese exporters would target the Korean market if the anti-dumping duties were lifted.[110] Japan objects to Korea's requests.[111]

2.70. We have decided not to grant Korea's requests. The "analysis" referred to in paragraph 7.78 concerns whether "price overselling could weaken the price competitiveness of domestic like products" with "higher on-average import prices [exerting] detrimental price pressure on lower on-average domestic prices". As reflected in footnote 213 (now footnote 212 in the Final Report), Korea stated explicitly that the KIA did not undertake any "specific price undercutting, suppression and/or depression analyses" in the third sunset review. Despite the absence of any such analysis in the KIA's determination, Korea provided a number of explanations for how domestic price competitiveness would be weakened by Japanese prices that would remain almost [[***]] higher even if the anti-dumping duties were lifted. These explanations provided by Korea are introduced in paragraph 7.79. Accordingly, there is no contradiction between the aspects of paragraphs 7.78 and 7.79 identified by Korea, and we see no reason to revise them.

2.71. With respect to footnote 217 (now footnote 216 of the Final Report), Korea suggests it is "misleading" to omit the applicants' argument concerning the "very high risk" that the Japanese exporters would target the Korean market if the duties expired.[112] Currently, footnote 217 states that "the applicants excluded Japanese exporters from their description of contemporaneous competitors in their application to initiate the third sunset review". We decline Korea's request because the applicants' "very high risk" argument related to an assumption of what the Japanese pricing level would be upon the lifting of the anti-dumping duties, and as set out at paragraph 7.66 of the Interim Report, this assumption was factually incorrect. While declining Korea's request, we will add paragraph 7.66 to the cross-references already listed in footnote 217.

2.14 Paragraph 7.79

2.72. Korea makes two requests to revise paragraph 7.79 of the Interim Report. First, Korea requests the Panel to delete the suggestion that "the KIA reached its findings on price competitiveness on a grade-by-grade basis", and instead to reflect Korea's description of the

[109] Korea's comments on the Interim Report, para. 41.
[110] Korea's comments on the Interim Report, para. 45.
[111] Japan's comments on Korea's comments on the Interim Report, paras. 39-40.
[112] Korea's comments on the Interim Report, para. 45.

KIA's finding as set out in paragraphs 263-265 of its second written submission.[113] According to Korea, the KIA did not actually make a grade-by-grade finding because "no grade-based evidence was ever presented to the KIA by the Japanese respondents and therefore no such analysis could ever have taken place".[114] Japan makes no comment in relation to this request.

2.73. Second, Korea requests the Panel to address an "essential argument" by Korea that is missing, namely that there were drastic changes in the price differential between the first and third sunset reviews.[115] Japan objects to this request because the KIA's determination in the third sunset review did not rely on the underselling finding from earlier reviews, and moreover, an assessment of past pricing that from over 12 years ago is not consistent with the forward-looking nature of sunset reviews.[116]

2.74. We have decided not to grant Korea's requests to revise paragraph 7.79. As to the first request, Korea complains that the Panel is wrong to describe its argument as being that "the KIA reached its findings on price competitiveness on a grade-by-grade basis". However, the direct quotation from Korea's submission is: "[t]he Korean authorities obviously considered that termination of the anti-dumping duties would lead to improved price competitiveness of the dumped imports on [a] *grade-by-grade basis*".[117] Moreover, to the extent that Korea made internally-contradictory arguments on this point, paragraph 7.81 of the Interim Report already captures this.

2.75. As to the second request, we reviewed the citations provided by Korea. Korea contends that these citations show that it had argued during the proceedings, based on the "history of Japanese products underselling domestic products", that "even if there was overselling based on the data collected in the third sunset review, there was no certainty that these prices would continue after the termination of the duties".[118] However, the citations provided by Korea indicate that it made a different argument during the proceedings. In particular, in these citations, Korea argued that the pricing history showed that the KIA could not have placed strong emphasis on past pricing data, since that pricing data had varied as between reviews. Korea was not arguing, as it is now, that this pricing history showed that the KIA considered that there was volatility in the Japanese exporters' prices, which in turn suggested that overselling would not necessarily continue after the expiry of the duties. Moreover, Korea has not drawn our attention to any aspect of the KIA's determination in which the KIA expressly relied upon this past pricing history to find that Japanese prices may fall by a margin lower than the quantum of the anti-dumping duty upon its termination. Accordingly, we see no compelling reason to make the revisions requested by Korea regarding paragraph 7.79.

2.15 Paragraphs 7.80 and 7.97 – price premiums

2.76. Japan requests the Panel to add passages to paragraphs 7.80 and 7.97 to reflect that there may be variations in different industries regarding the role, if any, of price premiums and price discounts.[119] Korea objects to Japan's request because the Panel's assessment is focused on the SSB market in particular.[120]

2.77. We have decided not to grant Japan's request. In effect, Japan wishes the Panel to reach a finding that the price premium commanded by Japanese products was not capable of explaining why Japanese products would recapture market share despite remaining higher-priced. To do so would be to engage in an impermissible *de novo* review.

2.16 Paragraph 7.80 – reflection of Korean arguments

2.78. Korea requests the inclusion of its arguments that (a) the Japanese exporters never adduced grade-by-grade pricing evidence to show that price differences per grade meant a lack of competition

[113] Korea's comments on the Interim Report, para. 46.
[114] Korea's comments on the Interim Report, para. 46.
[115] Korea's comments on the Interim Report, para. 47.
[116] Japan's comments on Korea's comments on the Interim Report, para. 41.
[117] Korea's response to Panel question No. 64(c)(iv). (emphasis added)
[118] Korea's comments on the Interim Report, para. 47.
[119] Japan's comments on the Interim Report, paras. 8-10.
[120] Korea's comments on Japan's comments on the Interim Report, p. 5.

thus negating cumulation; and (b) the KIA found the products of all relevant countries to be in a competitive relationship and "there has been no essential change in the competitive environment between the Japanese and Korean products".[121] Japan makes no comment on this request.

2.79. We have decided not to grant Korea's request. Korea offers no rationale for the inclusion of these arguments in paragraph 7.80 of the Interim Report. Paragraph 7.73 of the Interim Report already recognizes Korea's argument that the KIA's findings in the third sunset review rest upon its conclusions in earlier reviews, including the second sunset review in which price was found to be the most important factor in purchasing decisions. Paragraph 7.76 and footnote 203 (now footnote 202 in the Final Report) also recognize Korea's argument that the KIA's "likeness" finding in the third sunset review was based on earlier reviews, including the original investigation, and incorporated the finding that consumers prefer low-priced products. Thus, these aspects of the Interim Report already recognize, as Korea now contends, that "there has been no essential change in the competitive environment between the Japanese and Korean products" in these ways.[122] Similarly, Korea's "grade-by-grade evidence" argument is already addressed to the extent necessary in paragraph 7.108 (now paragraph 7.107) and section 7.5.3.3 of the Interim Report, and Korea offers no reason why it needs to be reflected in paragraph 7.80.

2.17 Paragraph 7.81

2.80. Korea requests the Panel to revise the sentence that "Korea tells us that '[t]he Korean authorities obviously considered that termination of the anti-dumping duties would lead to improved price competitiveness of the dumped imports on [a] grade-by-grade basis'".[123] The underlined portion of this sentence is a direct quotation from Korea's submissions during the proceedings. We reject this request.

2.18 Paragraph 7.82

2.81. Japan requests the Panel to revise the general proposition in paragraph 7.82 of the Interim Report that a price gap may become irrelevant when the focus is on what producers could produce.[124] According to Japan, such a finding would in practice vary from case-to-case, and further, the supply side does not operate in isolation from demand. Korea objects to Japan's request, noting that the language used by the Panel does not imply the kind of categorical finding that Japan is suggesting the Panel made.[125]

2.82. We have decided not to grant Japan's request. The passage in question is already sufficiently caveated to accommodate Japan's concerns, namely by reference to "if production can shift in response to demand".[126]

2.19 Paragraph 7.91

2.83. Korea requests the Panel to more comprehensively summarize Korea's arguments in paragraph 7.91 of the Interim Report about the "other factors" on which the KIA relied to find that Japanese exports would increase, particularly those set out in paragraphs 226-227 of its second written submission.[127] Japan makes no comment on this request.

2.84. We have decided not to grant Korea's request. Paragraphs 7.101, 7.112, and 7.119 of the Interim Report already expand upon these "other factors" in more detail. Korea has not demonstrated any need to additionally refer to its arguments on these points in paragraph 7.91, which is intended to provide a brief overview of the main thrust of the parties' respective cases.

[121] Korea's comments on the Interim Report, paras. 48-49.
[122] Korea's comments on the Interim Report, para. 49.
[123] Korea's comments on the Interim Report, para. 50 (quoting Interim Report, para. 7.81, in turn quoting Korea's response to Panel question No. 64(c)(iv)). (emphasis omitted; underlining added)
[124] Japan's comments on the Interim Report, paras. 11-12.
[125] Korea's comments on Japan's comments on the Interim Report, p. 9.
[126] Interim Report, para. 7.82. (emphasis added)
[127] Korea's comments on the Interim Report, paras. 51-52.

2.20 Paragraph 7.92

2.85. Japan requests the Panel to include language in paragraph 7.92 of the Interim Report to qualify the general proposition that, if anti-dumping duties are exerting a remedial effect, the removal of the duties could lead to the situation prevailing prior to their application.[128] Japan's concerns are that (a) higher prices and lower volumes are not necessarily indicative of anti-dumping duties exerting a remedial effect; and (b) even if the duties are exerting a remedial effect, changes in the market situation may nonetheless preclude a return to the situation prevailing prior to their application.[129] Korea objects to Japan's request, emphasizing that the language proposed by Japan would lead to an overly prescriptive new test.[130]

2.86. We have decided not to grant Japan's request. The relevant passage of paragraph 7.92 simply states that if the duties *are* exerting a remedial effect, then it *may* be reasonable to consider that their removal will lead to a return of the prior situation – but that any such assessment must have a *factual basis*. We see no reason to add further qualifying language.

2.21 Paragraph 7.94

2.87. Korea asserts that "[t]he sentence that 'Korea seems to suggest that the 'price gap' between Japanese imports and third-country imports upon the lifting of the anti-dumping duties was irrelevant to whether they were in competition with one another …' is an inaccurate and misplaced presentation of Korea's position".[131] Korea continues that its argument in paragraph 237 of its second written submission, which is cited in relation to this sentence in paragraph 7.94, addressed a different argument by Japan, namely the "replacement"/"displacement" argument.[132] Moreover, Korea contends that the main question at issue was whether Japanese products were in competition with Korean products. In this regard, Korea requests the Panel to reflect its argument that the price differential was not such as to suggest that these products were not in competition.[133]

2.88. Japan objects to Korea's request, noting that Korea's own cited answer to Panel question No. 20(f) proves the Panel's point in this aspect of the Interim Report.[134]

2.89. We have decided not to grant Korea's request. We have reviewed paragraphs 233-237 of Korea's second written submission, as well as Korea's response to Panel question Nos. 19 and 20(f). Based on our review of those aspects of Korea's submissions during the proceedings, we are satisfied that paragraph 7.94 of the Interim Report accurately depicts Korea's argument on this point.

2.22 Paragraph 7.95

2.90. Korea requests the Panel to "reconsider its findings about the central nature of the Japanese prices" in paragraph 7.95 of the Interim Report, and to correct the inaccurate statement that "the relevant finding of the KIA is that the drop in Japanese prices would lead to an increase in imports".[135] Japan objects to Korea's request, contending that the price drop for Japanese products was indeed the central point in the KIA's analysis.[136]

2.91. We have decided not to grant Korea's request. It is based on an incorrect reading of what is being described as "central" in paragraph 7.95 of the Interim Report. Paragraph 7.95 describes the role of the Japanese pricing level in the intermediate finding, which is made clear through footnote 281 to paragraph 7.95 (now footnote 280 in the Final Report). This paragraph does not describe the role of the Japanese pricing level with respect to the overall likelihood-of-injury determination, which is addressed at paragraphs 7.116-7.119 of the Interim Report.

[128] Japan's comments on the Interim Report, paras. 13-14.
[129] Japan's comments on the Interim Report, paras. 14-15.
[130] Korea's comments on Japan's comments on the Interim Report, pp. 12-13.
[131] Korea's comments on the Interim Report, para. 53. (emphasis original)
[132] Korea's comments on the Interim Report, para. 54.
[133] Korea's comments on the Interim Report, paras. 54-55.
[134] Japan's comments on Korea's comments on the Interim Report, paras. 45-47.
[135] Korea's comments on the Interim Report, paras. 57-60.
[136] Japan's comments on Korea's comments on the Interim Report, para. 52.

2.23 Paragraph 7.100

2.92. Korea requests the Panel to delete or reconsider its analysis based on pages 58-59 of the OTI's final report, contending that the following sentence in paragraph 7.100 of the Interim Report reflects a misunderstanding of Korea's position: "[t]o the extent that the 'lack of incentives' proposition was addressed in the KIA's determination, Korea stated that it was 'definitively' addressed at pp. 58-59 of the OTI's final report."[137] Japan objects to Korea's request, arguing that Korea's view of the "lack of incentive" issue is unduly limited to general-versus-special steel.[138]

2.93. We have decided to revise paragraph 7.100 in light of Korea's comments by deleting the following sentence: "[t]o the extent that the 'lack of incentives' proposition was addressed in the KIA's determination, Korea stated that it was 'definitively' addressed at pp. 58-59 of the OTI's final report". Korea now clarifies that it did not intend to argue that the broader "lack of incentives" issue was "definitively" addressed in this regard, and Korea's clarification reflects a plausible reading of its response to Panel question No. 16. Korea now tells us that the KIA did not address the "lack of incentives" issue from the perspective of per grade price differences, but instead addressed it solely from the perspective of general-versus-special steel since this was the proposition of the Japanese exporters to which the KIA was responding.[139] Korea's clarification in this regard confirms the accuracy of the conclusion in paragraph 7.100 that the KIA's determination contains no evaluation of how the volume of Japanese exporters would increase upon the lifting of the anti-dumping duties in view of the presence of a large volume of lower-priced imports from third countries that was already exerting price pressure in the price-sensitive Korean SSB market.

2.94. Korea also requests the Panel to reconsider "how it approached this issue related to the alleged 'lack of incentive' for Japanese producers to export to Korea" because "it would be entirely *de novo*" to conduct an analysis based on a proposition that is different to the one advanced by the Japanese exporters during the review.[140] Japan objects to Korea's request.[141]

2.95. We have decided not to grant Korea's request. Panels in anti-dumping disputes are not limited in their analysis to the arguments actually made by interested parties during the underlying investigation at issue.[142] There is no such rule in the Anti-Dumping Agreement or the DSU. Such a rule would frustrate the ability of complainants to challenge aspects of an authority's evaluation that were not disclosed until its final determination or that were never disclosed to the interested parties, contrary to e.g. the obligation on authorities in Article 6.9 of the Anti-Dumping Agreement. Whether an interested party raised a given matter or objection during the underlying review can be relevant to a panel's examination of whether the authority's evaluation is "unbiased and objective", but it is not dispositive.[143] Indeed, we recall that Korea advocated such a position during the present proceedings:

> To be clear, the position of Korea is not that simply because an interested party has not raised an objection to particular conclusion of the authorities during the investigation that a Member would be prevented from raising it in the context of a WTO dispute. That is clearly not the case and that is not the argument made by Korea. Indeed, if a challenge against the authority's finding is properly before a panel, the panel should be allowed to review the challenge even if no interested parties have raised the same challenge in the underlying investigation or review.[144]

2.96. In any case, we do not accept Korea's argument that the Japanese exporters only advanced a "lack of incentives" argument in relation to exports of general-purpose steel and not in relation to the differing price levels of Japanese and other products. Korea's argument is factually incorrect.

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[137] Korea's comments on the Interim Report, paras. 62-67.
[138] Japan's comments on Korea's comments on the Interim Report, paras. 56-63.
[139] Korea's comments on the Interim Report, para. 66.
[140] Korea's comments on the Interim Report, para. 68.
[141] Japan's comments on Korea's comments on the Interim Report, para. 64.
[142] See, e.g. Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.66 and fn 136; *China – Autos (US)*, paras. 7.30, 7.249, and 7.292.
[143] See, e.g. Panel Reports, *EC – Countervailing Measures on DRAM Chips*, para. 7.229; *EU – Fatty Alcohols (Indonesia)*, para. 7.196; *US – Carbon Steel (India) (Article 21.5 – India)*, paras. 7.211 and 7.221; and *Egypt – Steel Rebar*, paras. 7.382 and 7.386.
[144] Korea's response to Panel question No. 3(b).

The Japanese exporters clearly made arguments in relation to their products being priced significantly higher than those of other countries that were not contingent on the general-purpose steel argument.[145] Korea's characterization of the assessment of the "lack of incentives" issue in the Interim Report as being *de novo* is without foundation and we see no reason to make any revisions to the Interim Report in that regard.

2.24 Paragraph 7.102

2.97. Japan requests certain revisions to paragraph 7.102 of the Interim Report concerning how price might affect the quantity of imports demanded.[146] Japan is concerned to ensure that there is no scope for an "overbroad reading" of paragraph 7.102 whereby lower prices or greater duty absorption could alone justify an assumption of an increase in imports without positive evidence.[147] Korea objects to Japans request, arguing that the revisions would change the essence of the Panel's finding in paragraph 7.102.[148]

2.98. We have decided not to grant Japan's request. Paragraph 7.102 does not endorse, implicitly or explicitly, the proposition about which Japan expresses a concern. Accordingly, there is no reason to introduce caveats in relation to such a proposition.

2.25 Paragraph 7.104

2.99. Korea requests the Panel to reconsider its findings and revise paragraph 7.104 of the Interim Report in light of a number of concerns, including (a) the absence of a basis for concluding that competition was not already taking place; (b) the undertaking of a *de novo* review by examining price differentials in isolation; (c) the reliance on Exhibit KOR-41.b despite this information not being before the KIA; and (d) the selective reliance on aspects of the applicants' petition.[149] Japan disagrees with Korea – emphasizing that the KIA failed to account for price being the most important factor in purchasing decisions[150] – and proposes its own revisions to paragraph 7.104 to clarify both why the record material contradicts Korea's assertion, as well as how the Panel relies on exhibit KOR-41.b.[151]

2.100. We have decided to delete paragraph 7.104 from the Interim Report. This paragraph responds to an argument made by Korea, but as Korea now emphasizes, it rejects the distinction between general-purpose and special steel.[152] Accordingly, the Korean argument that paragraph 7.104 seeks to address was made on an *arguendo* basis.[153] Since the Panel does not make a finding on the alleged distinction between general-purpose and special steel, Korea's *arguendo* argument is not enlivened, and we therefore have no need to address it. Given that we have decided to delete paragraph 7.104, we see no need to make the revisions to this paragraph proposed by Japan.

2.101. We also note that Korea's arguments concerning Exhibit KOR-41.b are unfounded for the reasons set out in footnote 318 of the Interim Report (now substantively reflected in footnote 322 of the Final Report), and we decline Korea's request to remove any references to this exhibit elsewhere in the Report.

2.26 Paragraphs 7.116-7.119

2.102. Korea requests the Panel to include the KIA's finding regarding capacity utilization in paragraphs 7.116-7.119 of the Interim Report (now paragraphs 7.115-7.118 of the Final Report) because the Japanese exporters' low capacity utilization rate provided an independent, standalone

[145] See, e.g. Japanese exporters' opinion regarding injuries, (Exhibit JPN-10.b (BCI)), pp. 9-10 and 19; Japanese exporters' opinion regarding applicants' rebuttal, (Exhibit JPN-13.b (BCI)), pp. 7-8.
[146] Japan's comments on the Interim Report, para. 16.
[147] Japan's comments on the Interim Report, para. 17.
[148] Korea's comments on Japan's comments on the Interim Report, pp. 16-17.
[149] Korea's comments on the Interim Report, paras. 70-76.
[150] Japan's comments on Korea's comments on the Interim Report, paras. 67-68.
[151] Japan's comments on the Interim Report, paras. 18-19; comments on Korea's comments on the Interim Report, para. 69.
[152] Korea's comments on the Interim Report, para. 74.
[153] See also Korea's response to Panel question No. 16(v).

basis for a "huge incentive to increase the export of the covered product … upon removal of the current anti-dumping duties".[154] Japan makes no comment on Korea's request.

2.103. We have decided not to grant Korea's request. The role of the KIA's capacity utilization finding is already part of the holistic examination of the KIA's likelihood-of-injury determination in section 7.5.3.4.

2.27 Paragraph 7.128

2.104. Korea requests the Panel to add certain arguments that it made during the proceedings to paragraph 7.128 of the Interim Report (now paragraph 7.127 of the Final Report) because these are currently absent.[155] Japan objects to the request, arguing that Korea's proposed insertions add nothing of substance.[156]

2.105. We have decided not to grant Korea's request. Paragraph 7.128 contains a brief summary of arguments and Korea has offered no rationale for why the requested arguments need to be referenced in this paragraph.

2.28 Paragraphs 7.132-7.133

2.106. Japan requests the Panel to revise paragraphs 7.132-7.133 (now paragraphs 7.131-7.132 of the Final Report) to clarify that there needs to be "some linkage" between the production capacity for other products and the product under investigation before such other production capacity can be "legitimately useable" in examining the production capacity for the product under investigation.[157] Japan is concerned that the current findings may be read to allow authorities to skip examining this kind of linkage, even when the evidence suggests a lack of technical feasibility or commercial incentives for switching production from other products to the product under investigation.[158] Korea objects to Japan's request, arguing that Japan's revisions are effectively seeking to introduce a new legal obligation in Article 11.3 and that the revisions are not relevant to the resolution of the present dispute.[159]

2.107. We have decided not to grant Japan's request. Paragraphs 7.132-7.133 indicate that an authority must have a "factual basis" for determining the parameters used for the product scope in its capacity utilization calculation. Accordingly, Japan's concern that authorities could determine a given product scope without a "factual basis" or without regard to contrary evidence does not warrant a revision to paragraphs 7.132-7.133.

2.29 Paragraph 7.136

2.108. Korea makes a series of interim review requests in relation to paragraph 7.136 of the Interim Report (now paragraph 7.135 of the Final Report). We address each in turn.

2.109. Korea's first request is to reconsider "all interim findings that are based on [the Panel's] incorrect intermediate factual finding that the KIA had changed its initial parameter for assessing the SSB production capacity".[160] According to Korea, the Panel's finding of a "change" is based on the incorrect premise that the KIA's initial parameter was contained in the June 2016 dumping questionnaire.[161] Korea contends that, in order to ascertain the KIA's initially-preferred parameter for calculating production capacity, the Panel should rely on the *injury* questionnaire sent to the Korean domestic industry instead of relying on the *dumping* questionnaire sent to the Japanese exporters.[162] Korea further contends that the initial parameter as conveyed in the *injury* questionnaire sent to the Korean domestic industry was the same parameter that had been used by the KIA in all of the previous SSB proceedings, and that the Japanese exporters had also used this

[154] Korea's comments on the Interim Report, paras. 80-83.
[155] Korea's comments on the Interim Report, para. 84.
[156] Japan's comments on Korea's comments on the Interim Report, paras. 73-74.
[157] Japan's comments on the Interim Report, para. 21.
[158] Japan's comments on the Interim Report, paras. 22-23.
[159] Korea's comments on Japan's comments on the Interim Report, p. 20.
[160] Korea's comments on the Interim Report, para. 105. (emphasis omitted)
[161] Korea's comments on the Interim Report, paras. 86-89.
[162] Korea's comments on the Interim Report, paras. 90-93.

same parameter in their submission to the USITC's SSB proceeding.[163] Korea also argues that it used the ISSF data reflecting a broader parameter in the second sunset review and that it used the ISSF data for India's production capacity despite the cooperation of Viraj, an Indian exporter, in the third sunset review.[164]

2.110. Japan objects to Korea's request, arguing that the June 2016 dumping questionnaire clearly set the "product under investigation" as the preferred parameter, and the KIA's final determination itself relied on the Japanese exporters' responses to that questionnaire in its injury assessment.[165] Japan also points out that what was asked of the Korean domestic industry does not prove what was asked of the Japanese exporters.[166]

2.111. We have decided not to grant Korea's request. We agree with Japan that "what matters is the written content of the questions actually directed to the Japanese [exporters]" in the KIA's third sunset review, as well as the content of any oral questions "actually directed" to those exporters.[167] The materials now relied upon by Korea relate to questions posed to other interested parties, or posed in the proceedings of other investigating authorities, or posed in previous SSB proceedings by the KIA. Such materials cannot displace the clear request by the KIA to the Japanese exporters in the 3 June 2016 dumping questionnaire to provide production capacity data with the "[p]roduct under investigation" as the preferred product scope for that data. Nor can such materials displace the clear references in the KIA's likelihood-of-injury determination to the Japanese exporters' responses to the 3 June 2016 dumping questionnaire. This is direct evidence that the KIA relied on the 3 June 2016 dumping questionnaire for the purposes of its likelihood-of-injury assessment and its probative value far outweighs the circumstantial materials now relied upon by Korea to contend otherwise.

2.112. Korea's second request is to refrain from relying on the references to the Japanese exporters' responses to the 3 June 2016 dumping questionnaire in the KIA's likelihood-of-injury determination to find that the dumping questionnaire comprised the "starting point" of the KIA's injury investigation.[168] Japan objects to Korea's request.[169]

2.113. We have decided not to grant Korea's request. Korea's main contention is that, when the KIA stated in its likelihood-of-injury determination "[a]ccording to Appendix D-3 attached to 'Response to Anti-Dumping Questionnaire' submitted by the Japanese Respondents" and "[a]ccording to the data submitted by the Japanese Respondents (Appendix D-3 Production Record and Production Capacity attached to 'Response to Questionnaire about Anti-dumping')", the KIA actually meant to reference the Japanese exporters' joint submission of 1 September 2016, in which the Japanese exporters had extracted data from their responses to the 3 June 2016 dumping questionnaire.[170] But Korea offers no direct evidence in support of its assertion. Indeed, elsewhere in the KIA's determination, the KIA refers to the Japanese exporters' "written opinion" where their joint submissions are intended to be referenced as the source of the relevant data.[171] Korea offers no explanation for why the KIA failed to adopt this same approach with respect to the instances cited in paragraph 7.136 of the Interim Report.

2.114. Korea's third request is to "re-consider [the] findings captured in paragraph 7.136 in their entirety" due to a "serious and fundamental inconsistency in the Panel's factual analysis" as between paragraphs 7.135 and 7.136.[172] According to Korea, the Panel finds in paragraph 7.135 that "the official dialogue with respect to production capacity… commenced on 1 September 2016", whereas

[163] Korea's comments on the Interim Report, paras. 93-96.
[164] Korea's comments on the Interim Report, paras. 97-100.
[165] Japan's comments on Korea's comments on the Interim Report, paras. 75-78.
[166] Japan's comments on Korea's comments on the Interim Report, para. 80.
[167] Japan's comments on Korea's comments on the Interim Report, para. 81
[168] Korea's comments on the Interim Report, paras. 107-109.
[169] Japan's comments on Korea's comments on the Interim Report, para. 75.
[170] OTI's final report, (Exhibit KOR-5.c (BCI)), pp. 58 and 87, and fn 80. (emphasis added)
[171] See, e.g. OTI's final report, (Exhibit KOR-5.c (BCI)), p. 58 ("[d]ata: The Three Japanese Respondents' written opinion submitted after the public hearing (Table 1, Table 2)"), p. 8 ("[s]ource: The Three Japanese Respondents' written opinion submitted after the public hearing (Tables 3, 4, and 5)"), and p. 85: ("[s]ource: The Three Japanese Respondents' written opinion submitted after the public hearing (Tables 1 and 2)").
[172] Korea's comments on the Interim Report, paras. 111-112.

"[i]n paragraph 7.136, the Panel suddenly takes 21 September as the commencement date of the said dialogue".[173] Japan objects to Korea's request.[174]

2.115. We have decided not to grant Korea's request. Korea's request is based on an incorrect premise. Neither paragraph 7.135 nor paragraph 7.136 purport to arrive at any finding as to when the alleged "dialogue" commenced. Rather, paragraph 7.136 refers to 21 September 2016 because this is when the KIA's Injury Investigation Division first made an inquiry of the Japanese exporters (not to be confused with the 3 June 2016 dumping questionnaire, which was the first inquiry by the KIA seeking production capacity data from the Japanese exporters). The 1 September 2016 date referred to in paragraph 7.135 pertains to when the Japanese exporters' 31 August written opinion was received by the KIA's Injury Investigation Division.

2.116. Korea also now argues that the 21 September 2016 inquiry by the KIA was a follow-up to the 31 August written opinion, and *not* to the 3 June questionnaire response, contrary to the understanding reflected in paragraph 7.136. Specifically, Korea contends "[b]ut, of course, the KIA on 21 September 2016 was looking for information that is 'supplementary' to the KIA's inquiries raised with respect to the Japanese respondents' Written Opinion submitted on 1 September 2016."[175] According to the KIA's own log, however, the 21 September 2016 inquiry by the KIA was the first made by the Injury Investigation Division. Before 21 September, there do not exist any "KIA inquiries raised with respect to the Japanese respondents' Written Opinion submitted on 1 September 2016" to which the 21 September inquiry was "supplemental"/"additional" – that is, other than the KIA's 3 June dumping questionnaire, which is precisely the point of this aspect of paragraph 7.136.

2.117. Based on the foregoing, we see no compelling reason to make any of the requested revisions to paragraph 7.136. Given that Korea's request regarding paragraph 7.138 is consequential upon the Panel granting its requests regarding paragraph 7.136, we likewise decline to make the requested revision to paragraph 7.138.[176]

2.30 Paragraph 7.139

2.118. Japan requests the Panel to revise paragraph 7.139 of the Interim Report (now paragraph 7.138 of the Final Report) because it incorrectly describes the email at issue as having been sent to the KIA, when in reality the email was an internal correspondence between the Japanese exporters and their legal representatives.[177] Korea agrees with Japan's request, except for the second part of the revision, and asks the Panel to reconsider all of its findings based on the erroneous understanding that the email was sent to the KIA.[178]

2.119. We agree to revise paragraph 7.139 in light of the proper understanding of the email as an internal email. Our revisions complement Korea's review request regarding paragraph 7.143 of the Interim Report for the following reasons. The text of the email states in relevant part:

> Regarding the utilization rate on page 20, Table 3 of the Opinion Regarding Injuries to the Industry, isn't it true that products other than stainless steel are also produced in the facility whose standard utilization rate was the basis of the calculations? What is the ratio between stainless steel and other products produced in this facility? Please identify the ratio of special steel and general-purpose products out of stainless steel.[179]

2.120. The text of the question to which the Japanese exporters responded in their 7 November 2016 submission is:

> With respect to the capacity utilization in Table 3 on page 20 of the opinion on injury to industry, please explain whether other products other than stainless steel are produced through the facilities, which are the basis of calculating capacity utilization, and further

[173] Korea's comments on the Interim Report, para. 111. (emphasis omitted)
[174] Japan's comments on Korea's comments on the Interim Report, para. 75.
[175] Korea's comments on the Interim Report, para. 111. (italics omitted; underlining added)
[176] Korea's comments on the Interim Report, para. 113.
[177] Japan's comments on the Interim Report, para. 7.139.
[178] Korea's comments on Japan's comments on the Interim Report, pp. 23-24.
[179] Email reporting the meeting dated 21 September 2016, (Exhibit JPN-30.b (BCI)), p. 1.

> explain the respective proportions of stainless steel and other products that are produced through the facilities and also respective proportions of special steel and general-purpose steel out of stainless steel.[180]

2.121. As these extracts show, the Japanese exporters' understanding of the KIA's information request as reflected in the internal email is substantively equivalent to their understanding of this information request as reflected in their subsequent submission to the KIA. Accordingly, the considerations regarding what was asked by the KIA, what was understood by the Japanese exporters, and whether/how the KIA took steps to inform the Japanese exporters that they had misunderstood the information request, are substantively the same and therefore inform our revisions to paragraphs 7.139, 7.141, and 7.145-7.146 of the Interim Report (now paragraphs 7.138, 7.140, and 7.144-7.145 of the Final Report).

2.31 Paragraph 7.143

2.122. Korea requests the Panel to revise paragraph 7.143 of the Interim Report to reflect and examine Korea's argument in relation to the Japanese exporters' confirmation of the KIA's information request through the question to which they responded in their 7 November 2016 submission.[181] Japan makes no comment on this request.

2.123. As we have explained in relation to Japan's request to review paragraph 7.139 of the Interim Report, we consider it appropriate to make the revisions requested by Korea, and have done so in a way that complements the revisions made regarding paragraph 7.139. Our revisions in this regard encompass the descriptive aspects of paragraphs 7.141 and 7.145, as well as the evaluative aspect of paragraph 7.146.

2.32 Paragraphs 7.147-7.150

2.124. Korea requests the Panel to revise paragraphs 7.147-7.150 (now paragraphs 7.146-7.149 of the Final Report) to reflect certain record facts that it contends are currently missing from the Interim Report, and to reconsider all of the Panel's findings accordingly.[182] Korea's comments in this regard are unstructured and do not clearly itemize the record facts that are allegedly missing, nor do they clearly delineate the "precise aspects" for which Korea seeks certain revisions to the text of paragraphs 7.147-7.150 of the Interim Report. The Panel thus sought to distil these comments into discrete requests for revisions, which could then be evaluated within the framework of Article 15.2 of the DSU, as follows.

2.125. First, Korea appears to request the Panel to examine its argument that the Japanese exporters' 8 December 2016 submission demonstrated that they understood that production capacity should be based on "secondary peeling processing", which is not limited to the "product under investigation".[183] Second, Korea requests additional analysis by the Panel beyond simply stating that the KIA's information request in mid/late November was "somewhat imprecise".[184] Third, Korea requests the Panel to find that the Japanese exporters failed to provide any data (as opposed to providing data based on incorrect parameters).[185] Fourth, Korea requests the Panel to analyse the wording of the question contained in the Japanese exporters' submission of 7 November 2016, which shows the "degree of specificity" with which the KIA conveyed the correct parameters.[186] Fifth, Korea requests the Panel to assess the Japanese exporters' continued submission of the same figure despite repeated requests for further information by the KIA and despite the exporters' changing their position on the product scope of that same figure, and to assess the Japanese exporters' decision to deliberately submit incorrect figures.[187] Sixth, Korea requests the Panel to

[180] Japanese exporters' submission of opinion dated 7 November 2016, (Exhibit KOR-25.b (BCI)), p. 1.
[181] Korea's comments on the Interim Report, para. 114.
[182] Korea's comments on the Interim Report, para. 130.
[183] Korea's comments on the Interim Report, para. 116.
[184] Korea's comments on the Interim Report, para. 117.
[185] Korea's comments on the Interim Report, paras. 118-119.
[186] Korea's comments on the Interim Report, paras. 120-122 and 125-126.
[187] Korea's comments on the Interim Report, paras. 124 and 126-127.

include a discussion of the KIA's written opinion to the MOSF on its attempts to obtain and verify data from the Japanese exporters.[188]

2.126. Japan understands Korea's interim review request to involve the reconsideration of two pieces of evidence, namely exhibit JPN-16.b and exhibit KOR-48.b, and Japan objects to Korea's request.[189] Japan's main points are that (a) the Interim Report already addresses Korea's concerns about exhibit JPN-16.b in paragraph 7.154 and footnote 453 of the Interim Report; (b) the Panel properly focused on the documentary evidence of what the KIA communicated, not on what Korea now tells the Panel that the KIA intended to communicate or thought it was communicating regarding its preferred production capacity parameters; (c) exhibit KOR-25.b does not reveal the KIA's alleged premise that production capacity should be based not only on the product under investigation, but also on other products not subject to the investigation; (d) the Interim Report already addresses exhibit KOR-48.b and reasonably finds its probative value to be limited; and (e) if the figures submitted by the Japanese exporters had been so inconsistent and unreasonable in the eyes of the KIA, as argued by Korea, then the KIA should have sought clarifications – but there is no record evidence of such clarifications being sought clearly and directly.[190]

2.127. We have decided not to grant Korea's requests regarding paragraphs 7.147-7.150 as we understand them. The first, fifth, and sixth requests (as numbered according to our understanding above) pertain to matters that are already addressed adequately in the Interim Report. Specifically, Korea's first request regarding the relationship between the Japanese exporters' reference to "secondary peeling processing" in their 8 December 2016 submission and the understanding of the product scope as the "product under investigation" is addressed already in paragraph 7.154 and footnote 453 of the Interim Report (now footnote 451 in the Final Report), and Korea has offered no compelling reason why those aspects are inadequate. Korea's fifth request implies that the Japanese exporters deliberately misled the KIA, with Korea arguing that they "failed to respond to the KIA's information requests not because they did not understand the questions due to their 'imprecise' nature, but because they opted to provide an incorrect answer that they were later forced to change".[191] Matters relating to the reliability of the Japanese exporters figures are already addressed in paragraphs 7.160-7.163 of the Interim Report, and matters relating to the alleged "unfaithful participation" of the Japanese exporters are already addressed in paragraphs 7.165-7.173 of the Interim Report, and we therefore see no reason to revise paragraphs 7.147-7.150 in light of Korea's fifth request. Korea's sixth request is already addressed in footnote 419 of the Interim Report (now footnote 411 in the Final Report), and again, Korea offers no compelling reason as to why that aspect of the Interim Report is inadequate.

2.128. We turn now to Korea's second, third, and fourth requests regarding paragraphs 7.147-7.150 as we understand them. Regarding Korea's second request, paragraphs 7.147-7.150 adequately show that the documentary evidence did not indicate that the term "capable" meant what Korea now contends, and moreover, other contextual documentary evidence suggested the contrary. Korea has not substantiated the need for a revision in this regard. However, in light of Korea's request in relation to paragraph 7.136 that the Interim Report reflect the KIA's information request to the Korean domestic industry (see above paragraph 2.109), we have decided to juxtapose the specificity of what was requested in writing of the Korean domestic industry *vis-à-vis* the imprecision of what was requested orally of the Japanese exporters in relation to their respective capacity utilization figures (reflected in paragraph 7.150 of the Final Report). Regarding Korea's third request, we understand this to concern what is largely a semantic issue of "data" versus "numbers", and we note that Korea initially described the Japanese exporters' figures as "data" in its first written submission[192], whilst subsequently changing its case to argue that these figures did not constitute "data". The KIA also referred to the Japanese exporters' submitted figures as "data", albeit incomplete and edited.[193] We have adjusted paragraph 7.150 of the Interim Report to clarify that, based on the evidence before us, the KIA never told the Japanese exporters that their submitted figures did not qualify as "data" in the eyes of the KIA. But we cannot accept the premise that the Japanese exporters submitted *nothing*, because evidently they did make submissions

[188] Korea's comments on the Interim Report, paras. 128-129.
[189] Japan's comments on Korea's comments on the Interim Report, para. 91.
[190] Japan's comments on Korea's comments on the Interim Report, paras. 92-98.
[191] Korea's comments on the Interim Report, para. 126. (emphasis added)
[192] Korea's first written submission, para. 323.
[193] KTC's submission of review to MOSF, (Exhibit KOR-48.b (BCI)), p. 8; OTI's final report, (Exhibit KOR-5.c (BCI)), p. 87 ("[a]ccording to the data submitted by the Japanese Respondents …").

concerning their capacity utilization rate. Regarding Korea's fourth request, this is addressed above through the revisions made in response to Korea's request regarding paragraph 7.143 of the Interim Report.

2.33 Paragraph 7.155 and footnote 457

2.129. Korea requests the deletion of the reference in footnote 457 (now footnote 455 in the Final Report) to how Korea explained the proper understanding of the term "dumped imports", arguing that this is irrelevant to the substance of paragraph 7.155 of the Interim Report.[194] Japan opposes Korea request, contending that Korea's explanation of the term "dumped imports" is relevant and should be retained, particularly since Korea stated that this explanation underlay every single finding and analysis in the text of the KIA's determination.[195]

2.130. We have decided not to grant Korea's request. The sentence of paragraph 7.155 of the Interim Report to which footnote 457 is appended states: "[i]f anything, the KIA's request on 11 January 2017 for the 'annual and daily volume of production … of the dumped imports' could warrant the opposite inference, insofar as the exporters might expect the production volume data and the production capacity data to have corresponding product scopes".[196] In turn, footnote 457 states:

> That is, in the absence of any indication otherwise from the authorities. See also Korea's response to Panel question No. 9(a)(i)-(ii) concerning how the term "dumped imports" should be understood in the underlying review.

2.131. In turn, Korea's response to Panel question No. 9(a)(i)-(ii) states, in relevant part, that:

> To come straight to the point, this is the rationale underlying every single finding and analysis in the text of the Korean authority's determination. Clearly, all likelihood-of-injury analysis by the KTC or OTI was conducted on the basis of the covered products. Products other than the covered products – excluded products – were never a part of the review, so it is safe to suppose that any analysis or finding made by the KTC in the context of its determination was exclusively focused on the covered product or covered product market.
>
> …
>
> By definition, therefore, the 'dumped imports' or '재심사대상물품' can only refers [*sic*] to the covered product (i.e. does not include products that are excluded from the scope of the review).
>
> To conclude, the said rationale appears almost everywhere in the OTI's Final Report or the KTC's Final Resolution to the extent that the Korean authorities' findings concern probable influx of the covered products from Japan upon termination of the anti-dumping measure.

2.132. The relevant aspects of paragraph 7.155 and footnote 457 concern what may, or may not, have been plausibly understood by the Japanese exporters upon receiving an information request from the KIA regarding the "dumped imports". Korea has not adequately explained how the cited part of footnote 457 "has nothing to do with the issue at hand".[197]

2.34 Paragraph 7.159

2.133. Korea requests "that the Panel at least examine whether the Japanese respondents had ever submitted any requested information, and make the appropriate findings, which would include re-considering its finding in paragraph 7.159".[198] Korea's main argument is that, whilst the Japanese

[194] Korea's comments on the Interim Report, para. 132.
[195] Japan's comments on Korea's comments on the Interim Report, para. 100.
[196] Emphasis added.
[197] Korea's comments on the Interim Report, para. 132.
[198] Korea's comments on the Interim Report, para. 135.

exporters submitted a "naked number" or "numerical allegation" on production capacity, they never submitted "specific data" in response to the KIA's requests.[199] Japan makes no comment on Korea's request.

2.134. We have decided not to grant Korea's request. We have earlier considered, in relation to Korea's requests to review paragraphs 7.147-7.150, that Korea's concern in this regard is largely a semantic issue of "data" versus "numbers", and Korea itself initially described the Japanese exporters' figures as "data" in its first written submission[200], whilst subsequently changing its case to argue that these figures did not constitute "data". We note that the KIA itself stated during the third sunset review that the Japanese exporters had submitted "some *data*", but that it was "incomplete" or "edited".[201] Clearly, therefore, the KIA itself considered that "some data" was submitted by the Japanese exporters concerning production capacity. This removes the premise of Korea's request to revise paragraph 7.159, namely that no "data" (or no "information") was submitted.

2.35 Paragraph 7.161

2.135. Korea requests the Panel to revise its acceptance of the Japanese exporters' discrepancy referred to in paragraph 7.161 of the Interim Report as "inadvertent". Japan objects to Korea's request.[202]

2.136. We have decided not to grant Korea's request. It is premised on a misreading of paragraph 7.161 of the Interim Report. This paragraph does not refer to an "acceptance" of the discrepancy as "inadvertent". Rather, this paragraph recounts that, subsequent to the discrepancy, the Japanese exporters provided an accurate description of their intended product scope, and thus the discrepancy cannot be said to have undermined the overall credibility and reliability of the production capacity figures submitted by the Japanese exporters.

2.36 Paragraph 7.162

2.137. Korea requests the Panel to consider, in paragraph 7.162 of the Interim Report, the "inherent tension" between "peeling" and "inspection" before concluding that there is no "inherent tension" between "peeling" and "secondary processing".[203] Specifically, Korea contends that:

> Although "peeling" is a subset of "secondary processing", "peeling" is not a subset of "inspection". In fact, both "peeling" and "inspection" are the defined stages of SSB manufacturing, distinctive from each other.
>
> Therefore, Korea respectfully submits that the Panel must either recognize this inherent tension or find further justification with respect to the relationship between "peeling" and "inspection".[204]

2.138. Japan objects to Korea's request, arguing that Korea seeks to create the appearance of a tension when in fact the two documents in question are consistent with one another.[205]

2.139. We have decided not to grant Korea's request. Korea relies on *Aichi's* questionnaire response to substantiate the proposition that [[***]] is a distinct stage of SSB manufacturing. However, the matter at issue in paragraph 7.162 of the Interim Report concerns *Daido's* submissions and whether *Daido* submitted contradictory material. In its questionnaire response, *Aichi* distinguished between [[***]], but there is no suggestion that this implied any meaningful difference for the generation of its production capacity figure, and moreover, Aichi [[***]], thus differentiating its process from

[199] Korea's comments on the Interim Report, paras. 133-134.
[200] Korea's first written submission, para. 323.
[201] KTC's submission of review to MOSF, (Exhibit KOR-48.b (BCI)), p. 8. (emphasis added)
[202] Japan's comments on Korea's comments on the Interim Report, para. 102.
[203] Korea's comments on the Interim Report, paras. 139-141.
[204] Korea's comments on the Interim Report, paras. 139-141.
[205] Japan's comments on Korea's comments on the Interim Report, para. 103.

Daido. In its individual response to the KIA's 3 June 2016 dumping questionnaire, *Daido* stated [[***]].[206] Daido thus described [[***]], and not as separate stages or processes.

2.140. According to paragraph 7.162 of the Interim Report, there is no "inherent tension" between the subsequent joint submission of the Japanese exporters – which referenced secondary processing[207] – and this earlier questionnaire response by Daido. The subsequent joint submission did not explicitly reference [[***]], but as just mentioned, it is apparent from Daido's earlier questionnaire response that Daido considered [[***]]. Korea has not demonstrated that Daido's reference to [[***]] in its earlier questionnaire response has any meaningful implication for its calculation of production capacity nor, relatedly, the subsequent description in the joint submission that secondary processing – and thus the peeling process – was the reference point for calculating production capacity. Accordingly, Korea has provided no compelling reason for the Panel to revise paragraph 7.162.

2.37 Paragraphs 7.165-7.173

2.141. Korea requests the Panel to delete paragraphs 7.165-7.173 from the Interim Report.[208] Korea's main contention is that it never argued that Japan acted in "bad faith" in initiating or engaging in the present proceedings, nor did the KIA make a finding of "bad faith" or draw adverse inferences from the Japanese exporters' conduct in the underlying review.[209] Korea advances various related and additional arguments in support of its request, which we will address as appropriate in our evaluation below. Japan objects to Korea's request because "[t]he argument of bad faith was clearly made, and took substantial time and resources of the other Party and the Panel".[210]

2.142. We begin by examining whether, as a factual matter, Korea did indeed argue during the proceedings that Japan was acting in bad faith in the present proceedings with respect to its production capacity claims and whether Korea asked the Panel to avoid an outcome that would result in Japan's misrepresentations being rewarded.

2.143. In the "General Observations" section of its comments on Japan's responses to the Panel's questions, Korea stated:

> [A]s Korea will demonstrate below, Japan's desperate attempts at rescuing the Japanese respondents' unsubstantiated numerical allegation from the fundamental errors that taint the very foundation of the allegation's veracity only reveals the unfaithful participation by the Japanese respondents' in the underlying review, and quite possibly, by Japan in this dispute (although Korea hates to say this).[211]

2.144. Korea indicated that this "demonstrat[ion]" would be made in its comments on Japan's response to Panel question Nos. 101 and 106. We note that question 106, in particular, concerns production capacity. We also note that, in its comments on Japan's response to Panel question No. 92 in respect of production capacity, Korea made a remark similar to that just quoted from its "General Observations", namely:

> More importantly, as demonstrated below, Japan's desperate attempts at minimizing the significance of such flaws by admitting the serious inconsistencies totally fails and even calls into question the good faith participation of Japan in this dispute.[212]

2.145. The plain text of these remarks in Korea's "General Observations" and comments on Japan's response to Panel question No. 92 shows that Korea did indeed "call into question the good faith participation of Japan in this dispute", which Korea intended to "demonstrate" in its subsequent comments on Japan's responses to Panel questions. Korea specified question 106 in that regard,

[206] Daido questionnaire response, (Exhibit JPN-9.b (BCI)), annex D-3. (emphasis added)
[207] Japanese exporters' post-hearing opinion, (Exhibit JPN-16.b (BCI)), pp 1-2.
[208] Korea's comments on the Interim Report, para. 144.
[209] Korea's comments on the Interim Report, paras. 152-154.
[210] Japan's comments on Korea's comments on the Interim Report, para. 106.
[211] Korea's comments on Japan's response to Panel question "General Observations", p. 4. (emphasis added)
[212] Korea's comments on Japan's response to Panel question No. 92, p. 16. (emphasis added)

which concerns production capacity. In turn, in its comments on question No. 106, Korea made the following remarks:

> **(Japan's Response is Disingenuous)** Japan's response to this critical question demonstrates either the fundamentally disingenuous nature of Japan's participation in this dispute or Japan's fundamental misunderstanding of the subject matter at hand.
>
> …
>
> Indeed, if the Panel breaks down Japan's argument in paragraphs 87 and 89 chronologically, it will note that the Japanese respondents committed mistakes *in virtually every submission* made to the Korean authorities. This suggests that the mistakes were not inadvertent, and the Panel should not be misled by Japan's crafty repackaging of the chronology of the events.
>
> **But more importantly**, Japan's *post hoc* justification is both completely false and evidently disingenuous.
>
> …
>
> In contrast, Japan's position constantly changes as the case develops, often providing self-contradictory arguments, and almost always run counter to the prevailing reality and the well-known industrial knowledge. By simple and straightforward analogy, therefore, it should be clear that Korea's arguments are in line with the objective findings of the Korean authorities based on the evidences and analyses that are genuine and contemporaneous, while Japan's arguments are opportunistic, often relying on an unfounded premise that the Panel would give them something if they raise enough number of issues, with or without a proper basis. As Korea repeatedly stressed, such an opportunistic approach does not represent a proper decorum befitting such an internationally-prestigious proceeding that is the WTO's dispute settlement procedure. That much is clear.
>
> …
>
> Korea truly believes that its authorities' attitude in the underlying review is to be commanded [sic] if anything but not to be faulted in any case. Conversely, Korea respectfully warns the Panel against the destructive implication that would be triggered by rewarding the Japanese respondents for their blatantly unfaithful participation in the underlying review due to some *room for improvement* that the Panel has apparently identified from the Korean authorities' conduct of review.
>
> As an aside but relatedly, Korea notes that Japan has made clear the premise on which it has launched this lawsuit: (i) explicitly, respondents to an anti-dumping investigation and review can cherry-pick the specific request from the authority that they will respond to, and (ii) implicitly, the respondents can choose the manner in which they will respond to the specific request by the authority. Otherwise, this is a dispute that could have not been conceivably brought to this Panel.[213]

2.146. To recall, Korea had indicated earlier in its filing that it would "demonstrate", in its comments regarding question No. 106[214], the "unfaithful participation" by Japan in this dispute and how "Japan's desperate attempts at minimizing the significance of such flaws by admitting the serious inconsistencies totally fails and even calls into question the good faith participation of Japan in this dispute". In turn, the above aspects of Korea's comments on Japan's response to Panel question No. 106 reveal the following points. Korea argued that Japan's submissions concerning the Japanese exporters' production capacity figures were intentionally "disingenuous", and that Japan had engaged in a "crafty repackaging of the chronology of the events", including with respect to "mistakes" by the Japanese exporters that were "not inadvertent", i.e. deliberately misleading. Korea

[213] Korea's comments on Japan's response to Panel question No. 106, pp. 46-51. (emphasis original)
[214] Korea also mentioned question No. 101, which relates to export volumes and the issue of "general-versus-special" steel.

also argued that Japan had adopted an "opportunistic approach" that was inconsistent with the "proper decorum" of the present proceeding, including by making submissions on the "premise that the Panel would give them something if they raise enough number of issues". Korea "warn[ed]" the Panel against rewarding the Japanese exporters "for their blatantly unfaithful participation in the underlying review", presumably by accepting Japan's arguments regarding the Japanese exporters' production capacity figures. Finally, Korea identified two questionable factors that formed the "premise" on which Japan "launched this lawsuit", contending that "[o]therwise, this is a dispute that could have not been conceivably brought to this Panel".[215]

2.147. In summary, in its comments on Japan's responses to the Panel's questions, Korea framed an overall argument that "call[ed] into question the good faith participation of Japan in this dispute" and described Japan's "participation" in the dispute as quite possibly "unfaithful", including with respect to its production capacity claims. Within the rubric of that overall argument, Korea relied upon (a) the wilful misrepresentation by Japan during the proceedings of the evidence relating to the Japanese exporters' production capacity figures; (b) the approach allegedly adopted by Japan of making a large volume of arguments so that the Panel might accept one of them; and (c) the questionable premise on which Japan allegedly initiated the present proceedings.

2.148. In the same filing, Korea also asserted – again in relation to production capacity – that "Japan submits several misleading and disingenuous arguments", that "Korea is genuinely troubled by Japan's disingenuous arguments before this Panel", that a certain argument by Japan was "incredibly misleading", and that "Korea must express its concern because Japan's misrepresentation of the facts does not seem to have been inadvertent".[216] The only way to read these assertions by Korea is that they were meant to convey that Japan was deliberately misleading the Panel in relation to its production capacity claims. Given the similarities in the subject matter and the language used, it is apparent to the Panel that these remarks also fell within the rubric of Korea's overall argument in which doubt was cast over Japan's good faith participation in the present proceedings *vis-à-vis* production capacity.

2.149. In a separate filing, namely Korea's comments on Japan's responses to Korea's questions, Korea made a number of remarks about Japan's conduct in the proceedings *vis-à-vis* the Japanese exporters' "various numerical allegations" (including the subject matter of Panel question No. 106 concerning production capacity) as follows:

> As a matter of primary importance, Korea underscores Japan's disingenuous response in paragraphs 92-93. It is one thing to describe a discrepancy as an "inadvertent mistake", but it is another to intentionally mislead the Panel, which unfortunately has been a frequent approach by Japan in this dispute.
>
> …
>
> It was considered that most, if not all, of the Japanese respondents' various numerical allegations were either unsubstantiated or inconsistent, or both. Japan provides various unsubstantiated, self-serving allegations to justify the apparent inconsistencies, but despite the numerous speculations and convoluted misrepresentation of the facts, Japan always fails to properly explain the problems. In contrast, one simple answer that is apparent from the record evidence is that the Japanese respondents' numerical allegations were unfounded. This basic and straightforward answer must not be overlooked, as Japan's blatant misrepresentation of the facts should not be rewarded in this dispute.
>
> Having said that, Korea's Question 29 focuses on one iteration (export volume data) of a fundamental problem in the review concerning the lack of participation and quality submissions by the Japanese respondents. Indeed, there was a general theme in the review of the Japanese respondents only selectively participating and providing the requested data. In those instances where information was provided, there were several issues with the data, which also Japan confirms in its responses to Panel Questions 101

[215] Korea's comments on Japan's response to Panel question No. 106, pp. 46-51.
[216] Korea's comments on Japan's response to Panel question No. 92, pp. 12-13.

> and 106. Japan's suggestion that it concerned merely a few "miswritten figures" is not credible.[217]

2.150. Accordingly, Korea alleged that it was a "frequent approach by Japan in this dispute" to "intentionally mislead the Panel", which correlates to Korea's overall argument calling into question Japan's good faith participation in the dispute as described above. Moreover, Korea contended that "Japan's blatant misrepresentation of the facts should not be rewarded in this dispute", which we understand to be a request to the Panel to refrain from "rewarding" Japan in this way.

2.151. We also note that, in its second written submission, Korea made a generalized iteration of its argument (described above) concerning the approach allegedly adopted by Japan of making a large volume of production capacity arguments so that the Panel might accept one of them, as follows:

> Korea finds it particularly troublesome that such an approach is apparently prevalent across many other claims and arguments that Japan is advancing to the Panel in this dispute. Korea does not consider that this "kitchen sink" approach of trying any argument that comes along is what the drafters had in mind when they provided that all Members are to engage in these procedures in good faith in an effort to resolve the dispute.[218]

2.152. As this extract demonstrates, Korea explicitly linked Japan's alleged "kitchen sink" approach to the question of "engag[ing] in these procedures in good faith".

2.153. In short, the foregoing demonstrates that Korea called into question whether Japan was participating in good faith in the present dispute in relation to its production capacity claims. Specifically, Korea cast doubt over the premise on which Japan initiated the proceedings and suggested that Japan had made deliberate misrepresentations and misleading statements to the Panel during the proceedings. Korea linked Japan's engagement in the dispute to the Japanese exporters' alleged "blatantly unfaithful participation" in the underlying review. Korea asked the Panel to avoid rewarding such behaviour. Accordingly, the Panel understood Korea to argue that Japan was acting in bad faith in the present WTO proceedings in relation to its production capacity claims. This understanding, as reflected in paragraphs 7.168-7.169 of the Interim Report, is derived from the plain text of Korea's submissions during the proceedings. Korea asserts that this understanding is incorrect for a numbers of reasons, to which we now turn.

2.154. First, Korea contends that the fact that it allegedly raised these issues "at the very end of the proceeding" shows that "this alleged argument was not an essential aspect of Korea's case that would have warranted such a lengthy discussion" in the Interim Report.[219] We agree that the timing of the submission of arguments and evidence can impact their admissibility under the Working Procedures and in light of principles of due process. However, neither party has raised any question as to the admissibility of Korea's arguments in this regard.[220] Moreover, it is inherent in the nature of these arguments – i.e. assertions as to the other party's conduct during the proceedings – that they may emerge only as the proceedings unfold. Thus, the fact that Korea advanced these arguments at a late stage in the proceedings does not provide a basis for the Panel to decline to address them in the Report.

2.155. Second, Korea contends that it never used the term "bad faith" in relation to *Japan*.[221] Korea notes that it did use the term "bad faith" on one occasion in relation to the *Japanese exporters*, but in the unrelated context of general-versus-special steel.[222] In our view, the term "bad faith" is the inverse of "good faith", and Korea expressly "call[ed] into question the good faith participation of Japan in this dispute".[223] Korea also used the term "unfaithful participation" in relation to Japan,

[217] Korea's comments on Japan's response to Korea's question No. 29, pp. 61 and 64. (emphasis added)
[218] Korea's second written submission, para. 69. (emphasis added)
[219] Korea's comments on the Interim Report, para. 145.
[220] Indeed, Japan requests that we address these arguments. (Japan's comments on Korea's comments on the Interim Report, para. 106).
[221] Korea's comments on the Interim Report, para. 146.
[222] Korea's comments on the Interim Report, paras. 146-149.
[223] Korea's comments on Japan's response to Panel question No. 92, p. 16.

referring specifically to "the unfaithful participation … quite possibly, by Japan in this dispute".[224] We note that the Interim Report uses the term "bad faith" to describe Korea's allegations against Japan, but it does not use quotation marks or otherwise imply that Korea used this exact term. We consider "unfaithful participation" to be synonymous with "acting in bad faith". We therefore see no reason to revise paragraphs 7.165-7.173 of the Interim Report on this basis.

2.156. Third, Korea contends that the Interim Report is incorrect to assert that Korea argued that Japan acted in bad faith in "initiating" or "engaging" in the proceedings.[225] Korea states that it "never made such an allegation and the Panel is unable to point to any such statement".[226] Contrary to this assertion by Korea on "initiating", part of Korea's "demonstrat[ion]" of doubt over "the good faith participation of Japan in this dispute" concerned allegations regarding "premise" on which Japan "launched this lawsuit".[227] Clearly, Korea's allegations in this regard concerned Japan's "initiation" of the proceedings. Additionally, contrary to Korea's assertion on "engaging", Korea expressly linked its allegation of Japan's "kitchen sink" approach to doubts over whether such an approach accorded with the requirement "to engage in these procedures in good faith in an effort to resolve the dispute".[228] Korea also described Japan's arguments during the proceedings as "misleading", "disingenuous", "blatant misrepresentations", and stated that that it was a "frequent approach by Japan in this dispute" to "intentionally mislead the Panel". Clearly, Korea's allegations in this regard concerned Japan's engagement in the proceedings.

2.157. Fourth, Korea contends that the remarks by Korea cited in the Interim Report were "focused on highlighting the uncooperative behaviour of the Japanese exporters in general … their demonstrated submission of incorrect information on the key point of selling 'general purpose' steel, and their confusing and changing version of the facts when it came to production capacity".[229] According to Korea, Japan had sought to "minimize" the nature of the mistakes and inaccuracies in the information provided by the Japanese exporters, and Korea was simply responding to Japan by pointing out that "it was unlikely that these inaccuracies were 'inadvertent'".[230] Korea proceeds to assert that "[i]t was not Korea that argued that these inaccuracies were deliberate; rather, Korea was responding to Japan's assertions about the alleged 'inadvertent' nature of the mistakes".[231]

2.158. We are unconvinced by Korea's attempt to distinguish between the concepts of "not inadvertent" and "deliberate". Moreover, we recall that Korea made the following remarks in relation to Japan's production capacity claims (a) "Japan submits several misleading and disingenuous arguments"; (b) "Korea is genuinely troubled by Japan's disingenuous arguments before this Panel"; and (c) "what Japan tries to argue based on such a non-issue is incredibly misleading".[232] Korea followed these remarks with the broader suggestion that "[a]t this juncture, Korea must express its concern because Japan's misrepresentation of the facts does not seem to have been inadvertent".[233] In our view, according to a plain reading of the text of these remarks by Korea, if Japan's alleged misrepresentation of the facts was not inadvertent, then it was intentional. Our understanding of Korea's argument in this regard was informed by Korea's allegation that it was a "frequent approach by Japan in this dispute" to "intentionally mislead the Panel".[234] In any event, contrary to what Korea now asserts, Korea explicitly contended that Japan was complicit in presenting the Japanese exporters' so-called "not inadvertent" errors as "mistakes", contending that these "mistakes were not inadvertent, and the Panel should not be misled by Japan's crafty repackaging of the chronology

[224] Korea's comments on Japan's response to Panel question "General Observations", p. 4.
[225] Korea's comments on the Interim Report, paras. 150-151.
[226] Korea's comments on the Interim Report, para. 150.
[227] See paras. 2.143-2.148 above.
[228] Emphasis added. See also paras. 2.151-2.152 above.
[229] Korea's comments on the Interim Report, para. 157.
[230] Korea's comments on the Interim Report, para. 157.
[231] Korea's comments on the Interim Report, para. 157.
[232] Korea's comments on Japan's response to Panel question No. 92, pp. 12-13.
[233] Korea's comments on Japan's response to Panel question No. 92, p. 13. We also note that the same response by Korea concludes by linking these remarks to its "good faith" argument, stating "[m]ore importantly, as demonstrated below, Japan's desperate attempts at minimizing the significance of such flaws by admitting the serious inconsistencies totally fails and even calls into question the good faith participation of Japan in this dispute". (Ibid. p. 16).
[234] Korea's comments on Japan's response to Korea's question No. 29, pp. 61 and 64.

of the events".[235] Korea made this remark as part of its "demonstrat[ion]" of why the "the good faith participation of Japan" was being "call[ed] into question" in this dispute.[236]

2.159. Korea now suggests that, rather than making a separate allegation of bad faith against Japan, it was (a) seeking to express "its frustration over this distortion of the facts and the willful [*sic*] shifting of the burden and re-characterization of the errors"[237]; (b) articulating the "frustration on Korea's side" about the "litigation technique of Japan" by which Japan sought to "blame the authorities for the errors committed by the Japanese exporters"[238]; (c) pointing "to a number of considerations that would have required a bit more restraint on the side of Japan" because "Japan may have been sailing a bit too close [to the wind]"[239]; and (d) expressing its "frustration about Japan's attempt at creating a critical confusion" and Japan's "seriously misleading" and "disingenuous" presentation of certain facts.[240] While Korea argued that Japan had engaged in a "disingenuous cover-up" during the proceedings, Korea now suggests that this is because "Japan attempted to rescue some serious discrepancies in the Japanese respondents' responses by 'packaging' – or 'covering them up' as 'inadvertent and minor mistake'".[241] Rather than making a separate allegation of bad faith against Japan through these kinds of remarks, Korea now argues that it was instead "plac[ing] a question mark around Japan's strategy".[242] Korea tells us that "[t]his question mark is not an argument or claim that Japan violated Article 3.10 of the DSU", but "is simply that, a question mark".[243]

2.160. In our view, if a party in WTO dispute settlement raises a question before a panel over the good faith participation of the other party to the proceeding, it should expect to receive an answer. Korea should not now be surprised that, having called into question Japan's "unfaithful participation" in the proceedings[244], the Panel proceeded to review this allegation in its Interim Report. In any event, we reject Korea's suggestion that it was merely "placing a question" as opposed to making an argument or claim for the Panel's consideration. As we have recounted above, Korea's remarks went significantly further than "placing a question". We therefore see no reason to revise paragraphs 7.165-7.173 on the basis that Korea was merely "placing a question" as opposed to making a claim or argument about Japan's participation in the present proceedings.

2.161. Korea also objects to the suggestion in paragraph 7.168 that Korea "characterized certain aspects of Japan's case as a 'hoax'", and in paragraph 7.169 that Korea "is acting in a manner inconsistent with Article 3.10 of the DSU by allegedly advancing allegations of bad faith as part of an adversarial effort or litigation technique".[245]

2.162. On the first point, Korea contends that it never argued that Japan's case was a hoax nor that it was alleging bad faith on the part of Japan, but was instead referring to the Japanese exporters' argument on general-versus-special steel as a hoax and suggesting that perhaps Japan "was being misled by the cunning lawyers for the respondents".[246] We have reviewed Korea's argument and consider the statement in paragraph 7.168 that Korea "characterized certain aspects of Japan's case as a 'hoax'" to be consistent with Korea's explanation during the proceedings. In particular, Korea explained that it "made the qualification *of the argument as a 'hoax'* and 'opportunistic', and it is Korea's right to respond *to the arguments of Japan by* pointing to …".[247] We therefore see no reason to revise that aspect of the Interim Report. Moreover, we are not convinced by Korea's argument that this matter pertained to something "that Korea said verbally in the heat of the debate" and that it arose from the "oral exchange" and therefore did not warrant being addressed in the Interim Report.[248] The allegation that the Japanese exporters had engaged

[235] Korea's comments on Japan's response to Panel question No. 106, p. 51.
[236] In particular, it was part of Korea's comments on Japan's response to Panel question No. 106, which Korea described as part of its demonstration in this regard. (Korea's comments on Japan's response to Panel question "General Observations", p. 4, and No. 92, p. 16).
[237] Korea's comments on the Interim Report, para. 161.
[238] Korea's comments on the Interim Report, paras. 162 and 163.
[239] Korea's comments on the Interim Report, para. 163.
[240] Korea's comments on the Interim Report, paras. 164-166.
[241] Korea's comments on the Interim Report, paras. 168-169.
[242] Korea's comments on the Interim Report, para. 170.
[243] Korea's comments on the Interim Report, para. 170.
[244] Korea's comments on Japan's response to Panel question "General Observations", p. 4.
[245] Korea's comments on the Interim Report, para. 173.
[246] Korea's comments on the Interim Report, paras. 174-175 and 180.
[247] Korea's response to Panel question No. 11. (emphasis added)
[248] Korea's comments on the Interim Report, para. 174.

in a "hoax" being advanced by Japan (knowingly or otherwise) was significant and potentially far-reaching. A "hoax" connotes a deception or fraud. Korea now contends that this remark was made "in the heat of the debate". However, by asking question No. 11, the Panel afforded Korea the opportunity to clarify in writing what it had intended by the "hoax" allegation and how this allegation related to the KIA's determination. For instance, in response to that question, Korea could have unambiguously withdrawn the remarks made by its legal counsel during the oral hearing that the Japanese exporters had engaged in a "hoax" that now formed part of Japan's arguments. Korea did not avail itself of that opportunity. On the contrary, Korea stated that "Korea remains of the view that this argument on special versus general-purpose steel is a smokescreen and that there is no basis for considering the authorities' rejection of this distinction for purposes of its likelihood analysis to be unreasonable" and "[t]hat is why Korea qualified the argument as a 'hoax'".[249]

2.163. On the second point[250], the passage in paragraph 7.169 about which Korea complains is simply a reflection of Korea's explanation in its response to question No. 11 that:

> The Panel is called upon by Japan (in Japan's defense, as led by the crafty lawyering of the Japanese respondents) to stand at the verge of accepting such a mistaken premise that has no basis whatsoever under any applicable industrial norm or practice.
>
> Thus, Korea made the qualification of the argument as a "hoax" and "opportunistic", and it is Korea's right to respond to the arguments of Japan by pointing to inconsistencies in the position of the Japanese respondents and a lack of evidence to support the conclusion that there was anything unreasonable or biased in the authorities' rejection of similar arguments during the review. On the flap side [sic] of coin, it is also Korea's responsibility as a Member of the WTO to exert its best advocacy effort in this adversarial process to prevent the Panel from accepting a premise that is so unrealistic.[251]

2.164. Korea explained its "hoax" argument as being, at least in part, a reflection of its "responsibility as a Member of the WTO to exert its best advocacy effort in this adversarial process". Paragraph 7.169 accurately quotes the relevant passages of Korea's explanation in this regard, and expresses the view – in the abstract and in the conditional tense – that advancing allegations of bad faith as part of an adversarial "advocacy effort" or litigation technique would not accord with Article 3.10 of the DSU, nor would it assist in facilitating the fair, prompt, and effective resolution of the actual matter in dispute. Whilst Korea pointed to its "advocacy effort in this adversarial process" in the quotation extracted above, we note that Article 3.10 of the DSU recognises that "the use of the dispute settlement procedures should not be intended or considered as *contentious acts*".[252] We see no reason to revise the aspect of paragraph 7.169 about which Korea now complains.

2.165. Korea also contends that paragraphs 7.165-7.173 "mix artificially issues raised in an entirely different context, such as in respect of the discussion on 'special' versus 'general-purpose' steels with this issue on capacity utilization so as to build an alleged claim of bad faith".[253] We note, however, that Korea explicitly mixed the "production capacity" issues with the "general-versus-special steel" issues in relation to the "unfaithful participation" of the Japanese exporters and of Japan, as follows (note that question 101 related to general-versus-special steel, and question 106 related to production capacity):

> Moreover, in its answers to the Panel's questions, even Japan admits that there were inconsistencies in the reported production capacity and volume data by the Japanese respondents. In response to Questions 101 and 106, Japan acknowledges there were several errors in the Japanese respondents' submissions. Japan confirms that the reported production capacity and volume data were *not* "correct", "accurate", or part of a "mistake". But as Korea will demonstrate below, Japan's desperate attempts at rescuing the Japanese respondents' unsubstantiated numerical allegation from the fundamental errors that taint the very foundation of the allegation's veracity only reveals the unfaithful participation by the Japanese respondents' in the underlying

[249] Korea's response to Panel question No. 11.
[250] Korea's comments on the Interim Report, paras. 181-182.
[251] Korea's response to Panel question No. 11. (emphasis added)
[252] Emphasis added.
[253] Korea's comments on the Interim Report, para. 184.

review, and quite possibly, by Japan in this dispute (although Korea hates to say this). In addition, as Korea explained at the second substantive meeting, there were simply too many inconsistencies in the Japanese respondents' unsubstantiated numerical allegations that it made no practical sense to pursue every single one of them (although, as explained in Korea's response to the Panel's question, the Korean authorities nonetheless attempted to clarify them to the extent possible). This refutes, among others, Japan's argument that the Korean authorities could, and should, have used the respondents' data to extrapolate the countrywide production capacity number for Japan, as there were serious questions about that data's affirmative, objective, verifiable, and credible nature.

Indeed, most of the numerical allegations advanced by the Japanese respondents' in the underlying review were unsubstantiated. In other words, whether it is the allegation that they exported [[***]] tons of "general-purpose" steel in 2015 or that their production capacity (for either the "covered product only" or "both the covered and excluded products", as they see fit) in 2015 was [[***]] tons, for example, neither of these numbers were based on evidence, and both of these numbers were inconsistent with relevant numbers otherwise submitted by the Japanese respondents.

Korea recalls that even Japan does not dispute that the Japanese respondents refused to participate in the dumping proceeding. Indeed, the Japanese respondents failed to provide information about the domestic sales and cost of production, rendering it impossible to calculate any sort of normal value. Tellingly, Japan's only defense is that their respondents are entitled to cherry-pick the specific aspects of the proceeding that they intend to cooperate with. Be that as it may, but they must then also accept that this approach may have consequences in terms of the information that is available to the authorities. By comparison, what is the difference between the Japanese respondents' fatal refusal to provide data for their domestic sales and cost of production in the dumping proceeding, on the one hand, and their unilateral allegation that they had exported [[***]] tons of "general-purpose" steel in 2015 or that their production capacity in 2015 was [[***]] tons in the injury proceeding?[254]

2.166. As another example, Korea argued in its comments on one of Japan's responses:

Japan unavailingly tries to rescue the Japanese respondents' chronological responses from the various discrepancies prevalent therein. But, despite how it packages the discrepancies, Japan is essentially forced to admit the discrepancies. Japan attempts to package the discrepancies as a mere "inadvertent mistake". Even assuming *arguendo* that they are, that does not change the fact that discrepancies were prevalent across the responses by the Japanese respondents. Korea reiterates that similar inconsistencies were prevalent across almost all of the Japanese respondents' responses in the review. Simply put, the Japanese respondents' responses on a variety of topics were fatally inconsistent and unreliable, such that it was impractical, if not impossible, for the Korean authorities to chase after every single discrepancy. However, the authorities still tried their best to obtain clarifications on such discrepancies, all to no avail from the unwilling respondents.

As a matter of primary importance, Korea underscores Japan's disingenuous response in paragraphs 92-93. It is one thing to describe a discrepancy as an "inadvertent mistake", but it is another to intentionally mislead the Panel, which unfortunately has been a frequent approach by Japan in this dispute.

…

Korea is prepared to do this exercise all day long, until Japan is completely cornered and forced to give up every effort to *post hoc* justify any of the prevalent discrepancies included in the Japanese respondents' numerical allegations. Korea is more than confident that its authorities thoroughly examined and understood the inherent inconsistencies prevalent across the Japanese respondents' numerical allegations. It

[254] Korea's comments on Japan's response to Panel question "General Observations", pp. 4-5. (italics original; underlining added; fns omitted)

> was considered that most, if not all, of the Japanese respondents' various numerical allegations were either unsubstantiated or inconsistent, or both. Japan provides various unsubstantiated, self-serving allegations to justify the apparent inconsistencies, but despite the numerous speculations and convoluted misrepresentation of the facts, Japan always fails to properly explain the problems. In contrast, one simple answer that is apparent from the record evidence is that the Japanese respondents' numerical allegations were unfounded. This basic and straightforward answer must not be overlooked, as Japan's blatant misrepresentation of the facts should not be rewarded in this dispute.
>
> Having said that, Korea's Question 29 focuses on one iteration (export volume data) of a fundamental problem in the review concerning the lack of participation and quality submissions by the Japanese respondents. Indeed, there was a general theme in the review of the Japanese respondents only selectively participating and providing the requested data. In those instances where information was provided, there were several issues with the data, which also Japan confirms in its responses to Panel Questions 101 and 106. Japan's suggestion that it concerned merely a few "miswritten figures" is not credible.[255]

2.167. Similarly, Korea submitted to the Panel that:

> With frustration, Korea would like to remind the Panel that there can be no question whatsoever that the Japanese respondents' participation in the underlying review, in general, was selective, far from being complete, result-oriented, and mostly unsubstantiated (in line with their tradition in all of the previous SSB anti-dumping investigation and reviews). The inconsistent nature of the Japanese respondents' argument was perhaps the second most prevalent feature in the Japanese respondents' responses, topped only by the unsubstantiated nature of the Japanese respondents' arguments. Simply put, most of the Japanese respondents' arguments were either unsubstantiated or internally inconsistent – it was not the other way around as the Panel seems to wrongly postulate. Korea had hoped that the Panel would have started to appreciate this general approach of the Japanese respondents from the discussion we had on the artificial distinction between the "special" and "general-purpose" steels for example. The Japanese respondents' evasive responses to the Korean authorities' continued instructions on the production capacity data was another example of this tactic.[256]

2.168. As the foregoing extracts demonstrate, Korea's "unfaithful participation" argument was based on the assertion that the Japanese exporters submitted voluminous unsubstantiated and inconsistent numerical allegations, including those related to production capacity and "general-versus-special" steel, and Japan was now endorsing and advocating these numerical allegations as part of its own case. Korea's argument in this regard certainly applied with respect to production capacity specifically.[257] But it was also broader, cutting across and drawing upon a number of facets of the dispute. This included the "general-versus-special" steel issue. We see no reason to revise paragraphs 7.165-7.173 on the basis that they artificially mix issues that arose in a different context, such as the "general-versus-special" steel context, nor on the basis that Korea's comments regarding "bad faith" were limited to the "general-versus-special" steel context.

2.169. We turn now to the specific arguments made by Korea in respect of the Japanese exporters – as distinct from those in respect of Japan itself – in its request to revise paragraphs 7.165-7.173. Korea argues that it is "both erroneous and inutile" for the Panel to make the finding at paragraph 7.167 that "Korea has not demonstrated that the KIA found that the Japanese exporters acted in bad faith in the underlying review".[258] Korea contends that it "did not argue that the KIA made a finding of bad faith or drew adverse inferences from any failure to cooperate or provide accurate information".[259] However, regardless of what the KIA found, Korea explicitly asked the Panel to avoid an outcome in the present dispute that would "reward" the Japanese

[255] Korea's comments on Japan's response to Korea's question No. 29, pp. 61 and 64. (emphasis added)
[256] Korea's response to Panel question No. 102, para. 182. (emphasis added)
[257] Korea's comments on Japan's response to Panel question No. 92, p. 16.
[258] Korea's comments on the Interim Report, para. 154.
[259] Korea's comments on the Interim Report, para. 154.

exporters' "blatantly unfaithful participation" in the underlying review.[260] Thus, Korea asked us to take account of this alleged "unfaithful participation" when making a finding on whether the KIA's production capacity determination was inconsistent with Article 11.3 of the Anti-Dumping Agreement. Korea now explains to us that "Korea was not saying that the KIA drew adverse inferences from alleged bad faith, but rather Korea was providing context for the findings of the KIA which identified inaccuracies in the information provided".[261] As Korea now explains it, the function of this "context" of "unfaithful participation" is that it "reveals that the authorities were right not to just rely on this inaccurate information".[262] However, we cannot now uphold the KIA's determination on the basis of a rationale that is different to that adopted by the KIA. To so do would be to engage in impermissible *ex post* reasoning. This is the essence of paragraph 7.167 of the Interim Report, and we see no compelling reason to revise it. Rather, Korea's arguments in its interim review request confirm that the Interim Report reached the correct conclusion in (a) the understanding that Korea was requesting us to take account of the Japanese exporters' alleged "unfaithful participation" to reject Japan's claim and uphold the KIA's determination on production capacity; and (b) in concluding that the KIA did not, however, base its determination on any findings related to the "unfaithful participation" of the Japanese exporters.

2.170. Further, Korea contends that, contrary to the approach of paragraph 7.172 of the Interim Report, the USITC report "directly *confirms* the very disingenuous nature of the Japanese respondents' participation in the third sunset review, which should at least bear some relevance in the Panel's factual findings about the KIA's scrutiny in respect of its examination of the Japanese respondents' production capacity calculation".[263] However, Korea relitigates matters that are already addressed in paragraphs 7.170-7.172 and offers no compelling reason to make a revision.[264] Moreover, Korea again asks us to take into account the "very disingenuous nature" of the Japanese exporters' behaviour in the third sunset review in order to reject Japan's claims and uphold the KIA's determination, but we again reiterate that we cannot substitute the KIA's rationale for a new and different rationale, particularly as Korea explicitly accepts that the KIA never made any findings on, or drew any inferences from, the alleged "unfaithful participation" of the Japanese exporters.

2.171. In conclusion, Korea offers no compelling reason to make any revisions to paragraphs 7.165-7.173 of the Interim Report, and we therefore decline Korea's request.

2.38 Paragraph 7.174

2.172. Korea requests the Panel to reconsider paragraph 7.174 of the Interim Report in light of two factors: (a) Viraj was a fully-cooperating Indian respondent and the KIA nonetheless used ISSF data for India's production capacity, which shows that the ISSF data was always the starting point for the KIA; and (b) the pre-hearing November 2016 interim report of the KIA explicitly stated that the KIA would use the ISSF data, and also conveyed the product scope of that data, which shows that the Japanese exporters were duly informed of the fact that the KIA was using a parameter encompassing not just the covered products but also the excluded products and more.[265] Japan objects to Korea's request, contending that Korea's argument on the pre-hearing interim report mischaracterizes what that document actually conveyed to the Japanese exporters.[266]

2.173. We have decided not to grant Korea's request. The argument relating to the pre-hearing interim report is a new argument by Korea.[267] We are unable test the evidence on the pre-hearing interim report with the parties, which is salient given that the Japanese exporters contested the pre-hearing interim report as defective for failing to account for their submissions.[268] It is unclear to us what this document represents and whether it was, in fact, defective. In any event, Korea's argument that this document conveyed the KIA's preferred parameters of the product scope

[260] Korea's comments on Japan's response to Panel question No. 106, pp. 50-51.
[261] Korea's comments on the Interim Report, para. 158.
[262] Korea's comments on the Interim Report, para. 161.
[263] Korea's comments on the Interim Report, para. 187. (emphasis original)
[264] Korea's comments on the Interim Report, paras. 185-187.
[265] Korea's comments on the Interim Report, paras. 190-196.
[266] Japan's comments on Korea's comments on the Interim Report, paras. 112-114.
[267] This is the first instance, as far as the Panel is aware, in which Korea was relied upon the KIA's pre-hearing interim report as a vehicle for conveying the relevant production capacity parameters to the Japanese exporters. Specifically, it is omitted from Korea's arguments and chronology in the following: Korea's responses to Panel question Nos. 50(a) and 92; and second written submission, para. 211.
[268] Japanese exporters' post-hearing opinion, (Exhibit JPN-16.b (BCI)), pp. 10-11.

for production capacity is deficient for the same reasons as outlined in paragraph 7.156 of the Interim Report. Korea has offered no compelling reason to revise the Interim Report on this basis.

2.174. Additionally, Korea has not demonstrated why the position of Viraj – which was an Indian exporter – is relevant to the present dispute. Korea has not drawn the Panel's attention to any record evidence concerning what the KIA conveyed to Viraj, nor how Viraj responded. Moreover, according to the ISSF statistics submitted by Korea, Viraj represented only a fraction of India's overall production capacity for stainless steel bars and sections, which stands in contrast to the Japanese exporters' [[***]] share of Japan's production capacity in the ISSF data. Korea has offered no compelling reason to revise the Interim Report on the basis of the position of Viraj.

2.39 Paragraph 7.189

2.175. Korea requests the Panel to reflect, in paragraph 7.189 of the Interim Report, the fact that the ISSF data was used in the second sunset review without any objection by the interested parties, and thus constituted the starting point for the third sunset review.[269] Japan opposes Korea's request, contending that the key issue is what information was requested in the third sunset review.[270]

2.176. We have decided not to grant Korea's request. The fact that the ISSF data was used in the second sunset review does not obviate the fact that, in the third sunset review, the KIA requested the Japanese exporters to provide production capacity data for "the product under investigation" in its initial questionnaire (the 3 June 2016 dumping questionnaire).

2.40 Paragraph 7.190

2.177. Korea requests the Panel to reconsider placing relevance, in paragraph 7.190 of the Interim Report, on the fact that the Japanese exporters comprised [[***]] of the ISSF's Japan-wide production capacity data.[271] Korea also requests the Panel to reconsider its reference to a KIA Commissioner describing the Japanese exporters' production capacity data as "necessary" and to Korea's remark in its first written submission that this data was "necessary".[272] Japan objects to Korea's requests, arguing that Korea is inappropriately seeking to change the starting point of the discussion, and that the reference to the KIA Commissioner's comment indicates that the requested information was important and necessary to ascertaining Japan's production capacity.[273]

2.178. We have decided not to grant Korea's requests. First, the fact that the Japanese exporters comprised [[***]] of the ISSF production capacity data shows that the distinction between countrywide and exporter-specific data is largely irrelevant in the present case. Additionally, paragraphs 7.187-7.191 of the Interim Report sufficiently examine whether the ISSF data was the true starting point for the KIA's investigation. Second, the materials about which Korea now complains, in which the Japanese exporters' production capacity data is described as "necessary", further indicate the indispensable character of the Japanese exporters' data in the eyes of the KIA. Korea advances no compelling reason to make any revisions in that regard.

2.41 Paragraph 7.192

2.179. Korea requests the Panel to quote a slightly different aspect of its case when describing its argument in paragraph 7.192 of the Interim Report.[274] Japan makes no comment on Korea's request. We have decided to grant Korea's request, particularly since it has no impact on the resolution of the dispute.

[269] Korea's comments on the Interim Report, para. 201.
[270] Japan's comments on Korea's comments on the Interim Report, para. 116.
[271] Korea's comments on the Interim Report, paras. 203-206.
[272] Korea's comments on the Interim Report, paras. 207-208.
[273] Japan's comments on Korea's comments on the Interim Report, paras. 117-120.
[274] Korea's comments on the Interim Report, para. 212.

2.42 Paragraph 7.195

2.180. Korea requests the Panel to include a lengthy recitation of its arguments in paragraph 7.195.[275] We have decided not to grant Korea's request because, in the absence of any other consideration, Korea's arguments will already be captured in its executive summary.

2.43 Paragraph 7.203

2.181. Korea requests the Panel provide a full summary of Korea's position in paragraph 7.203 in similar detail to the description of Japan's position in paragraphs 7.201-7.202.[276] Korea argues that the Panel fails to give due regard to Korea's position presently by collapsing Korea's rebuttal arguments into the statement that "Korea rejects Japan's argument".[277] Japan objects to Korea's request, arguing that the Panel's summarization of Korea's argument is accurate and sufficient.[278]

2.182. We have decided to not to grant Korea's request. Korea requests the Panel to set out in detail its rebuttal arguments in the introduction to section 7.6. The present section 7.6.1, entitled "[i]ntroduction and legal standard", is intended to provide a brief review of the applicable provisions of the Anti-Dumping Agreement, along with a roadmap for the Panel's analysis in the subsequent sections pertaining to each of the main points of contention. As Japan is the complainant in this dispute, the nature and substance of its claims necessarily informs the manner in which the Panel considers it appropriate to structure its analysis, as set out in the introduction. Korea's rebuttal arguments are examined in detail in the subsequent analysis and Korea has offered no compelling reason to additionally include a lengthy recital of its rebuttal arguments in the introduction. In any event, Korea's rebuttal arguments will already be captured in its executive summary.

2.44 Paragraph 7.204

2.183. Korea requests that the Panel delete or revise the third and fourth sentences of paragraph 7.204. Korea argues that these sentences do not properly reflect its argument because "Korea did not agree with Japan on anything and … did not just say that producers are not required to provide explicit reasons to establish good cause".[279] Japan objects to Korea's request, arguing that the Panel's summarization of Korea's argument is accurate and sufficient.[280] Japan notes, moreover, that Korea's own summary will be included in its executive summary.[281]

2.184. We have decided not to grant Korea's request. Korea states that its first written submission does not specifically "agree with Japan" nor specifically argue that "explicit reasons" are not required. We nonetheless consider the summary of Korea's position in the Interim Report to be accurate. First, Korea has not called into question Japan's assertion that the documents at issue do not contain any explicit reference to good cause. Accordingly, Korea did not dispute this point during the proceedings. Second, Korea responds to Japan's argument that there was no express showing of good cause by arguing that the submission of redacted documents "implicitly asserts" good cause, and that this was sufficient for the purpose of Article 6.5.[282] Accordingly, paragraph 7.204 correctly characterizes Korea's argument as being "that the applicants were not required to provide explicit reasons to establish good cause".[283] Additionally, Korea's rebuttal arguments will be captured in its executive summary.

[275] Korea's comments on the Interim Report, para. 213.
[276] Korea's comments on the Interim Report, para. 218 (referring to Korea's second written submission, paras. 288-290).
[277] Korea's comments on the Interim Report, para. 218 (referring to Korea's second written submission, paras. 288-290).
[278] Japan's comments on Korea's comments on the Interim Report, para. 125.
[279] Korea's comments on the Interim Report, para. 219 (referring to Korea's first written submission, paras. 421-422).
[280] Japan's comments on Korea's comments on the Interim Report, para. 126.
[281] Japan's comments on Korea's comments on the Interim Report, para. 126.
[282] Korea's first written submission, para. 422.
[283] Interim Report, para. 7.204.

2.45 Paragraph 7.206

2.185. Japan requests the Panel to delete the second and third sentences of paragraph 7.206[284], because "[a]s found by the Appellate Body in the *EC – Fasteners (China)* case, for the investigating authority to objectively assess whether there had been 'good cause shown' under Article 6.5 … it is logically required to scrutinize the showing of good cause by the party seeking confidential treatment of information".[285] Japan additionally requests that footnote 628 (now footnote 626 in the Final Report) be condensed and incorporated into the body of the text at the end of paragraph 7.206 for consistency between the understanding of the Panel and that of the Appellate Body.[286]

2.186. Korea objects to Japan's request, arguing that there is no basis for the proposed deletion of the second sentence of paragraph 7.206, which contains a direct quote from Japan's argument.[287] Korea further argues that there is no basis for the deletion of the second sentence of paragraph 7.206.[288] Korea additionally argues that footnote 628 clarifies the relationship between the Panel's analysis and the Appellate Body Report in *Korea – Pneumatic Valves (Japan)*.[289]

2.187. We have decided not to grant Japan's request to delete the second and third sentences of paragraph 7.206. Japan proposes to delete a sentence directly quoting its own argument, as well as the following sentence stating the Panel's disagreement with Japan's argument. The quotation of Japan's argument, however, is verbatim and thus clearly accurate, as is our description of our approach to that argument.[290] We have also decided not to grant Japan's request to integrate part of footnote 628 into the text of paragraph 7.206. Japan has not provided any compelling reason to make such a revision. Moreover, the present footnote more effectively clarifies the relationship between the Appellate Body's findings in *Korea – Pneumatic Valves (Japan)* and the findings in the present case.

2.46 Paragraph 7.211

2.188. Korea requests the Panel to revise the following sentence in paragraph 7.211 of the Interim Report: "Korea argues that Korean officials should be assumed to have checked whether the redacted information in the documents fell into the categories of the Enforcement Rule, and to have thus discharged the requirement for good cause in Article 6.5."[291] Korea requests this be revised as follows: "Korea argues that Korean officials are bound to follow the law and that they complied with the law by 'checking' whether certain information fall within any enumerated category specified by Article 15 of the Enforcement Rules."[292] Korea submits that this revision should be made because the present summary of its argument in paragraph 7.211 is not accurate as Korea did not state that "Korean officials should be assumed to have checked".[293]

2.189. Japan objects to Korea's request, arguing that the Panel's summarization of Korea's argument is accurate and sufficient.[294] Japan continues that panels do not need to follow the specific language used by the parties.[295] Japan notes, moreover, that Korea's own summary will be included as an annex.[296]

2.190. We have decided not to grant Korea's request. The fourth sentence of paragraph 7.211 provides an accurate summary of Korea's argument. Korea argues that the KIA should be assumed to have checked for good cause. In turn, the reason underlying Korea's argument in this regard – i.e. because the KIA officers "are bound to follow the law" – is identified in the second sentence of

[284] Japan's comments on the Interim Report, para. 28.
[285] Japan's comments on the Interim Report, para. 28 (referring to Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.411).
[286] Japan's comments on the Interim Report, para. 31.
[287] Korea's comments on Japan's comments on the Interim Report, p. 25.
[288] Korea's comments on Japan's comments on the Interim Report, p. 25.
[289] Korea's comments on Japan's comments on the Interim Report, p. 25.
[290] Interim Report, para. 7.206; Japan's first written submission, para. 332.
[291] Korea's comments on the Interim Report, para. 220.
[292] Korea's comments on the Interim Report, para. 220.
[293] Korea's comments on the Interim Report, para. 220 (referring to Korea's first written submission, para. 426).
[294] Japan's comments on Korea's comments on the Interim Report, para. 127.
[295] Japan's comments on Korea's comments on the Interim Report, para. 127.
[296] Japan's comments on Korea's comments on the Interim Report, para. 128.

paragraph 7.215 of the Interim Report ("Korea argues that the Panel should presume the KIA investigators acted in compliance with domestic laws, and thus that good cause was properly shown in accordance with Article 6.5"). Korea has not objected to the characterization of its case in paragraph 7.215. We see no reason to expand upon the summary of Korea's argument in paragraph 7.211, but we have made a revision to clarify that the Panel is not directly quoting Korea's submissions in paragraph 7.211.

2.47 Paragraph 7.217

2.191. Korea requests the Panel to include a reference to Korea's argument that "merely because certain information is publicly available does not necessarily mean that there is no good cause for non-disclosure of such information", especially in relation to third party intellectual property rights.[297] Japan objects to Korea's request, arguing that Korea's reference to third party intellectual property rights is being presented at the interim report stage for the first time, and thus should not be taken into account by the Panel.[298]

2.192. We have decided to decline Korea's request. This request concerns Korea's argument that, while certain information was "public", "good cause" was nonetheless shown for treating it as confidential because it was subject to a third party's intellectual property rights.[299] Korea's arguments on this point are already addressed in paragraph 7.217 of the Interim Report. In particular, we have already found in paragraph 7.217 that Korea failed to support these arguments with sufficient evidence. Korea does not provide any persuasive reason to make the requested revision.

2.48 Paragraph 7.219 and footnote 656

2.193. Korea requests the Panel to remove the finding in footnote 656 (now footnote 654 in the Final Report) that: "[w]e consider that Korea clearly conceded that Nos. 78-79, 81, 83, and 95-97 are public information."[300] Korea argues that its position did not amount to a concession that certain information was public.[301] Korea further requests the Panel remove the finding in relation to items Nos. 78-79, 81, 83, and 95-97 of Exhibit KOR-35 that Korea: "tacitly conceded that these items had 'already been made public'".[302]

2.194. Japan objects to Korea's request, arguing that the Panel's summarization of Korea's argument is accurate and sufficient.[303] Japan continues that panels do not need to follow the specific language used by the parties.[304]

2.195. We have decided to decline Korea's requests. In footnote 656, the Panel analysed Korea's statements in relation to whether items Nos. 78-79, 81, 83, and 95-97 were public and concluded that "Korea clearly conceded that Nos. 78-79, 81, 83, and 95-97 are public information". By quoting Korea's statement that these items had "already been made public", and that Japan "already has full access to the information", footnote 656 of the Interim Report shows that Korea clearly did make a concession that the relevant information was public.[305] Footnote 656 also addresses Korea's subsequent attempts to provide an alternative explanation, and concludes that "Korea's later attempts to clarify the meaning of 'publicly available' were incomplete and unsupported by evidence".[306] While Korea disagrees with the Panel's finding, it offers no compelling reason to revise footnote 656. For the same reasons we do not consider Korea to have offered any compelling reason to revise paragraph 7.219.

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[297] Korea's comments on the Interim Report, para. 221.
[298] Japan's comments on Korea's comments on the Interim Report, para. 130.
[299] Korea's response to Japan's Article 6.5.1 allegations, (Exhibit KOR-35), Nos. 10, 15-16, 19, 40, and 44-45.
[300] Korea's comments on the Interim Report, para. 221.
[301] Korea's comments on the Interim Report, paras. 221-222.
[302] Korea's comments on the Interim Report, paras. 221-222.
[303] Japan's comments on Korea's comments on the Interim Report, para. 131.
[304] Japan's comments on Korea's comments on the Interim Report, para. 131.
[305] Interim Report, fn 656 (referring to Korea's response to Japan's Article 6.5.1 allegations, (Exhibit KOR-35), Nos. 78, 83, and 95-97).
[306] Interim Report, fn 656 (referring to Korea's response to Panel question No. 108, para. 231).

2.49 Paragraph 7.221

2.196. Korea requests the Panel to provide specific findings in relation to four different groupings identified by Korea of the 102 items of information challenged by Japan.[307] Korea also argues that the Panel's finding that "the fact of the existence of the aforementioned system of checking does not, in and of itself, provide a sufficient rebuttal to Japan's claims" puts the burden of proof onto Korea.[308] Additionally, Korea considers that there is no basis for a finding that there were "manifest inadequacies" in certain individual items as the individual items challenged by Japan "are left largely unaddressed in the Panel's interim report".[309] Finally, Korea argues that it did not simply rely on the KIA's system to defend the confidential treatment, but also "for each of such instance, how under such system the KIA has complied with Article 6.5 of the Anti-Dumping Agreement by confirming the 'good cause shown' by the submitter of the information".[310]

2.197. Japan objects to Korea's request, arguing that Korea's claim that the Panel shifts the burden of proof mischaracterizes the Panel's finding.[311]

2.198. We have decided to decline Korea's request. First, the Panel's finding does not unduly shift the burden of proof onto Korea. The analysis rather concludes that Korea's explanation of the KIA's system in this particular case is an ineffective rebuttal to Japan's claims because of the "manifest inadequacies" identified in the KIA's treatment of the confidential information.[312] Japan still bore the onus of proving its case. In particular, paragraphs 7.215 and 7.216 of the Interim Report already describe how Japan set out to prove its case, and paragraph 7.221 concludes that Japan did indeed establish its case in this regard.[313] We therefore see no reason to revise paragraph 7.221 of the Interim Report on the basis of an undue shifting of the burden of proof onto Korea.

2.199. Second, the basis for the finding of "manifest inadequacies" is clearly found in the preceding four paragraphs, which analyse in detail a substantial number of cases that indicate that the KIA failed to adequately check the redacted information (paragraph 7.217 addressing items nos. 10, 15-16, 19, 40, and 44-45; paragraph 7.218 addressing items nos. 14, 46, and 65; and paragraph 7.219 addressing nos. 78-79, 81, 83, and 95-97). Korea has not demonstrated that a revision to paragraph 7.221 is warranted on this basis.

2.200. Third, Korea did rely on the KIA's system to defend the KIA's treatment of the challenged items of information as confidential, and Korea's item-specific "grounds for redaction" did not comprise a separate rebuttal in this regard. As there is no record information concerning the KIA's actual reasoning for according confidential treatment to each individual item challenged by Japan, the item-specific "grounds for redaction" provided by Korea during the proceedings are necessarily imputed to be the grounds that the KIA would have identified through its system of checking. Accordingly, and contrary to the argument that Korea now seems to make, there is no basis for treating the item-specific "grounds for redaction" provided by Korea as a separate rebuttal *vis-à-vis* the existence and operation of the KIA's system of checking. To find the contrary – that is, to treat Korea's item-specific "grounds for redaction" as a separate rebuttal – would lead to the acceptance of impermissible *ex post* reasoning. This is because of the absence of record evidence that the item-specific "grounds for redaction" now provided by Korea in these proceedings were indeed the grounds that the KIA actually relied upon in the underlying review (that is, separate from its system of checking whether there is "good cause" *vis-à-vis* the categories in the Enforcement Rule). Accordingly, we see no reason to revise paragraph 7.221 on the basis that Korea's item-specific "grounds for redaction" comprised a separate rebuttal to its reliance on the KIA's system of checking.

[307] Korea's comments on the Interim Report, paras. 223-225.
[308] Korea's comments on the Interim Report, para. 223.
[309] Korea's comments on the Interim Report, para. 224.
[310] Korea's comments on the Interim Report, para. 223.
[311] Japan's comments on Korea's comments on the Interim Report, para. 132.
[312] Interim Report, para. 7.221.
[313] Interim Report, para. 7.221.

2.50 Paragraph 7.222

2.201. Japan requests the Panel to delete the last sentence of paragraph 7.222 of the Interim Report, which states: "[r]ather, we see merit in the general approach adopted by the KIA to protecting confidential information". Japan argues that the last sentence should be deleted because the Panel, having clarified that its findings were limited, does not need to "go further and make such a broad comment about Korea's 'general approach'".[314]

2.202. Japan requests alternatively that we replace the last sentence of paragraph 7.222 with the following language: "[r]ather, we see merit in Korea's allegation that an 'implicit assertion' of good cause may be allowed for certain information depending on the circumstances of the case as described above". Japan proposes alternative language "to avoid the overly broad implications" of the present language if the Panel is unwilling to simply delete the last sentence.[315]

2.203. Korea objects to Japan's request, arguing that the "Panel is entitled to find merit in the general approach adopted by the KIA to protecting confidential information based on an 'Enforcement Rule'".[316] Korea further argues that the proposed alternative language should also be rejected on the basis that it distorts the Panel's findings, which was not confined to "certain information and instances".[317]

2.204. We have decided to decline Japan's request to delete the last sentence of paragraph 7.222. In view of the nature of Japan's claims and Korea's rebuttal, we consider it important to clarify that our findings under Article 6.5 of the Anti-Dumping Agreement should not be understood as casting doubt over whether the general approach adopted by the KIA to protecting confidential information is capable of operating in a manner consistently with Article 6.5.

2.205. We further decline to replace the last sentence of paragraph 7.222 with Japan's proposed alternative language because this alternative language is inaccurate. Neither Korea nor the Panel gave consideration to whether an "implicit assertion" of good cause would be limited to "certain information".

2.51 Paragraphs 7.229 and 7.230

2.206. Japan requests extensive additions to paragraphs 7.229-7.230 to convey that the cumulation-based assessment was not alone capable of supporting the KIA's overall likelihood-of-injury determination. While Japan does not disagree with the Panel's finding, it argues that its proposed revisions are necessary to provide sufficient factual findings for the Appellate Body to complete the legal analysis if the Panel's decision to exercise judicial economy over the issue of cumulative assessment is overturned on appeal.[318] Japan specifically raises a concern that Korea may argue in later proceedings or on appeal that the KIA's ultimate conclusion was not exclusively based on the Japan-specific analysis, and that the KIA's cumulative assessment provides a standalone basis for upholding the KIA's ultimate conclusion.[319]

2.207. Japan also suggests that the Panel complete the analysis because "the Panel already found in essence that Japanese imports cannot be assumed to interact or compete with the domestic like products in the Korean market" and thus that "the Panel can easily find that the use of cumulative assessment lacks a sufficient factual basis and that there is no unbiased and objective determination under Article 11.3".[320]

2.208. Korea objects to Japan's request, arguing that Japan tries to rewrite the Panel's findings and seeks to have the Panel make findings on various issues that it never made.[321]

[314] Japan's comments on the Interim Report, para. 33.
[315] Japan's comments on the Interim Report, para. 34.
[316] Korea's comments of Japan's comments on the Interim Report, p. 26.
[317] Korea's comments of Japan's comments on the Interim Report, p. 26.
[318] Japan's comments on the Interim Report, para. 36.
[319] Japan's comments on the Interim Report, para. 37.
[320] Japan's comments on the Interim Report, para. 39.
[321] Korea's comments on Japan's comments on the Interim Report, p. 29.

2.209. We have decided to decline Japan's requests to revise paragraphs 7.229-7.230 of the Interim Report. As we understand it, Japan's requests concern two discrete matters. Japan first indicates that it wishes the Panel to further explain the exercise of judicial economy over Japan's claim concerning cumulation. Japan continues, however, to argue that the Panel should simply find in Japan's favour on this issue.

2.210. We see no reason to reverse our decision to exercise judicial economy over Japan's claim concerning cumulation and to instead examine the merits and find in favour of Japan. Contrary to Japan's contention, such a finding has not already been made "in essence", and an examination on the merits would require substantial additional analysis, contrary to our decision to exercise judicial economy over this claim. We note that Japan's proposed clarifications in paragraphs 7.229-7.230 are actually substantive arguments not reflecting findings by the Panel elsewhere in the Interim Report.

2.211. We also do not consider it necessary to provide additional explanation for the exercise of judicial economy over this claim. As the analysis makes clear, the KIA's ultimate likelihood-of-injury determination did *not* turn on the KIA's cumulative assessment.[322] We therefore consider it sufficiently clear in paragraphs 7.229-7.230 that, based on our findings on the structure and content of the KIA's ultimate likelihood-of-injury determination, the KIA's cumulative assessment did not alone sustain the KIA's ultimate likelihood-of-injury determination, nor can it now provide a standalone basis to justify that ultimate determination. Rather, as explained in paragraphs 7.229-7.230, as well as in paragraphs 7.116-7.119 regarding the drop in Japanese prices and 7.177-7.183 regarding Japan's capacity utilization rate, the KIA's Japan-specific findings were integral to its ultimate likelihood-of-injury determination and thus to its renewal of anti-dumping duties on the Japanese products.[323] Our findings in this regard on the content and structure of the KIA's ultimate likelihood-of-injury determination concern how, as a factual matter, this ultimate determination should be construed. Japan has not provided any compelling grounds for its concern that this factual finding on the content and structure of the KIA's ultimate determination may be overturned on appeal. A panel would be unable to ever exercise judicial economy if it was required to complete the analysis on each issue in view of the mere possibility that a finding – not least, a factual finding – could be reversed on appeal, as Japan seems to suggest. In view of the foregoing, we see no reason to make any revisions to paragraphs 7.229-7.230 of the Interim Report.

2.52 Paragraphs 7.234 and 7.235

2.212. Japan requests the Panel to complete the analysis of Japan's claim that Korea failed to disclose certain essential facts in paragraphs 7.234-7.235 of the Interim Report.[324] Japan argues that the Panel should not exercise judicial economy because (a) the "rationale explained by the Panel for the use of judicial economy over these claims has the effect of rendering practically useless any 'as applied' claim under Article 6.9 in conjunction with substantive claims"; and, (b) "[a]ccepting a substantive claim should not prevent the Panel from also addressing 'as applied' claims under Article 6.9, and thus providing guidance to the parties for future stages in the proceeding".[325]

2.213. Korea objects to Japan's request, arguing that the Panel is entitled to exercise judicial economy if it is of the view that there is no need to address the claim under Article 6.9 in light of the findings under the substantive provisions at issue.[326]

2.214. We have decided not to grant Japan's request. We consider that a panel need only address those claims that must be addressed in order to resolve the matter in issue in a dispute. As explained in paragraphs 7.234-7.235, the question of whether all essential facts were disclosed on a given matter is irrelevant if, due to a substantive finding of inconsistency, a subsequent reinvestigation to comply with that inconsistency would necessarily require a renewed factual assessment of the given matter. Japan does not identify any issues that the Panel failed to consider in deciding to exercise judicial economy over its claims under Article 6.9. The Panel's exercise of judicial economy is specific to the facts of the case and does not render procedural claims "useless". More so, a specific finding

[322] Interim Report, paras. 7.116-7.119, 7.177-7.183, and 7.229-7.230.
[323] Interim Report, paras. 7.116-7.119, 7.177-7.183, and 7.229-7.230.
[324] Japan's comments on the Interim Report, paras. 41-43.
[325] Japan's comments on the Interim Report, para. 41.
[326] Korea's comments on Japan's comments on the Interim Report, p. 34.

by the Panel is not necessary to guide the parties as they are already directed by Article 6.9 as to the requirement to disclose essential facts.

2.53 Paragraph 8.1

2.215. Korea requests the Panel to reflect its findings from paragraphs 7.109, 7.110, 7.126, and 7.222 of the Interim Report in the "Conclusions and Recommendations" section.[327] Japan objects to Korea's request, arguing that there is no need to summarize all secondary findings in the "Conclusions and Recommendations" section.[328]

2.216. We have decided not to grant Korea's request. First, paragraphs 7.109-7.110 pertain to outcomes on arguments and not findings on claims. This understanding is consistent with the Panel's explanation at paragraph 7.60 of the Interim Report. The conclusion on the relevant *claim* covering paragraphs 7.109-7.110 is contained in paragraph 8.1(b)(i). Second, paragraph 7.126 is clearly referenced in paragraph 8.1(b)(iii). Third, paragraph 7.222 does not contain a finding on a claim. The finding on the relevant ("as applied") claim is already referenced in paragraph 8.1(d)(i).

2.217. We are nonetheless content to recognize that the following paragraphs contain aspects that were favourable to Korea's case:

a. Paragraph 7.109: Based on the material before us, Japan has not established the existence of a reliable relationship between pricing levels and the categorization of a product as general-purpose steel (grades 304 and 316) or special steel (all others). On the contrary, the uncontested record evidence indicates that Japanese general-purpose steel was in a different price bracket to general-purpose steel from other sources and was, according to the applicants, "only general in name, but ha[s] particular specification or size and are mostly products that are not competitive". Moreover, according to the pricing data submitted by Korea, it was not the case that special steel was necessarily higher-priced and general-purpose steel was necessarily lower priced during the POR.[329]

b. Paragraph 7.110: Therefore, Japan has not established a *prima facie* case that the KIA erred by failing to undertake an analysis that differentiated between general-purpose and special steel when examining the consequences of the drop in Japanese prices upon removing the anti-dumping duties. We consequently find that Japan has failed to demonstrate that the KIA acted inconsistently with Article 11.3 of the Anti-Dumping Agreement on this point. For the avoidance of doubt, our conclusion in this regard should not imply a broader finding on the existence or utility of the alleged distinction between general-purpose steel and special steel, nor on the degree of competitive overlap in the product mixes of the relevant countries.

c. Paragraph 7.126: We therefore find that Japan has failed to demonstrate that the KIA acted inconsistently with Article 11.3 of the Anti-Dumping Agreement regarding the cost of raw materials and the weak demand in the domestic and export markets. Having reached this finding, we need not address the parties' arguments and rebuttals on the precise circumstances and manner in which an authority may be required to examine other known injury factors under Article 11.3, including whether there is a difference between recurrence and continuation determinations in that regard.

d. Paragraph 7.222: We emphasize that our finding is confined to the particular redactions challenged by Japan in the review at issue in these proceedings. We reiterate that, in our view, Japan has not demonstrated that the KIA's system for protecting information as confidential is incapable of operating in a manner consistently with Article 6.5. Rather, we see merit in the general approach adopted by the KIA to protecting confidential information.

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[327] Korea's comments on the Interim Report, paras. 226-227.
[328] Japan's comments on Korea's comments on the Interim Report, para. 134.
[329] Fns omitted.

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

FIRST INTEGRATED EXECUTIVE SUMMARY OF
THE ARGUMENTS OF JAPAN

I. Introduction

1. Through its first written submission, opening and closing statements at the first panel meeting as well as its responses to the Panel's questions, Japan has established that Korea's continued imposition of anti-dumping duties upon Japanese stainless steel bars does not comply with its obligations under the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement").

II. Korea's Anti-Dumping Measures on Stainless Steel Bars from Japan Are Inconsistent with Article 11.3 of the Anti-Dumping Agreement

A. Legal Standards under Article 11.3 for the Imposition and Maintenance of an Anti-Dumping Duty

2. Although Article 11.3 of the Anti-Dumping Agreement does not require the investigating authority to establish a causal link between the past dumping and injury anew in a sunset review, it does require that the investigating authority establish a causal "nexus" between the "expiry of the duty" and "continuation or recurrence of dumping and injury" that allows the authority to reasonably "determine" the existence of a causal link between dumping and injury.

3. Article VI:1 of the GATT 1994 states that dumping "is to be condemned if it causes or threatens material injury to an established industry in the territory of a [Member] or materially retards the establishment of a domestic industry", and Article VI:2 of the GATT 1994 provides that a Member may levy an anti-dumping duty "[i]n order to offset or prevent dumping". Article VI:6(a) of the GATT 1994 further provides that no anti-dumping duty shall be levied unless the importing Member "determines that the effect of the dumping … is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry". Thus, as the Appellate Body found in *US – Anti-Dumping Measures on Oil Country Tubular Goods*, Article VI of the GATT 1994 "establishes the fundamental principle that there must be a causal link between dumping and injury to a domestic industry, if an anti-dumping duty is to be levied on a dumped product" and "further establishes that the purpose of an anti-dumping duty is to counteract dumping that causes injury". In other words, anti-dumping duties can be imposed on imports from a certain Member only if dumping of such imports from that country causes material injury to the domestic industry. Considering also that anti-dumping duties are, according to Article VI:2 of the GATT 1994, imposed "[i]n order to offset or prevent dumping" and are not imposed as penalties for past dumping actions, this principle necessarily also means that, if dumped imports cease to exist or if dumped imports cease to cause injury to the domestic industry and, therefore, there is accordingly no longer a need to "offset or prevent dumping", no anti-dumping duty can be imposed.

4. Article 11.1 of the Anti-Dumping Agreement also confirms that this is an overarching principle for the review procedure, providing that "[a]n anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury". In this regard, the Appellate Body in *US – Anti-Dumping Measures on Oil Country Tubular Goods* also found that this principle, provided in Article 11.1 of the Anti-Dumping Agreement, "applies during the entire life of an anti-dumping duty. If, at any point in time, it is demonstrated that no injury is being caused to the domestic industry by the dumped imports, the rationale for the continuation of the duty would cease".

5. In essence, as the Appellate Body appropriately described in *US – Anti-Dumping Measures on Oil Country Tubular Goods*, a causal link between dumping and injury to the domestic industry is necessary for both the imposition and the *maintenance* of an anti-dumping duty under the Anti-Dumping Agreement.

6. This means that it is a fundamental principle in anti-dumping procedures under Article VI of the GATT 1994 and the Anti-Dumping Agreement that anti-dumping duties can be imposed on imports from a Member only if dumping from that Member causes material injury to the domestic industry.

7. Accordingly, a determination of likelihood of injury should not be based on a mere assumption made from the past affirmative injury determinations, including the most recent one. Rather, a likelihood-of-injury determination should be based upon positive evidence and a sufficient factual basis that allows the authority to draw a reasoned and adequate conclusion pertaining to the relevant period of investigation ("POI"). The Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews* found that these requirements set forth in Article 3.1 of the Anti-Dumping Agreement are "equally relevant" to the likelihood-of-injury determination in a sunset review which is undertaken by the investigating authorities under Article 11.3 of the Anti-Dumping Agreement. Also, it should be recalled that, in light of the forward-looking nature of sunset reviews, every determination therein must stand on its own and supersede the prior determinations. When an investigating authority uses information and findings from past proceedings, it must be ensured that those information and findings are actually applicable to the POI of the sunset review.

8. Otherwise, an anti-dumping duty could be maintained even if the sunset determination left open a possibility that the likely dumped imports from a certain Member would not in fact cause material injury to the domestic industry.

B. Critical Deficiencies of the Likelihood-of-Injury Determination by the Korean Investigating Authorities

9. The likelihood-of-injury determination by the Korea Trade Commission ("KTC") and the Office of Trade Investigation ("OTI") ("Korean Investigating Authorities") does not meet the requirements of Article 11.3 of the Anti-Dumping Agreement. The Korean Investigating Authorities based their determination on an insufficient assessment of the interactions through the market competition among the likely dumped imports from each country and the domestic like products, and they failed to consider other factors that may have effects on the injury to the domestic industry, in particular third country imports, in the analysis of the effects of likely dumped imports.

10. These failures contravene the fundamental principle that anti-dumping duties can be imposed on imports from a Member only if dumping from that Member causes material injury to the domestic industry. Therefore, these failures mean that the Korean Investigating Authorities' likelihood-of-injury determination at issue is not based upon "positive evidence" and an "objective examination" and lacks a "sufficient factual basis" that allows the investigating authority to draw a "reasoned and adequate conclusion", and thus is inconsistent with Article 11.3 of the Anti-Dumping Agreement.

1. The Korean Investigating Authorities' Findings Regarding the Propriety of Using Cumulative Assessment

a. Introduction

11. It should be noted that Article VI of the GATT 1994 clearly indicates that the causal link between dumped imports and injury to the domestic industry must be examined and found to exist on a country-by-country basis, and accordingly, that the use of cumulative assessment should not be permitted to cause a false attribution of injury to the domestic industry to dumped imports from a country whose imports do not actually cause such injury. The first sentence of Article VI:1 of the GATT 1994 defines dumping as "products of *one country* … introduced into the commerce of another country at less than the normal value of the products". (emphasis added) The same sentence also provides that dumping "is to be condemned if *it* causes … material injury" to the domestic industry. (emphasis added) Article VI:6(a) of the GATT 1994 further states that "[n]o [Member] shall levy any anti-dumping … duty on the importation of any product of the territory of another [Member] unless it determines that the effect of the *dumping* … is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry". (emphasis added) Thus, the determination of a causal link between "dumping", as defined on a country-by-country basis, and injury to the domestic industry, is required for the imposition or continued imposition of anti-dumping duties. For sunset reviews, this means that a nexus between the expiry of the anti-dumping duties and the continuation or recurrence of injury must be found on

a country-by-country basis, namely, that the dumped imports from a particular country that would be likely to continue or recur are the cause of the injury. If such a nexus cannot be found regarding the imports of a particular country, specifically, then a causal link between dumping and injury to the domestic industry also cannot be reasonably assumed, and thus, anti-dumping duties against such dumped imports cannot be maintained. In other words, regardless of whether the proceeding at issue is an original investigation or a sunset review, Article VI of the GATT 1994 does not allow attribution of injury to the domestic industry to dumped imports from a specific Member if those dumped imports do not in fact cause material injury.

12. In deciding that they may cumulatively assess the imports from Japan, India, and Spain, the Korean Investigating Authorities relied upon factual findings and conclusions made in prior investigations. As already discussed, a mere assumption based on the existence of an affirmative determination or findings in previous proceedings cannot be sufficient, since the relevant circumstances, including market situation, may have changed meaningfully since the time of the last determination.

13. If there has been meaningful change from a previous proceeding, the investigating authority cannot rely on the finding from such previous proceeding as such, regardless of whether the finding was accurate at the time it was made. In such cases, the extent to which the investigating authority can rely on a previous finding may depend on the degree of the changes since the previous proceeding. This is because such changes impact whether or not the prior findings are still applicable in the current investigation, regardless of whether the finding was accurate at the time it was made.

14. Accordingly, the Korean Investigating Authorities should have assessed whether or not such meaningful changes had taken place between the time the findings they sought to use were rendered and the current POI. However, the Korean Investigating Authorities did not sufficiently examine whether or not such changes took place.

15. The Korean Investigating Authorities stated that they found cumulative assessment to be appropriate for the following three reasons: (a) the Korean Investigating Authorities had used cumulative assessment in the original investigation and in the first and second sunset reviews; (b) the physical characteristics, manufacturing process, distribution market, uses, and consumer evaluation, etc. of the product under investigation and the domestic like products were the same as or similar to those at the time of the original investigation; and (c) allegedly, the competitive market environment had not changed since the second sunset review. Notably, in reaching their finding on point (c), the Korean Investigating Authorities found only two facts: (i) the import proportion of general-purpose products from Japan, the import proportion of Indian special steels, and the production proportion of special steel produced by the domestic industry maintained a similar level during the POI, and (ii) the proportion of the import volume of the product under investigation to the total import volume in 2013 and 2015 were similar.

16. However, the Korean Investigating Authorities did not explain what these statements meant in any more detail, nor did they provide information on the data that they used to make such findings. As a result, it is not possible to discern whether or not the Korean Investigating Authorities' statements regarding the lack of change since the prior investigations are properly founded, or even what ranges of products from which countries the Korean Investigating Authorities were comparing to draw these conclusions. In fact, the record in the sunset review at hand shows that there have been significant changes in both the competitive environment and the products at issue.

b. Lack of justification for reliance upon findings in the previous investigations

17. In this case, there have been drastic changes which have accumulated over the long period from the original investigation through the following three reviews, which has lasted for over 15 years, some of which directly contradict the unsupported conclusions stated by the Korean Investigating Authorities. It would be necessary to examine the changes that have taken place since the original investigation in order to properly rely upon the findings in the original investigation.

18. In particular, the market interaction among the relevant products (i.e. the product under investigation imported from the several subject countries and the domestic like products) has changed significantly due to the change in their product mixes, such that there is the lack of

substantial overlap in the competitive relationships among the Japanese imports, the Indian imports and the domestic like products. As a result, cumulative assessment is now (if it ever was) no longer appropriate, because the product under investigation from the several subject countries does not have a "cumulative" effect on the Korean industry, if they do have an effect. There have also been significant changes in the levels of imports from third countries, which has altered the market situation in Korea.

19. These changes in the underlying situation regarding the market and the products were obvious from the record before the Korean Investigating Authorities, but the Korean Investigating Authorities simply relied upon the prior investigations' findings without examining such changes appropriately nor providing any reasons why they still could rely on the previous findings despite such changes.

20. Furthermore, aside from such changes in the underlying situation regarding the market and the products, the evidence on record shows substantial differences in price among the allegedly dumped imports from Japan, those from India, and the domestic like products, and differences in the respective proportions of special steel and general-purpose steel within them, which indicate the lack of substantial overlap of competitive relationships among different segments of the product under investigation from different countries. In such circumstances, the Korean Investigating Authorities could not have relied on findings in prior proceedings to rely upon a cumulative assessment without properly examining the aforementioned facts that seemed to conflict with such prior findings and that indicated the lack of substantial overlap of competitive relationships due to the differences of product mix and of price levels.

21. In addition, the prior investigations did not provide sufficient support for the use of a cumulative assessment because the prior investigations did not sufficiently examine the factors relevant to the propriety of the use of a cumulative assessment that were raised in the sunset review at issue by the Japanese producers that responded to the review ("Japanese Respondents"). In the face of reasonable objections by the interested parties, the factors relevant to the use of a cumulative assessment needed to be assessed, regardless of the fact that they had not been properly addressed in the previous proceedings.

22. Additionally, due to the enlargement of the scope of products excluded from the product under investigation over the past sunset reviews, the prior investigations used a differently defined product under investigation. Therefore, there is inherently a difference in the scope of the products which were examined in prior investigations compared to those being at issue in the current investigation. Accordingly, the Korean Investigating Authorities should have examined, in light of the re-defined product scope of the third sunset review, whether the different grades - in particular the categories of general-purpose steel and special steel - interacted in the market or not. This issue was also unaddressed by the Korean Investigating Authorities, although the necessity for an examination of the prior findings and their evidentiary bases is particularly true in this case, where the evidence and findings in the current review conflict with the findings made in the previous proceeding.

c. Insufficiency of the Korean Investigating Authorities' Analysis of Competitive Relationships in the Current Period of Investigation

23. Finally, apart from the failure to address the changes between the prior investigations and the sunset review at issue, the Korean Investigating Authorities' findings related to the current POI are likewise insufficient to support the decision to use a cumulative assessment. The Korean Investigating Authorities made only a very few findings regarding the POI. Namely, the Korean Investigating Authorities found that the product under investigation and the domestic like products in the sunset review at issue were similar to those in the original investigation in terms of their physical characteristics and other attributes and that the conditions of competition had not changed since the second sunset review. However, both of these findings rely upon a comparison with the prior investigations' findings which the Korean Investigating Authorities could not rely on for the reasons discussed above, to derive meaning. Accordingly, the Korean Investigating Authorities did not make any meaningful findings regarding the facts of the current POI which could stand alone.

24. In addition, the Korean Investigating Authorities' evaluation of the propriety of cumulative analysis of the Japanese, Indian, and Spanish product under investigation was inappropriate because the authorities did not engage in a sufficient analysis of the competitive relationships among the

product under investigation from the several subject countries and between the product under investigation and the domestic like products.

25. If the likely dumped imports from each exporting country in an investigation do not have any substantial overlap in their competitive relationships with each other, or with the domestic like products, the investigating authority may not be able to provide a reasonable explanation to justify the use of cumulative assessment to conclude that all of the likely dumped imports from the several different countries will likely cause material injury to the domestic industry. Such an affirmative finding through cumulative assessment leaves open a possibility that the likely dumped imports from one country were the sole cause of the material injury to the domestic industry, and thus the authority cannot reasonably attribute the material injury to the products from the other countries.

26. In the sunset review at issue, there were significant differences in terms of grades, product mixes and price levels among the product under investigation from the several subject countries and between the product under investigation and the domestic like products which indicated the lack of substantial overlap of competitive relationships among them.

27. Specifically, the published reports demonstrate that there were clear price differences among the relevant products from the several subject countries and the domestic like products. This fact indicated that there is a possibility that (i) even within the same grade, Japanese stainless steel bars are higher priced because of the difference of quality and consequently the lack of substitutability with other lower-priced products and/or (ii) Japanese stainless steel bars contain a higher percentage or proportion of high-priced grades.

28. The substantial price differences between products from different sources, in particular for products that are material input used by cost-sensitive industrial users, should be viewed as strongly indicative that these products are serving different market needs. The Appellate Body Report's findings support this conclusion. In *China – HP-SSST (Japan) / China – HP-SSST (EU)*, the Appellate Body found that when the evidence on the record indicates the existence of different types of products, with different prices, the investigating authority cannot disregard such evidence; otherwise, it cannot conduct an objective examination.

29. In this regard, Korea argues that its finding of "likeness" for the purpose of defining the domestic like products proves that the products at issue were in competition with one another such that there was no need to separately assess the competitive relationships between them. However, the "likeness" analysis does not actually provide such proof. In fact, previous panels, such as the panel in *China – Autos (US)* and the panel in *China – X-Ray Equipment*, have repeatedly rejected arguments that an investigating authority could use a finding of "likeness" as a substitute for the more careful required analysis of assessing the actual competitive impact of the imported products. When considering "likeness", the investigating authority is not required to examine the conditions of competition between the allegedly dumped imports and the domestic like products, or to examine, in particular, competition which may exist between each of the sources of dumped imports and the domestic like products.

30. Nor does Korea's examination of the trends in the product mixes suffice as an examination of the competitive relationships between the relevant products. The product mixes are merely snapshots of the relative proportions at a given point in time and are essentially irrelevant to whether general-purpose steel and special steel have market interaction and are in a competitive relationship or not. The proportion of import volumes of general-purpose steel and special steel could change because of shifting demand, which has nothing to do with the degree of competitive relationship among the different product segments.

31. One of the most relevant factors in analysing a competitive relationship is whether the products are substitutable for purchasers. The Korean Investigating Authorities focused on examining the Japanese producers' production capacities and the alleged adaptability of production facilities between stainless steel bars and other steel products, and did not analyse the substitutability of the products from the purchasers' perspective. In other words, the Korean Investigating Authorities focused on analysing production side information and did not address demand side information or the competitive relationship in the market between and among the product under investigation and the domestic like products. However, the ability to produce a certain quantity of products is a fundamentally different concept from whether and how those products actually compete with each other in the market, and whether the products are commercially

interchangeable with each other for purchasers. In fact, the price differences between the product under investigation from the several subject countries suggests that the products were not substitutable, and most notably, the record shows that a Korean purchaser stated at the public hearing that price was the most important factor in making purchase decisions for stainless steel bars. This in turn suggests that the higher priced Japanese products are not substitutable with the lower priced products from other sources, as they would not be competitive in Korea.

2. The Korean Investigating Authorities' Findings Regarding the Production and Export Capacities of the Japanese Respondents

32. The Korean Investigating Authorities' determination of likelihood of injury is not supported by "positive evidence" or an "objective examination" also because it is based on improperly made findings regarding the production capacities and export capacities of the Japanese Respondents.

33. The Korean Investigating Authorities based their findings regarding the production capacities and export capacities of the Japanese Respondents upon data from the International Stainless Steel Forum ("ISSF"), which showed a much larger production capacity for the Japanese Respondents, rather than the data that the Korean Investigating Authorities requested from and were provided by the Japanese Respondents. Those data provided by the Japanese Respondents was direct and to the point in assessing the production capacities and export capacities of the Japanese Respondents. However, the Korean Investigating Authorities did not provide sufficient reasons for their rejection of the Japanese Respondents' data, nor did they provide sufficient reasons why the ISSF's data was reliable, despite there being obvious aspects of it which put its suitability in doubt.

34. As reasons for rejecting the Japanese Respondents' data, the Korean Investigating Authorities merely stated that the Japanese Respondents' data was significantly different from that of the ISSF, that the calculation methodologies used for their production capacity data varied between the Japanese Respondents, that two of the Japanese Respondents were members of the ISSF, that the ISSF's data addressed the production capacity of stainless steel bar mills, that the Japanese Respondents allegedly prevented the Korean Investigating Authorities from performing on-site verification by not responding to the dumping investigation, and that the investigating authority of another Member, namely, the United States, also used the ISSF's data in making its findings. However, none of these facts provided a sufficient factual basis for the Korean Investigating Authorities to reject the data from the Japanese Respondents.

35. The Japanese Respondents provided the Korean Investigating Authorities with explanations regarding all of their expressed concerns. Namely, the Japanese Respondents explained that the ISSF's data was different (and larger) in part because it included products which were not part of the product under investigation. The ISSF's data was also based on rough estimates, as the ISSF did not have direct data on the production capacities of the Japanese Respondents, and the ISSF's data did not take into account bottlenecks in processing capacities due to the Japanese Respondents' capacity limits for secondary processing. The calculation methods used by the Japanese Respondents were also fully explained by them in their submissions to the Korean Investigating Authorities, and the differences reflected slight differences in the flow of their manufacturing processes. The Korean Investigating Authorities did not dispute these explanations during the sunset review.

36. In terms of the suitability of the ISSF's data, the fact that two of the Japanese Respondents were members of the ISSF means nothing as to the reliability of the ISSF's data, because they did not provide the ISSF with data regarding their production capacities. Nor did the Japanese Respondents prevent the Korean Investigating Authorities from verifying their data, as the Korean Investigating Authorities could have undertaken an on-site verification during the injury investigation or verified the data in some other way.

37. The fact that the United States' investigating authority also used the ISSF's data is also meaningless because the United States' authority referred to the ISSF's data in examining the global trends of demand or production, rather than as evidence regarding the actual situation of the country subject to the review or as evidence regarding the details of activities of the companies in such country. Additionally, in a recent sunset review conducted by the United States regarding the anti-dumping duties on stainless steel bars from Brazil, India, Japan, and Spain, all of the Japanese Respondents calculated their production capacity in the same manner as they did in the sunset

review at issue and submitted the resulting data to the United States' investigating authority, which indeed relied on such data.

38. Accordingly, the Korean Investigating Authorities' determination, relying upon the ISSF's more favorable data, is not based on "positive evidence" or an "objective examination".

3. The Korean Investigating Authorities Did Not Make Proper Findings Regarding Import Volume and Price Effects

39. The Korean Investigating Authorities also did not appropriately assess the import volume and price effects from the several subject countries, and accordingly, their determinations based on such assessments are not based on "positive evidence" or an "objective examination".

40. Specifically, the Korean Investigating Authorities found that the import volume of the product under investigation would increase and that such increase would be likely to cause injury to the domestic industry, should the anti-dumping duty be terminated. However, the Korean Investigating Authorities made that finding regarding an increase in import volume by selectively analysing only a part of the data from the relevant time period. Namely, the Korean Investigating Authorities referred only to the increase in the import volume since 2014, whereas the import volume of the product under investigation during the whole POI (2012 to 2015) overall decreased.

41. Furthermore, as discussed above in relation to the use of cumulative assessment, the Korean Investigating Authorities did not examine the actual competitive relationship between the domestic like products and the product under investigation taking into account that the difference in grades, product mixes and price levels. They appear to have simply presumed that all products contained within the scope of the product under investigation and all products contained within the domestic like products compete with each other, despite evidence from multiple sources to the contrary. Accordingly, the Korean Investigating Authorities' analysis does not establish what, if any, the actual price effects which the product under investigation from the several subject countries imposes upon the domestic market are.

42. Likewise, the Korean Investigating Authorities' analysis of the impact of the product under investigation on the domestic industry did not take into account other factors, such as third country imports, on the predicted import volumes of the product under investigation from the several subject countries or upon the actual price effects that the product under investigation may have.

4. The Korean Investigating Authorities Did Not Consider the Impact of Other Factors on the Existence of a Nexus Between the Product Under Investigation and the Recurrence of Injury to the Domestic Industry

43. Finally, the Korean Investigating Authorities did not consider whether the likely injury to the domestic industry would be caused by factors other than the product under investigation, such as third country imports, material costs, and weakening domestic demand. Although the Korean Investigating Authorities explicitly recognized that such factors currently have or may have an effect on the domestic industry in their published reports, they did not address those factors in making their likelihood-of-injury determination.

44. The omission of such factors from the Korean Investigating Authorities' analysis of the likelihood of injury, despite the fact that such other factors are currently having an adverse impact on the domestic industry, casts doubt upon the existence of a causal nexus between the expiry of the anti-dumping duty on the product under investigation and the recurrence of injury to the domestic industry. Without analysing the likely impact of other factors upon the domestic industry in case of expiry of the anti-dumping duties, the Korean Investigating Authorities cannot ensure that the injuries which would in fact be caused by those unexamined other factors would not be attributed to the subject imports of product under investigation.

III. Korea's Continuation of the Imposition of Anti-Dumping Measures on Stainless Steel Bars from Japan Is Inconsistent with Article VI:6(A) of the GATT 1994

45. Article VI:6(a) of the GATT 1994 establishes that a Member cannot impose an anti-dumping duty on any product from another Member unless it determines that the effect of the dumping is such as to cause or threaten material injury to the domestic industry.

46. For the reasons discussed above, the Korean Investigating Authorities did not properly determine that the effect of the alleged dumping of the product under investigation is such as to cause or threaten material injury to the domestic industry.

IV. Korea's Use of Facts Available in the Likelihood-of-Injury Determination Was Inconsistent with Articles 11.4 and 6.8 of the Anti-Dumping Agreement

47. Article 6.8 of the Anti-Dumping Agreement permits an investigating authority to use facts available to make its determinations, under the conditions provided in Annex II. Article 11.4 of the Anti-Dumping Agreement provides that Article 6 (including, of course, Article 6.8) applies to sunset reviews, as well as original investigations. Under Paragraph 3 of Annex II of the Anti-Dumping Agreement, as the Appellate Body clarified in *US – Hot-Rolled Steel*, an investigating authority is not entitled to reject the information submitted to it which meets all of the requirements set forth within that Paragraph (i.e. verifiability of the data, appropriateness of the manner of submission, timeliness of submission, and, where applicable, the use of a medium or computer language requested by the authority).

48. In this case, the Japanese Respondents submitted information regarding their production capacities, which the Korean Investigating Authorities ultimately rejected in favor of the ISSF's data, as discussed above. However, the Korean Investigating Authorities did not address the factors listed in Paragraph 3 of Annex II to explain their rejection of the data, and in fact, the information provided by the Japanese Respondents and its method and timing of provision all comply with the requirements of Paragraph 3 of Annex II. This rejection is therefore not compliant with Article 6.8.

49. Furthermore, Paragraph 7 of Annex II states that an investigating authority should base their findings upon information from secondary sources with "special circumspection", which the panel in *Korea – Certain Paper* explained to mean that the investigating authorities should confirm the reliability of the information. *Korea – Certain Paper (Article 21.5 – Indonesia)*'s panel also stated that the investigating authority must adequately explain how it compared secondary source information with that provided by the interested parties. The panel and Appellate Body in *Mexico – Anti-Dumping Measures on Rice* found that the secondary source information should be found to be the "best" information available. However, the Korean Investigating Authorities did not explain whether or how they analysed these factors.

50. Korea argues in this proceeding that it did not resort to the use of facts available at all, because the necessary information was country-wide unused capacity and utilization rather than those of the Japanese Respondents. However, there is no basis in Article 6.8 and Annex II to find that the requirements for use of "facts available" need not be met for certain types of information, e.g. when an authority seeks to examine a country's production capacity rather than individual capacities of producers within that country.

51. Moreover, while the general issue with regard to the capacity utilization or capacity of a certain subject country in the sunset review is that of the relevant industry as a whole in the particular country, the particular evidence which should be used to adduce such is a separate question. In determining what evidence should be used, an investigating authority should consider whether the source of the evidence at issue is a primary source, whether the data includes only the product under investigation or whether it includes other products, and whether there are producers of the product under investigation which did not provide their production capacity information. The Korean Investigating Authorities did not make any such evaluation in choosing the ISSF's data over the data submitted by the Japanese Respondents as evidence.

52. In this case, not only was the capacity data submitted by the Japanese Respondents information derived from a primary source, the evidence also indicated that the Japanese Respondents had a significant share of the exports to Korea of the product under investigation from the producers in Japan. Moreover, while the Japanese Respondents' data was specifically focused on the product under investigation, the ISSF's data included products other than the product under investigation. Thus, the Korean Investigating Authorities' use of secondary source information (i.e. the ISSF's data) over primary source information (i.e. the Japanese Respondents' data) in this case does not satisfy the foregoing requirements under Article 6.8 and Paragraphs 3 and 7 of Annex II of the Anti-Dumping Agreement.

V. The Korean Investigating Authorities Failed to Disclose the Essential Facts as Required by Articles 11.4 and 6.9 of the Anti-Dumping Agreement

53. Article 6.9 of the Anti-Dumping Agreement provides that an investigating authority must inform all interested parties of the essential facts which form the basis for the decision whether to apply definitive measures before a final determination is made on the application of such definitive measures.

54. The Korean Investigating Authorities, however, did not disclose the essential facts before the final determination was made, depriving the Japanese Respondents of the ability to defend themselves in an effective manner. The Korean Investigating Authorities indicated to the Japanese Respondents on 3 April 2017 that the essential facts were disclosed by OTI's Final Report and KTC's Resolution of Final Determination, as well as OTI's Interim Report (Revised). However, the KTC's Resolution of Final Determination, which is the "final determination" under Article 6.9 of the Anti-Dumping Agreement, was already rendered by that time.

55. Furthermore, even if those documents had disclosed the essential facts in a timely fashion, the scope of the disclosure is limited and therefore does not satisfy the required standard under Article 6.9 of the Anti-Dumping Agreement.

56. The disclosure of the essential facts underling an investigating authority's determination must be disclosed in such a way as to permit an interested party to understand the basis for the decision to continue imposing anti-dumping duties, including the factual basis for their intermediate findings and conclusions reached by them.

57. However, the documents indicated by the Korean Investigating Authorities are so heavily redacted that it is not possible to confirm the facts which were essential to the Korean Investigating Authorities' determination.

58. Concerning the likelihood of dumping, the Korean Investigating Authorities found, *inter alia*, (a) the dumping margin calculated for each exporter, (b) unused production capacity in each exporting country, and (c) a decrease in import volume and domestic market share of the product under investigation after the imposition of anti-dumping duty.

59. Concerning the likelihood of injury, the Korean Investigating Authorities found, *inter alia*, (d) sufficient unused production capacity and export capacity of the exporting country, (e) a possible increase in the import volume and domestic market share of the product under investigation in case of the expiry of the anti-dumping duty, (f) a large decrease in the price of the product under investigation, which would cause the increase in its imports and weaken the domestic like products' price competitiveness, in case of the expiry of the anti-dumping duty, and (g) the import controls by the United States and the European Union, which would cause the exporting countries to have a limited market for exports.

60. The reports indicated by the Korean Investigating Authorities did not disclose much of the numerical data that they used to conclude that the above factors supported their determination. Some of the data was removed entirely from the disclosed versions of the reports to the effect that the interested parties were unable to discern that the relevant material even existed. Much of the rest of the data was redacted such that the interested parties could know of its existence but could not discern its content.

61. Additionally, the Korean Investigating Authorities made a finding that it was appropriate to make a cumulative assessment of the effects of imports of the product under investigation from Japan, India, and Spain. However, as discussed above, the Korean Investigating Authorities did not provide the essential facts regarding why cumulative assessment was appropriate, and therefore their determination based upon such cumulative assessment does not comply with Article 6.9 of the Anti-Dumping Agreement.

62. Although Article 6.5.1 of the Anti-Dumping Agreement provides that an investigating authority may provide summaries of data which needed to be redacted to protect confidential information, the Korean Investigating Authorities' reports also did not provide sufficient summaries of the data which was redacted such as could allow the interested parties to understand the substance of the information withheld.

VI. The Korean Investigating Authorities' Treatment of Certain Information as Confidential and Failure to Provide Sufficiently Detailed Non-Confidential Summaries Were Inconsistent with Articles 11.4, 6.5 and 6.5.1 of the Anti-Dumping Agreement

63. Article 6.5 of the Anti-Dumping Agreement provides that information may be treated as confidential only when a showing of good cause has been made for such treatment. The Korean Investigating Authorities did not adhere to the requirements under Article 6.5 because they treated the information submitted by the Applicants as confidential without any showing of good cause having been made. There is also no indication, in any of OTI's Final Report, KTC's Resolution of Final Determination, or OTI's Interim Report (Revised), of an assessment by the Korean Investigating Authorities as to whether good cause actually existed for the information to be treated as confidential.

64. The panel in *Korea – Pneumatic Valves (Japan)* correctly found that "the existence in the legislation of defined categories of information that will normally be treated as confidential does not relieve the investigating authorities of their obligation to determine that good cause has been shown to justify the confidential treatment". This finding is in line with the Appellate Body's previous findings in *EC – Fasteners (China)* and *China – HP-SSST (Japan) / China – HP-SSST (EU)* that the investigating authority is required to objectively assess the "good cause" alleged for confidential treatment and scrutinize whether the request for confidential treatment has been sufficiently substantiated by the showing of alleged "good cause".

65. It should also be noted that the Appellate Body also clarified in *China – HP-SSST (Japan) / China – HP-SSST (EU)* that a panel must examine whether the investigating authority undertook the necessary analysis to confirm that the submitted information indeed warranted confidential treatment "on the basis of the investigating authority's published report and its supporting documents".

66. Article 6.5.1 of the Anti-Dumping Agreement also requires that sufficiently detailed non-confidential summaries of the information which was granted confidential treatment be provided. However, the Korean Investigating Authorities also failed to satisfy this requirement, as they have not provided sufficiently detailed non-confidential summaries of the information granted confidential treatment such as to allow the interested parties to understand the substance of the confidential information and to defend their interests. In fact, most redactions of confidential information were accompanied by no explanation of either the justification for the redaction or the data which was redacted.

VII. Korea's Anti-Dumping Measures on Stainless Steel Bars from Japan Are Inconsistent with Articles 12.3, 12.2 and 12.2.2 of the Anti-Dumping Agreement

67. Lastly, Article 12.2 requires that public notice be given of, among other things, any preliminary or final determination. Article 12.2.2 further requires that for the conclusion of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty, the public notice shall make available all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures.

68. However, the Korean Investigating Authorities did not describe in sufficient detail their findings and all relevant information regarding, among other things, (a) their decision to use cumulative assessment, (b) their findings regarding the production capacity of the Japanese Respondents, (c) their findings regarding the propriety of use of facts available constituting secondary source information, (d) their findings regarding expected import volumes and their effects on the domestic industry should the anti-dumping duties terminate, (e) their findings regarding the Japanese Respondents' incentives to increase exports to Korea, (f) their findings regarding the existence of a nexus between the expiry of the anti-dumping duties and the recurrence of injury, and (g) their findings regarding the effects of other factors on the nexus between the expiry of the anti-dumping duties and the recurrence of injury.

VIII. Korea's *Ex Post* Arguments Within This Dispute Settlement Proceeding Should Be Rejected

69. Japan also notes that Korea has made various *ex post* arguments for the first time within this dispute settlement proceeding, seeking to justify the Korean Investigating Authorities' determination and the findings underlying them with new arguments which were not raised or addressed during the sunset review at issue.

70. These *ex post* arguments that cannot be discerned from the record evidence or the published reports include, among other things, (a) an allegation that the Korean Investigating Authorities found that all types of stainless steel bars were commodities that can be tailor-made to purchasers' orders and thus compete against each other, (b) an allegation that the authorities conducted an analysis of the prices of the dumped imports and the domestic like products, (c) an allegation that the Korean Investigating Authorities examined factors other than the product under investigation to make the determination of likelihood of injury, and (d) new proposed reasons allegedly for which the Korean Investigating Authorities rejected the Japanese Respondents' data regarding their production capacity.

71. However, these new *ex post* arguments by Korea should not be taken into account when analysing the Korean Investigating Authorities' determination and findings. The Appellate Body found in *US – Countervailing Measures (China) (Article 21.5 – China)* that the parties to a WTO dispute settlement proceeding are precluded from offering new rationales or explanations *ex post* to justify the determination of an investigating authority. The Appellate Body likewise found in *US – Countervailing Duty Investigation on DRAMS* that a panel examining the determinations of an investigating authority should consider whether the investigating authority provided, during the sunset review, a reasoned and adequate explanation as to: (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings supported the overall determination, and that such explanations should be discernible from the published determination itself. Accordingly, *ex post* explanations cannot cure a deficiency in the published determination.

ANNEX B-2

FIRST INTEGRATED EXECUTIVE SUMMARY OF
THE ARGUMENTS OF KOREA

I. INTRODUCTION

1. This dispute concerns Korea's third sunset review of the definitive anti-dumping measures on imports of stainless steel bars ("SSBs" or "dumped imports") from Japan, India, and Spain. The original anti-dumping measures were taken by the Ministry of Finance and Economy (a predecessor of the Ministry of Strategy and Finance) on 30 July 2004. The imposition of the anti-dumping duties were extended by the Ministry of Strategy and Finance ("MOSF") firstly in February 2010 and secondly in October 2013, through the first and second sunset reviews, respectively. On 2 June 2017, in the third sunset review, the MOSF decided to extend the imposition of the anti-dumping duties for a period of 3 years ("Final Determination"). The Final Determination was based on the Final Resolution of the Korea Trade Commission ("KTC") and the Final Report of the Office of Trade Investigation ("OTI"), a subsidiary organ of the KTC.

2. Korea's decision to extend the application of the anti-dumping duties on SSB imports in the third sunset review was based on a sufficient factual record and was the result of an objective examination based on positive evidence of the facts on the record. The decision to extend the duties was supported by reasoned and adequate conclusions. Specifically, the KTC evaluated and applied the required elements of the Anti-Dumping Agreement for sunset reviews, and conducted a critical and searching examination of the record evidence in conformity with the basic principles of good faith and fundamental fairness. The examination of the evidence was made in an unbiased manner, without favoring any interested party or group of interested parties, and involved positive evidence. Then, in a reasoned and reasonable manner, the KTC made a number of intermediate factual findings that supported its ultimate conclusion on a likely continuation or recurrence of dumping and injury to the domestic industry in Korea if the SSB duties were to expire.

3. Following the recommendation of the KTC, MOSF subsequently allowed all interested parties, including the Japanese respondents and the KTC, to present further arguments in support of their respective positions. After careful review of the parties' submissions, the MOSF decided to endorse the KTC's findings and thus extended the anti-dumping duties pursuant to Article 11.3 of the Anti-Dumping Agreement.

II. PRELIMINARY RULING REQUEST PURSUANT TO ARTICLE 6.2 OF THE DSU

4. Korea submits that Japan's request for the establishment of a panel ("Panel Request") is inconsistent with the requirements of Article 6.2 of the DSU since it fails to identify the specific "measures" challenged and includes claims that were not covered by its request for consultations.

5. In the Panel Request, Japan refers to "the measures" by Korea, but never clearly identifies the relevant measures in accordance with Article 17.4 of the Anti-Dumping Agreement. However, a panel request concerning a dispute under the Anti-Dumping Agreement must comply with the relevant provisions of the DSU and the Anti-Dumping Agreement. The request must identify, as the specific measure at issue, one of three types of anti-dumping measures, namely either a definitive anti-dumping duty, the acceptance of a price undertaking, or a provisional measure. A panel request that challenges a decision to initiate an investigation under Article 5 or a sunset review determination under Article 11 fails to meet this obligation.

6. Accordingly, Korea submits that Japan's Panel Request fails to identify the relevant measures in accordance with Article 6.2 of the DSU and 17.4 of the Anti-Dumping Agreement and, on that basis, all of Japan's claims are outside the Panel's terms of reference.

7. In the alternative, Korea submits that Japan's Panel Request unduly expanded on matters identified in its request for consultation, and thus includes claims for which no proper consultations were held in violation of Articles 4.4 and 6.2 of the DSU and Article 17.3 of the Anti-Dumping Agreement.

III. LEGAL STANDARD UNDER ARTICLES 11.3 AND 11.4 OF THE ANTI-DUMPING AGREEMENT CONCERNING SUNSET REVIEWS

8. The applicable disciplines in sunset reviews are set forth in Articles 11.3 and 11.4 of the Anti-Dumping Agreement. Article 11.3 requires termination of an anti-dumping duty after five years unless its expiry would "likely" lead to continuation or recurrence of dumping and injury. In contrast to original investigations, Article 11.3 does not impose detailed disciplines for findings of dumping, injury, and causation. This suggests a certain degree of latitude when reaching a "likelihood" of dumping or injury finding upon expiration of duties as long as there is a sufficient factual basis for the conclusions. In essence, any challenge of a sunset review is a factual matter. In respect of such factual determinations, the relevant standard of review under Article 17.6 of the Anti-Dumping Agreement and Article 11 of the DSU is that, as long as a reasoned and adequate explanation has been provided by the authorities, the conclusions must be upheld even if another conclusion could have been reached.

9. Article 17.6 of the Anti-Dumping Agreement is one of the special and additional rules of procedure which highlights that the panel is not the trier of fact in anti-dumping disputes but is only to review whether the determination of the investigating authority was objective and unbiased. It importantly specifies that if the evaluation was unbiased and objective, the evaluation shall not be overturned, even though the panel might have reached a different conclusion. This important deferential standard of review must be borne in mind in a dispute that is essentially of a factual nature given the total lack of specific legal disciplines or guidance in Article 11.3 of the Anti-Dumping Agreement.

10. The Appellate Body has underscored that original investigations and sunset reviews are distinct processes with different purposes. Indeed, Article 11.3 does not prescribe a specific methodology for making a "likelihood" determination, and it does not identify particular factors that must be taken into account in such a determination. All that is required is that investigating authorities must act with an appropriate degree of diligence in order to arrive at a reasoned conclusion, and undertake a forward-looking analysis and seek to resolve the issue of what likely would occur if the duty expired. Such a determination is forward-looking and based on a certain degree of speculation about future events. While the nature and extent of the requisite evidence will vary with the attendant circumstances of each review, the Appellate Body has noted that *current* market conditions are relevant as a basis to draw reasoned conclusions regarding likely *future* market conditions.

11. Similarly, in terms of likely future injury, Article 11.3 does not specify a methodology that must be followed. Rather, investigating authorities enjoy a certain degree of discretion, as no injury examination in the sense of Article 3 of the AD Agreement is required in sunset reviews. All that is required is that a likelihood of injury finding must be made pursuant to an objective examination based on positive evidence, and rest on a sufficient factual basis that is supported by reasoned and adequate explanations that future injury is likely if the duty expires.

12. Moreover, there is no requirement to establish a "causal link" between likely dumping and injury in a sunset review. Whereas causation between dumping and injury is a fundamental requirement in original investigations, the nexus to be demonstrated in a sunset review is rather between "the expiry of the duty" and the likely continuation or recurrence of dumping and injury.

13. Japan consistently refers to the need to establish a "causal nexus" in the context of a sunset review. Although formally speaking it states that this nexus should be demonstrated to exist between the expiry of the duty and the likely continuation or recurrence of dumping and injury, it is clear that it actually uses this concept to impose new obligations not present in Article 11.3. It deliberately borrows this "causal nexus" terminology from the causation requirement between dumping and injury in Article 3.5 of the Anti-Dumping Agreement that applies only in original investigations. Indeed, through the concept of "causal nexus", Japan seeks to introduce the Article 3.5 causation requirement into Article 11.3 through the backdoor.

14. The inquiry in sunset reviews is between *the expiry* of the anti-dumping measure and *the likelihood of dumping and injury*. Importantly, the Appellate Body has made clear that a causal link between dumping and injury need not be *established anew* in a review conducted under Article 11.3. Rather, to the extent that dumping and injury are likely to continue or recur if a measure expires, the Appellate Body has noted that "it is reasonable to assume that … the causal link between dumping and injury, established in the original investigation, would exist". In other words, the question is not

whether dumped imports from a particular country are causing injury, but whether the expiry of the duty would likely lead to a continuation or a recurrence of dumping and injury.

15. By force of logic, therefore, it only follows that the "building blocks" for the causal link, e.g., price effect (or price comparability, for that matter), need not be *established anew* under Article 11.3 either. Absent a new market development in the relevant POR clearly and substantially vitiating the pre-determined correlation (including price comparability) between the dumped imports and the state of the domestic industry, the correlation must be presumed to exist. It naturally also means that the price developments during the relevant POR are not determinant for the projection of the *future* price effect in the "forward-looking" analysis under Article 11.3, where fundamental changes in pricing matrix is destined to occur upon termination of the anti-dumping duties. In this context, situations pertaining to the periods prior to imposition of the measure may be highly relevant. Nothing on the record even remotely indicated that the correlation established in the original investigation was severed or significantly altered during the POR for the third sunset review.

16. Also important in analyzing the likelihood of injury upon termination of the current anti-dumping measure is the continued effect of the anti-dumping measure on the volume and price of the dumped imports. If the anti-dumping measure is continuing to affect the volume and price of the dumped imports, it is reasonable and adequate to assume that the volume and the price of the dumped imports will increase and decrease, respectively, upon removal of the measure. The record clearly shows that imposition of the anti-dumping measure immediately and continuously exerted remedial effect, as it suppressed the volume and inflated the price of the dumped imports from all subject countries throughout the course of the measure's imposition. In fact, it is on these bases, among others, that the KTC considered it appropriate to cumulate the *de minimis* imports from Spain with the dumped imports from other subject countries during the third sunset review. The Japanese respondents, for their part, had never demonstrated that the dumped imports from Japan showed any deviation from the dumped imports from other origin from this perspective.

17. A similar error of law that permeates Japan's arguments concerns the disciplines on cumulating injury in sunset reviews. Again, Japan is effectively trying to have the same disciplines applying in original investigations (under Article 3.3) to sunset reviews (under Article 11.3) as it seeks to demonstrate that the Korean investigating authorities' decision to examine the effects of the measure on dumped imports on a cumulative basis was inconsistent with Article 11.3. It argues that the authorities failed to properly determine that cumulation was appropriate in this sunset review given the alleged lack of competition between Japanese imports of "special" SSBs with domestic and Indian sales of "general purpose" SSBs and that the authorities should have followed the normal rule of making a country-specific examination. However, Japan attempts to create new rules out of thin air, and errs when re-stating the relevant jurisprudence.

18. The Appellate Body has recalled that cumulation is not the exception, contrary to what Japan seems to suggest, but is rather what would "normally" happen in injury determinations. Since injury might come from several sources simultaneously, the Appellate Body has found cumulation to be a useful tool. Japan's attempt at reading more into the basic utility of cumulation in the context of sunset reviews is unwarranted, and would lead the Panel to add to obligations of Members without any textual basis in the Anti-Dumping Agreement. In addition, contrary to Japan's repeated assertions based on the distinction between "general purpose" and "special" SSBs, there is no requirement in Article 11.3 to examine whether cumulation is appropriate in the light of the conditions of competition between the imported products and between imported products and the like domestic product. In its report on *US – Oil Country Tubuluar Goods Sunset Reviews,* the Appellate Body has already clearly rejected this attempt at reading the requirements of Article 3.3 into Article 11.3 finding that the conditions of Article 3.3 "do not apply in the context of sunset reviews". In addition to the fact that Japan's argument based on this distinction between these newly invented categories of products has no basis in the facts on the record, as explained below, it is thus also legally irrelevant. Japan's claim on cumulation under Article 11.3 is flawed in every way.

IV. RELEVANT CONTEXT OF THE THIRD SUNSET REVIEW

19. Korea originally imposed anti-dumping measures on SSBs from, among others, Japan in 2004 and these duties were extended twice through the first and second sunset reviews. In these prior proceedings, very similar issues were raised and they were largely addressed in the same manner as in the third sunset review, without challenge by Japan. The third sunset review, therefore, was derived from and part of a string of connected and sequential determinations that started with the original

investigation and continued through the subsequent sunset reviews. In the third sunset review, the Korean authorities did not simply rely on its findings from prior proceedings, but, to the extent relevant, these prior findings may still play a part in subsequent reviews. For example, the Korean authorities followed the pattern of reasoning and analysis that was used in previous proceedings, when assessing the record evidence pertaining to the third sunset review. Factual and analytical findings from prior proceedings also lend important contextual support to the KTC's findings in the underlying third sunset review. Based on such record evidence, it was confirmed that the relevant situation had not changed substantially from previous proceedings.

20. SSB products are a special steel grade among steel bars, and SSBs products generally compete with each other on the basis of their grades or specifications. Because SSBs is an internationally traded commodity, traders rely on internationally-recognized designation standards when placing orders internationally. Thus, SSB orders are placed based on designated grades or specifications, and as long as the ordered products are certified for that certain grade or specification, the fungibility between the products are presumed and the products are deemed to be in a competitive relationship.

21. In addition, SSB production facilities have high adaptability for a wide-range of steel products, without a need for further investment in or alternation of the facilities. It is well known that SSB production facilities not only can produce all kinds of SSB products with different grades, but can also produce other steel products that require surface treatment, (e.g., carbon steels, alloy steels, tool steels, bearing steels, etc.), almost immediately upon order. The industrial practice for SSB is to maintain only minimal amount of inventory, as vast majority of SSB sales are produced upon order. The Japanese respondents explicitly confirmed that this was their case as well, i.e. that SSB products were manufactured and supplied to Korean customers on an 'on-demand basis', and thus that they do not keep inventory. A corollary of this undisputed fact is the high adaptability of SSBs production facilities, where production can be tailored to customer demand and specifications. In other words, SSB producers can modify easily and quickly their facilities to produce any grade of SSB as long as there is demand. This is the reason why the Korean authorities' likelihood-of-injury determination in the third sunset review focused, among others, on the SSB capacity utilization of the subject countries.

22. Moreover, an unsubstantiated assertion by the Japanese respondents that the dumped imports from Japan were not in competition with the like domestic products were refuted, as it stood in tension with record evidence. Indeed, no applicable standard categorizing SSBs into "general purpose" and "special" steel products exists, contrary to what Japan suggests. Although each steel grade is characterized by specific chemical composition, they all form one consolidated group of like products. There was simply no justifiable ground to distinguish so-called "general purpose" SSB products from so-called "special" SSB products for purposes of the investigation.

23. Nevertheless, for purposes of examining the Japanese respondents' argument, the Korean authorities assumed that such an artificial distinction between "general-purpose" and "special" SSB products could be made. Thus, they examined whether the alleged difference in product mix potentially implied that there was no competition between the dumped and domestic products. It turned out, however, that the Japanese respondents' assertion was not at all supported by the facts on the record. Official customs data confirmed that there was a large overlap between the dumped imports from Japan and the like domestic product, even accepting the artificial categorization of "general purpose" and "special" SSB products. Indeed, no record evidence suggested that the Japanese respondents had stopped producing so-called "general purpose" steel or that Korean producers did not produce "special" steel, such that there would be no competitive overlap. Exporters as well as domestic producers were found to sell both "categories" of products in significant amounts and largely similar proportions. The fundamental factual premise of the Japanese respondents' argument was not supported by the facts on the record. There was no reason to consider that the basket of covered products of the Japanese respondents was not in competition with the basket of products of other exporters and domestic producers. Imported and domestic like products are in the market together and competing with one another and there was therefore no reason to doubt that the situation would be any different if the duties were removed.

V. LEGAL ARGUMENT

V.1. CLAIM 1: JAPAN'S CLAIM THAT KOREA FAILED TO DETERMINE PROPERLY THAT THE EXPIRY OF THE SSB DUTIES WOULD LIKELY LEAD TO CONTINUATION OR RECURRENCE OF INJURY IS WITHOUT MERIT

24. Japan claims that Korea failed to properly determine that the expiry of the SSB duties would likely lead to a continuation or recurrence of injury in accordance with Article 11.3 of the Anti-Dumping Agreement. However, all four of Japan's specific allegations in support of its claim under Article 11.3 are without merit and based on an erroneous understanding of the relevant disciplines.

V.1.1. JAPAN'S CLAIM THAT KOREA'S CUMULATIVE LIKELIHOOD OF INJURY DETERMINATION WAS NOT BASED ON AN OBJECTIVE EXAMINATION OF POSITIVE EVIDENCE IS BASELESS

25. Japan asserts that the likelihood of injury determination by Korea violated Article 11.3 because there was not a sufficient factual basis for the finding to cumulate imports from Japan, India, and Spain, as imports from Japan allegedly did not compete with imports from the other countries. Especially, Japan considers there were critical differences in the product mixes, as imports from Japan mostly consisted of "special" steel SSBs whereas imports from India and the like domestic product were mainly composed of "general purpose" SSBs.

26. Korea considers that this claim under Article 11.3 is without merit. In the absence of any specific legal requirement in respect of cumulation in sunset reviews, Japan fails to demonstrate that there was an insufficient factual basis for Korea's decision to cumulate imports, or that the decision did not rest on positive evidence and an objective examination.

27. There was a sufficient factual basis for Korea's decision to cumulate imports from Japan, India, and Spain. Indeed, relevant jurisprudence clearly confirms that cumulation of injury in sunset reviews is permissible provided such a decision is supported by positive evidence and has a sufficient factual basis that the imports are 'in the market together and competing against each other'. The KTC found that all dumped imports, regardless of origin, are in competition with each other and with the like domestic products. The covered SSB products were produced by all of the subject countries as well as Korea, were fungible, were present in the Korean market during the review period, and used the same distribution channels.

28. In fact, the factual underpinnings taken into account by the KTC when making its decision to cumulate imports fulfilled all the requirements enumerated by the Appellate Body in *US – Anti-Dumping Measures on Oil Country Tubular Goods* when upholding an USITC determination to cumulate imports in a sunset review.

29. First, the KTC found that the same reasons justifying a cumulative assessment of injury in the prior investigation and reviews applied to the third sunset review as well. The physical characteristics, manufacturing process, distribution channel, purpose of use, consumers' evaluation, etc., of the imports and the like domestic product remained the same or similar to that of the original investigation as well as the first and second sunset reviews. In addition, the OTI confirmed that the products at issue had obtained relevant certificates under international standards, which *ipso facto* confirmed their physical similarities and effectively confirmed their competitive relationship. The KTC's examination of the record facts confirmed the similarity to earlier investigation and reviews, and was thus an intermediate factual finding in support of the decision to cumulate.

30. Second, an important intermediary factual finding by the KTC in the third sunset review was that the imports and the domestic SSBs constituted "like" products. This finding had been consistently made since the original investigation through the previous sunset reviews. The finding of "likeness", based among others on customer statements and evaluations, grade/specification designation under globally-recognized certification standards, manufacturing processes, distribution channels, price, functions and purported uses, etc., confirmed that the products sold in the Korean market shared sufficient similarities to be *competing*. Thus, the competitive overlap among the dumped imports and with the like domestic products was significant. Indeed, SSBs are internationally traded commodities, which share physical similarities and fungibility in use (thus the market competition), and the interchangeability is presumed among comparable product specifications as long as they are certified by globally recognized standards.

31. Third, the KTC examined the artificial distinction between "general-purpose" and "special" SSBs introduced by the Japanese respondents but considered that even accepting this distinction there was no basis in the facts on the record to consider that there was no or insufficient competition between imported and like domestic products. For example, the composition of trade had remained similar over the current POR and the previous investigations, i.e. there had been a consistent proportion of imports of so-called "general-purpose" and "special" SSBs from Japan and India, and in relation to production and sales volumes in Korea. The official customs clearance data revealed that the Japanese respondents' assertion that imports of "general purpose" SSBs ceased as of 2015 was incorrect.

32. Fourth, the price information that was considered by the KTC confirmed that the average resale price of the like domestic product was within the range of the dumped imports' resale prices. In fact, the average import and resale price of the dumped imports were considerably lower than the average resale price of the like domestic product in 2015.

33. As a result, Korea's decision to examine imports cumulatively for the likelihood of injury had a sufficient factual basis and Japan failed to demonstrate any bias in the authorities' evaluation of the facts. This evaluation cannot be overturned. Therefore, Japan's claim must fail.

V.1.2. JAPAN'S CLAIM THAT KOREA'S DETERMINATION THAT THE JAPANESE INDUSTRY HAD THE CAPABILITY TO INCREASE PRODUCTION AND EXPORTS TO KOREA WAS NOT AN OBJECTIVE EXAMINATION BASED ON POSITIVE EVIDENCE IS BASELESS

34. Japan argues that Korea violated Article 11.3 because the determination of a likelihood of recurrence of injury relied, among others, on the allegedly erroneous finding that Japan's SSB sector had sufficient additional production capacity for exports. Japan argues that this finding was not based on an objective examination of positive evidence because the KTC rejected "direct evidence" submitted by the Japanese producers and instead relied on secondary source information "without justifiable reason".

35. Korea considers that this claim under Article 11.3 is without merit. The Korean authorities had different sources of information at their disposal to examine the extent to which there was excess production and export capacities in Japan. A reasonable and adequate explanation was provided why the data from ISSF, the Japan Stainless Steel Association, and the Korea International Trade Association were preferred in examining production and export capacities in Japan.

36. First, the data were eminently objective, reliable, and credible, as information was derived from reputable international institutions and industry associations. The data on production capacity was obtained through ISSF, and reflected data collected by its members, national steel associations, overseas market research agencies, publicly available information, and industrial knowledge.

37. Second, the Korean authorities' examination was not meant to be company-specific, but was necessarily order-wide and thus related to the country as a whole. The ISSF data covered the production capacities of the Japanese industry as a whole, including the three Japanese respondents, and collected statistics on the secondary processing step of SSB products. In the context of the likelihood-of-injury analysis, the ISSF data was preferred and was used to examine production capacities in India and Spain as well, without objection. Tellingly, the Korean authorities relied on the ISSF data in previous reviews as well, and this was never disputed by the Japanese respondents in the past. In addition, ISSF data has been used by other WTO Members in anti-dumping proceedings concerning SSBs and other stainless steel products.

38. Japan asserts that there was no reasonable justification for the Korean authorities to reject the Japanese respondents' capacity data when calculating the production capacity of Japan's SSBs sector, in favour of the ISSF data. However, the Korean authorities examined and provided elaborate explanation for the decision not to use the Japanese respondents' data. In particular, it was difficult to accept the respondents' data because it significantly differed from ISSF data, the method of calculating production capacity varied by each company, no underlying data was provided to allow verification of the submitted information, and the respondents' repeatedly changed their calculation methodologies throughout the review. In addition, the record shows that the Korean authorities attempted to verify the submitted data, but the respondents refused to cooperate by providing the

requested raw data. The decision to rely on the ISSF data, which had been used in the second sunset review, in respect of which Japan never raised any issue was thus reasonable.

39. As a result, the countrywide ISSF data did not suffer from the problems that affected the information provided by the Japanese respondents, and was information that had been used in the second sunset review as well as in anti-dumping investigations by WTO Members. The data relied on was reliable, credible, and objective and was obtained from a well-respected source, and thus constituted "positive evidence" that provided a sufficient factual basis for the Korean investigating authorities' determination that Japan's SSB industry had sufficient additional production capacity and room for exports. Japan's claim is without merit.

V.1.3. JAPAN'S CLAIM THAT KOREA ERRED IN FINDING THAT IMPORTS FROM JAPAN WOULD INCREASE IF DUTIES WERE REMOVED AND THAT DOMESTIC PRICES WOULD DECREASE IS WITHOUT MERIT

40. Japan argues that Korea violated Article 11.3 of the Anti-Dumping Agreement because the determination of a likelihood of recurrence of injury was based on the erroneous finding that imports from Japan would increase if duties expired and that domestic prices would significantly decrease. Japan asserts that this is speculative and that the Japanese industry has shifted its focus away from the price competitive "general purpose" SSBs that dominate the Korean market. However, Japan's assertions are not supported by the facts on the record which reasonably supported the Korean authorities' contrary findings.

41. First, the finding that dumped imports were likely to increase if duties expired was based on, *inter alia*, a recent increase in their volume and market share (despite the imposition of duties), in combination with the fact that such volumes were still well below pre-measure levels, suggesting further increases were probable. In addition, the Korean authorities found that investigated producers continued to make investments in new facilities, and that there was considerable spare production capacity.

42. Second, the Korean authorities' examination of prices showed that the dumped imports continued to undercut prices of the like domestic product throughout the POR, and that the average import and resale prices of the dumped imports were considerably lower than the average resale price of the like domestic product at the end of the POR. Thus, even with the imposition of anti-dumping duties, the average sales price of the dumped imports undercut the average price of the like domestic product. The logical conclusion, therefore, was that expiry of the duties would exhort additional price pressure on domestic prices. This finding was supported by analysis of the above-referenced price data and related explanation. The authorities also pointed to the fact that the removal of the duties on imports from Japan would make these imports more price competitive putting additional pressure on domestic prices.

43. Third, the Korean authorities also examined the likely impact of other factors, especially third-country imports, material costs, and domestic demand. This analysis showed that there were no reason why such other factors would refute a finding of likely increase in volume and decrease in domestic prices if duties were removed. For example, the volume and market share of third-country imports remained stable over the review period, and their market share had only increased slightly.

44. In sum, the Korean authorities' determination of a likely increase in the volume of dumped imports and a drop in domestic prices if duties were to expire was firmly grounded in the facts on the record and was based on reasonable projections about future events.

V.1.4. JAPAN'S CLAIM THAT KOREA FAILED TO PROPERLY EXAMINE THE LIKELY IMPACT OF OTHER FACTORS IS WITHOUT MERIT

45. Japan argues that Korea's determination of a likelihood of recurrence of injury is inconsistent with Article 11.3 because the Korean authorities failed to examine properly the likely injury caused by "known factors other than the dumped imports". However, first, as a legal matter, Article 11.3 does not require a causation and non-attribution analysis based on the effects of dumped imports on injury as separated and distinguished from the effects of other known factors, as is the case in original investigations under Article 3.5. In any case, second, as a factual matter, Korea's determination involved an objective examination of positive evidence, and rested on a sufficient factual basis, that allowed Korea to make a reasoned and adequate conclusion on the likelihood of recurrence of injury if the duties were removed even in the light of other factors.

46. As part of this analysis, although not legally required, the Korean authorities considered the effects of factors other than the dumped imports, such as third-country imports, material costs, and demand. The Korean authorities found that there was no basis to consider that these other factors played an important role in determining the likelihood of recurrence of injury if the anti-dumping duties were removed. For example, regarding the volume of third-country imports, the authorities found that the volume and market share of these imports remained stable over the review period, and trended similarly to the dumped imports and the like domestic product. In addition, material costs declined and demand increased in the review period. These two factors could not be a cause of recurrence of injury if the duties were removed.

47. In sum, the Korean investigating authorities examined the likely impact of factors other than the dumped imports, even though there is no such obligation under Article 11.3. This evaluation of other factors was objective and reasonable. Japan has failed to demonstrate the contrary and its claim must thus be rejected.

V.2. CLAIM 2: JAPAN'S CLAIM THAT THE ALLEGED USE OF FACTS AVAILABLE VIOLATED ARTICLES 11.4, 6.8 AND PARAGRAPHS 3 AND 7 OF ANNEX II OF THE ANTI-DUMPING AGREEMENT IS IN ERROR

48. Japan claims that Korea acted inconsistently with Articles 11.4, 6.8, and paragraphs 3 and 7 of Annex II of the Anti-Dumping Agreement because it rejected information submitted by the Japanese respondents and allegedly resorted to facts available for calculating the SSB production capacity in Japan based on ISSF data. However, Japan errs when it argues that Korea resorted to the use of facts available, and in any case fails to demonstrate that Korea acted inconsistently with Article 6.8 and paragraphs 3 and 7 of Annex II of the Anti-Dumping Agreement in the underlying review investigation.

49. First, the Korean authorities did not resort to the use of facts available due to missing necessary information in the third sunset review. They simply attached more weight to the reliable ISSF data. The authorities had the necessary information that most reliably represented Japan's countrywide capacity and production from reputable public sources, e.g. the ISSF data. Article 6.8 and Annex II simply do not apply to a likelihood-of-injury determination where investigating authorities seek to examine, as one of many factors, the availability of excess production and export capacity in a country of export. While actual data about producers' prices and costs are "necessary" to be obtained from the producers themselves in order to make a determination of dumping, the same is not the case for a likelihood-of-injury determination. Such a determination includes an analysis of a country's production capacity and capacity utilization with a view to evaluating the likely future increase in the volume of imports, as one of many factors that is examined. In this case, there was no missing information, as there was reliable and objective data available from the ISSF. In addition, the specific information from the cooperating exporters did not constitute "necessary" information, as such data was only producer specific. There was thus no gap to fill that would have required the authorities to resort to facts available under Article 6.8.

50. Second, in any case, and should the Panel find that Korea resorted to facts available (*quod non*), every condition under Article 6.8 was satisfied and, thus, Korea was justified to use facts available. Indeed, the Japanese respondents refused access to necessary information by, for example, failing to respond to the dumping aspect of the review. The respondents also withheld various requested data, ignoring the clear instructions and requests by the Korean authorities. Thus, the respondents more than significantly impeded the third sunset review, failed to act to the best of their abilities, and their submitted information was neither verifiable, nor appropriately or timely submitted so that it could be used without undue difficulties by the Korean investigating authorities.

51. Third, there is no basis for Japan's claim that the Korean authorities acted without special circumspection when using the ISSF data. Korea notes that the ISSF data did not constitute "secondary source" information. As there was no *primary* source of information for the finding on capacity available in Japan as a whole, the ISSF data could not constitute *secondary* source information. In any event, the Korean authorities assessed the relevance and reliability of the ISSF and JSSA data for the question concerning production capacity and capacity utilization in Japan. It found that the ISSF data represented useful and reliable data on this issue, as it was collected from various producers and national associations involved in the SSB industry, and that the data was frequently relied on in anti-dumping investigations of other WTO Members. Japan in the context of this dispute has also confirmed that it is not challenging the reliability of the ISSF data.

52. In sum, the Korean investigating authorities did not resort to the use of facts available, as they had relevant and appropriate information on production and exports of SSBs in Japan from reputable public sources. Assuming, *arguendo,* that Article 6.8 and Annex II of the Anti-Dumping Agreement even apply, all conditions for resorting to facts available were met. Japan's claim is to be rejected.

V.3. Claim 3: Japan's Claim that Korea Failed to Disclose the Essential Facts Before the Final Determination in Violation of Articles 11.4 and 6.9 of the Anti-Dumping Agreement Is Baseless

53. Japan claims that Korea violated Articles 11.4 and 6.9 of the Anti-Dumping Agreement, as the KTC allegedly failed to inform all interested parties of the essential facts under consideration that formed the basis for the decision to extend the anti-dumping duties. However, this claim is baseless, as the Korean authorities disclosed the essential facts that constituted the basis for its decision in various documents and meetings, in particular in the KTC's Final Resolution and the OTI's reports. Indeed, the Korean authorities not only provided the respondents with the interim report that contained most of the OTI's findings on dumping and injury, but also provided the amended interim report which reflected the opinions of the interested parties, thereby disclosing most of the facts that constituted the OTI's findings.

54. All of Japan's allegations under this claim are either groundless or concern facts that were not significant in the process of reaching a decision to extend the measure – they were thus not "essential" facts that warranted disclosure. Where actual data was redacted for protection of confidential information, the narrative in the published reports provided the relevant information through a non-confidential summary, allowing the interested parties to exercise their rights of defense. Importantly, neither the Japanese respondents in the underlying investigation nor Japan brings a claim under Articles 6.2 and 6.4 of the Anti-Dumping Agreement, thus confirming that the respondents' rights to defend their interests were fully respected in the underlying investigation.

55. In sum, the essential facts for the decision to extend the application of the anti-dumping measures on imports of SSBs were clearly disclosed to the interested parties in accordance with Articles 11.4 and 6.9, enabling them to defend their interests with respect to the key facts supporting the determination.

V.4. Claim 4: Japan's Claim that Korea Failed to Treat Properly Confidential Information in Violation of Articles 11.4, 6.5, and 6.5.1 of the Anti-Dumping Agreement Is Baseless

56. Japan claims that Korea violated Articles 11.4, 6.5, and 6.5.1 of the Anti-Dumping Agreement because the Korean authorities afforded confidential protection of certain information without a showing of "good cause", and because they failed to require sufficient non-confidential summaries of the confidential information. Japan's claims of violation of these provisions are baseless.

57. In Korea, every interested party in anti-dumping investigations submits non-confidential summaries by designating what information is to be treated confidential. It does this by deleting the relevant information. By doing so, the provider of the information asserts that such deleted information falls within the categories of "confidential information" specifically set forth in the relevant laws in Korea (in particular, the Enforcement Decree and Enforcement Rule of the Customs Act of Korea). It is understood that every participant in the underlying investigation, including the applicants and the respondents, were aware of this established practice in Korea.

58. The KTC proceeded to assess objectively whether there was "good cause", i.e. whether the deleted information indeed fell within a category of confidential information enumerated in the relevant Korean laws. In applying the relevant provisions of Korean law, the KTC also considered that the requested confidential information was by nature "commercially-sensitive information (such as profit or cost data or proprietary customer information) that is not typically disclosed in the normal course of business and which would likely be regularly treated as confidential in anti-dumping investigations". There was therefore an assessment of "good cause" in light of the standard applied under Korean law, but the KTC did not require the applicants to link each piece of redacted information to a category of confidential information, because the nature of the redacted information obviously pointed to the relevant category of confidential information under the law. There is no obligation under Article 6.5 requiring investigating authorities to make express "statements" in their reports as to whether good cause was shown for the confidential treatment of specific information. Rather, the

obligation on investigating authorities is to treat any information as confidential "upon good cause shown" by the provider of the information. Thus, an authority must only satisfy itself (i.e. "ensure") that good cause is shown before treating the information in question as confidential.

59. Moreover, it is the established practice in Korea that all interested parties to anti-dumping investigations provide the "non-confidential summary" of their confidential information by way of providing a public version of the document that contains the confidential information. Non-confidential summaries are not required under Article 6.5.1 for every single figure and piece of data included in the parties' submissions, regardless of the relevant context. Thus, investigating authorities are entitled to a reasonable degree of deference in accepting or rejecting non-confidential summaries. In the underlying investigation, the applicants provided non-confidential summaries for all confidential information that they submitted. Such non-confidential summaries were in sufficient detail to permit reasonable understanding of the substance of the confidential information.

60. In sum, Korea's treatment of confidential information in the third sunset review was consistent with Articles 11.4, 6.5, and 6.5.1. Moreover, Japan did not include a claim under Articles 6.2 and 6.4 of the Anti-Dumping Agreement – thus confirming the respondents' rights to defend their interests were fully respected in the underlying investigation.

V.5. Claim 5: Japan's Claim that Korea Failed to Provide Sufficient Detail of Findings and Conclusions in Violation of Articles 12.3, 12.2, and 12.2.2 of the Anti-Dumping Agreement Is Without Merit

61. Japan claims that Korea acted inconsistently with Articles 12.3, 12.2, and 12.2.2 of the Anti-Dumping Agreement because of a failure to provide in sufficient detail the findings and conclusions reached on all issues of fact and law that the investigating authorities considered material. However, Japan's arguments are without merit. The MOSF rendered its final determination by way of endorsing the findings and recommendations made by the KTC and the OTI, without any modification. When the MOSF issued the public announcement of the final determination, it also publicly disclosed in adjoining annexes the Final Resolution and the Final Report.

62. Therefore, the MOSF complied with its obligations under Articles 12.3, 12.2, and 12.2.2 through its disclosure of the Final Determination, which included the Final Resolution and the Final Report.

V.6. Claim 6: Japan's Consequential Violation of Article VI:6(a) of the GATT 1994 Is Unfounded

63. Japan claims that Korea acted inconsistently with Article VI:6(a) of the GATT 1994 because of the alleged inconsistencies with Article 11.3 of the Anti-Dumping Agreement. Japan's claim is entirely consequential of its Article 11.3 claims. Korea submits that this claim should be rejected, since Korea has refuted Japan's claims under Article 11.3. Moreover, Japan's Panel Request fails to specify which of the obligations under GATT Article VI:6(a) would be violated as a consequence of the alleged inconsistencies with Article 11.3. Therefore, this claim is not within the terms of reference of the Panel, as Japan has failed to present the problem clearly in accordance with Article 6.2 of the DSU.

VI. CONCLUSION

64. For the reasons stated in this submission, Korea respectfully requests the Panel to reject all of Japan's claims that Korea's determination to extend the anti-dumping measure on imports of SSBs from Japan, India, and Spain is inconsistent with the Anti-Dumping Agreement.

ANNEX B-3

SECOND INTEGRATED EXECUTIVE SUMMARY OF
THE ARGUMENTS OF JAPAN

I. Introduction

1. Through its second written submission, opening and closing statements at the second substantive meeting of the Panel, as well as its responses to the Panel's questions, Japan continues to demonstrate that Korea's continued imposition of anti-dumping duties upon Japanese stainless steel bars does not comply with its obligations under the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement").

II. Common Evidentiary Issues

A. Impermissibility of *Ex Post* Explanations

2. Korea has put forth and relied upon multiple new, *ex post* explanations for the findings and conclusions in the reports of the Korea Trade Commission and Office of Trade Investigation ("Korean Investigating Authorities"). However, neither the evidence in the record of the sunset review at issue nor the Korean Investigating Authorities' published reports indicate that these explanations had been contemplated by the Korean Investigating Authorities during the sunset review.

3. It is well established that a Member cannot supply new, *ex post* rationales in a World Trade Organization ("WTO") dispute settlement proceeding to support the determinations of its investigating authorities, when those rationales were not a contemporaneous part of the investigation. It is clear that *ex post* explanations that cannot be discerned from the published reports and record evidence cannot be considered by the panel as evidence of what the investigating authority actually considered, analysed, or determined during its investigation.

4. Thus, in the present case, the *ex post* explanations presented to the Panel by Korea cannot be taken into account in assessing whether the determination is consistent with the requirements of the Anti-Dumping Agreement.

B. Standard of Review

5. An inquiry by the panel into whether there is an "alternative explanation of the facts [that] is plausible" to assess whether the investigating authority's explanation is reasoned and adequate in light of that alternative explanation, found to be necessary by the Appellate Body in *US – Countervailing Measures (China) (Article 21.5 – China)*, is fully consistent with both Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Article 17.6(i) of the Anti-Dumping Agreement, and was necessary in this case.

6. Japan's arguments do not seek a *de novo* review of the Korean Investigating Authorities' findings in this case. Rather, Japan argues that the determination of likelihood of injury in this case is clearly not reasoned and adequate based on the published reports and record evidence from the investigation as the Korean Investigating Authorities' investigation has left open a risk of the false attribution of injury to the alleged dumped imports from Japan, which means that the conclusion that the expiry of the anti-dumping duty on imports (including Japanese imports) would *lead to* the likely-recurring injury may be false.

III. Article 11.3 of the Anti-Dumping Agreement

7. The Korean Investigating Authorities' determination of the likelihood of injury does not comport with the requirements of Article 11.3 of the Anti-Dumping Agreement because it was not based on positive evidence and an objective examination, and did not have a sufficient factual basis to allow them to draw reasoned and adequate conclusions. Japan has provided explanations

regarding both the legal standards and the specific analysis of the deficiencies of the likelihood-of-injury determination at issue.

A. Legal Issues

1. Korea's Argument That the Causal Nexus Need Not Be Examined is Incorrect

8. Korea emphasizes that "there is no requirement to establish a causal link in a review under Article 11.3", as Article 3.5 does not apply to sunset reviews, and states that Japan's argument is "essentially" concerned with such requirement that does not actually exist.

9. However, although a causal link between the dumping and injury may not need to be established anew, a causal nexus between the expiry of dumping and the continuation or recurrence of injury must still be established. This requirement to establish the causal nexus derives from the fundamental principles under Article VI of the GATT 1994 that (i) anti-dumping duties can be imposed on imports from a certain Member only if dumping from that Member causes material injury to the domestic industry, and (ii) if dumped imports cease to exist or cease to cause injury to the domestic industry, no anti-dumping duty can continue to be imposed.

10. Article 11.3 of the Anti-Dumping Agreement confirms and embodies such principles under Article VI of the GATT 1994, by requiring that the expiry of the anti-dumping duties would be likely to "lead to" the continuation or recurrence of dumping and injury to the domestic industry. In this regard, as the Appellate Body has recognized in *US – Anti-Dumping Measures on Oil Country Tubular Goods*, examination of the causal nexus between the expiry of the anti-dumping duties and the continuation or recurrence of injury to the domestic industry allows the existence of the causal link between dumping and injury to be reasonably assumed, which is the reason that such causal link may not be established anew in sunset reviews.

2. The Forward-Looking Nature of a Sunset Review Does Not Allow Bare Speculation, and the Update of the Market Realities Is Necessary

11. Korea argues that because the analysis in a sunset review is "forward-looking", it inherently includes a degree of speculation. However, as the Appellate Body found in *US – Anti-Dumping Measures on Oil Country Tubular Goods*, the text of Article 11.3 provides that "the termination of the anti-dumping duty at the end of five years is the rule and its continuation beyond that period is the 'exception'". According to the Appellate Body's finding in *US – Corrosion-Resistant Steel Sunset Review*, the term "determine" in that provision also indicates that the investigating authority is not allowed to "simply assum[e] that likelihood exists" without evaluating the facts of a particular case. Rather, as the Appellate Body stated in *US – Oil country Tubular Goods Sunset Reviews*, the requirement of Article 3.1 is "equally relevant" to sunset reviews, and thus such determination must be based on "positive evidence" and an "objective examination". The Appellate Body further found, in *US – Corrosion-Resistant Steel Sunset Review*, that "[a]n investigating authority must have a sufficient factual basis to allow it to draw reasoned and adequate conclusions concerning the likelihood of such continuation or recurrence".

12. This view that even forward looking analysis requires a proper factual basis is supported also by Article 3.7 of the Anti-Dumping Agreement, which prohibits an affirmative finding of threat of future material injury based "merely on allegation, conjecture or remote possibility". The analysis of threat of material injury under Article 3.7 has a stronger forward-looking nature than the likelihood of injury analysis under Article 11.3. In this regard, the Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews* has found that the "imminent" timeframe under Article 3.7 does not apply to sunset reviews. However, the Appellate Body in *US – Softwood Lumber VI (Article 21.5 – Canada)* also found that the Article 3.1 is an "'overarching provision[s]' that reinforce elements of Article 11 of the DSU by imposing certain 'fundamental' obligations' … that determinations of injury, *including threat of injury*, be based on positive evidence and an objective examination of the specific factors set out in these provisions" (emphasis added), and Articles 3.1 and 3.7 "enjoin a panel to scrutinize carefully the inferences and explanations of the investigating authority in order to ensure that any projections or assumptions made by it, as to likely future occurrences, are adequately explained and supported by positive evidence on the record". Article 11.3 and 3.7 thus have a parallel relationship to Article 3.1. Under both Article 11.3 and Article 3.7, speculation without positive evidence is not allowed, as the authority must make a forward looking "determination", and all such determinations must be based on "positive evidence" under Article 3.1. The phrase "not merely on allegation,

conjecture or remote possibility" is helpful context for understanding how an authority should approach a forward looking determination based on "positive evidence".

13. Therefore, the forward-looking nature does not excuse the likelihood-of-injury determination from being based on the objective examination and positive evidence, and a sufficient factual basis that allows the reasoned and adequate conclusion. Rather, in light of the forward-looking nature, the likelihood-of-injury determination must be based upon proper inferences from the most recent relevant past and supersede the prior determinations, and thus must reflect the updated market situation for the current POI. In this regard, the investigating authority cannot passively rely on the findings of the previous proceeding without examining whether such previous findings actually apply to the POI of the review at issue. In other words, the historical factual basis provided by the prior proceedings must be updated to reflect the current market realities. Moreover, the investigating authority must be open to a possibility that the fact finding in the prior proceedings was not accurate when such possibility can be inferred from the market realities currently before the investigating authority.

14. For this purpose, if the investigating authority properly finds that there has not been any meaningful change in the factors and circumstances that supported the finding in a previous proceeding and that there is no basis to consider that such prior finding was not accurate when made, such finding could form the basis for an affirmative determination in a subsequent sunset review. On the other hand, if an investigating authority finds a meaningful change from a previous proceeding, the investigating authority cannot rely on the finding from such previous proceeding as such, even if the finding may have been accurate at the time it was made. In such cases, the extent to which the investigating authority can rely on a previous finding may depend on the degree of the changes since the previous proceeding. If, for example, there have been substantial changes in multiple factors that supported the previous finding, the investigating authority would only be able to rely on the previous finding to a limited extent. It is even possible that the investigating authority could not sufficiently assess the entire effect of such changes, thus eliminating the ability to rely on any aspect of such previous finding. In such cases where an investigating authority cannot determine the relevance of a previous finding to a current proceeding, the investigating authority must examine the current status of the market and make new findings, rather than examining what has changed from the previous proceedings.

3. Relevancy of Articles 3.2, 3.3 and 3.5 of the Anti-Dumping Agreement in Sunset Reviews

15. Japan also considers that, as Article 3 and Article 11.3 are both based on the fundamental principles established by Article VI of the GATT 1994, Articles 3.2, 3.3 and 3.5, while not being directly applicable in sunset reviews, still constitute an important part of the context for understanding the likelihood-of-injury determination under Article 11.3 in that they provide certain guidance for what matters are required to be examined under Article 11.3. When properly viewed in context, Article 11.3 only provides that the investigating authority has flexibility in the steps involved and the evidence to be examined beyond those set forth in the various subparagraphs of Article 3. And even though the investigating authority has somewhat more discretion as to its approach under Article 11.3, that discretion does not allow it to ignore the important function of the analytical framework under Article 3.

16. The Appellate Body's findings confirm this understanding. The Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews* found that "[c]ertain of the analyses mandated by Article 3 and necessarily relevant in an original investigation may prove to be probative, or possibly even required, in order for an investigating authority in a sunset review to arrive at a 'reasoned conclusion'". The Appellate Body in the same case states that "factors such as the volume, price effects, and the impact on the domestic industry of dumped imports, taking into account the conditions of competition, may be relevant to varying degrees in a given likelihood-of-injury determination", and that "[a]n investigating authority may also, in its own judgement, consider other factors contained in Article 3 when making a likelihood-of-injury determination".

B. Issues Related to the Analysis of the Korean Investigating Authorities

17. With regard to the substantive issues of the Korean Investigating Authorities' analysis, Korea has been unable to explain the serious flaws in the Korean Investigating Authorities' decision to cumulatively assess the effects of imports from Japan, India, and Spain; their consideration (or lack

thereof) of the effects of factors other than the product under investigation, their analysis of the price and volume effects of the product under investigation, and their analysis of production capacity.

18. While the final likelihood-of-injury determination was based on four major findings, namely: (a) a volume effects analysis, (b) a price effects analysis, (c) the unused export capacity, and (d) the trade remedy measures in other countries, because of the serious flaws in the aforementioned issues, each of the four major bases for the determination has serious deficiencies. Structural defects in even one of the four pillars would bring down Korean's flimsy structure, and here all four of the pillars are defective. Thus, the Korean Investigating Authorities' affirmative likelihood-of-injury determination, even in the totality of evidence, is not at all based on positive evidence and an objective examination, nor reasoned or adequate.

1. The Korean Investigating Authorities' Decision to Use Cumulative Assessment Does Not Comport with the Requirements of Article 11.3

19. Korea essentially argues that because Article 3.3 of the Anti-Dumping Agreement does not apply *per se* to sunset reviews, the Korean Investigating Authorities were not required to ensure that their use of cumulative assessment was appropriate in light of the conditions of competition between the domestic like products and the product under investigation and between the product under investigation from different subject countries, despite the fact that Korea has also admitted that "whether imports are 'in the market together and competing against each other'" may need to be examined when relying on cumulative assessment.

20. However, although Article 3.3 does not apply *per se* to sunset reviews, the requirements contained within it may need to be satisfied in a sunset review regardless, depending on the factual circumstances of the case, as an investigating authority must ensure that the injury to the domestic industry is not being falsely attributed to the product under investigation from a particular country, whether or not it chooses to cumulatively assess the effects of imports from multiple countries. Otherwise, the investigating authority cannot determine, in accordance with the requirements of Article 11.3, that the expiry of the anti-dumping duty on products from a certain country would be likely to lead to the continuation or recurrence of injury to the domestic industry.

21. Specifically, if the products have no substantial overlap in their competitive relationships, that is to say, if the products from a subject country do not substantially compete with the domestic like products or the products from other subject countries, the impact of the products from that country on the domestic industry as a whole may not reach the level of "material". Thus, if the evidence and arguments before the investigating authority indicate the lack of substantial competition between them, it needs to examine whether a sufficient competitive relationship can be found in spite of such evidence and arguments, in order to remove the risk of false attribution.

22. It should also be noted that Korea admits that "whether imports are 'in the market together and competing against each other'" may need to be examined when relying on cumulative assessment. Moreover, the statement in the OTI's Final Report that the "competitive market environment at the time of the second sunset review has not yet changed" at least shows that the Korean Investigating Authorities also understood that they were required to find that subject imports are "competing against each other" in order to use cumulative assessment.

23. Japan has demonstrated that the finding of and evidence before the Korean Investigating Authorities in this case show that the products imported from Japan were constantly and substantially higher priced than the domestic like products and the products imported from India, and that the three countries' products had different product mixes in terms of the steel grades they contained. Thus, it was highly likely that the imports from Japan overall do not substantially compete with either of the domestic products overall or the imports from India overall. However, the Korean Investigating Authorities made a baseless assumption that all of the Japanese, Korean, and Indian products could be deemed homogeneous without addressing the findings and evidence that suggest otherwise, which left open the possibility of falsely attributing the likelihood of injury to the domestic industry to the imports from Japan.

2. The Korean Investigating Authorities' Analysis of Factors Other than the Product Under Investigation Does Not Comport with the Requirements of Article 11.3

24. Korea argues that the Korean Investigating Authorities were under no obligation to consider factors other than the product under investigation because they were under no obligation to examine causation and non-attribution in the sunset review, but that even if there was such an obligation, the Korean Investigating Authorities did examine the other factors raised by Japan: third-country imports; changes in the price of material costs; and demand in domestic and export markets.

25. However, the need to analyse other factors is directly derived from the fundamental principle under Article VI of the GATT 1994 that anti-dumping duties can be imposed on imports from a certain Member only if dumping from that Member causes material injury to the domestic industry, which is confirmed and embodied in Article 11.3 of the Anti-Dumping Agreement. Indeed, the Korean Investigating Authorities in this case made explicit findings that the current injury to the domestic industry appeared to be caused by the factors Korea mentioned above, which would be likely to remain highly relevant upon the expiry of anti-dumping duties. Nevertheless, there is no evidence on the record at all that they actually took into account these or any other factors, other than the product under investigation, in making their likelihood-of-injury determination, which means that all of Korea's arguments before the Panel are *ex post* arguments.

26. In addition, even the Korean Investigating Authorities' alleged conclusions regarding such factors lack a sufficient factual basis, because of their biased selection of data or other improper analysis that allegedly supports the conclusions.

3. The Korean Investigating Authorities' Analysis of Price Effects and Volume Effects Does Not Comport with the Requirements of Article 11.3

27. Korea argues that the assessment of the volume and price effects of the dumped imports, which are required under Article 3.2, are not required under Article 11.3, and that the Korean Investigating Authorities "did not actually undertake a price effects analysis" in the sunset review at issue. However, it is apparent that the Korean Investigating Authorities did in fact rely upon such analysis in the sunset review at issue, as they stated that, "[w]here the anti-dumping measures are terminated, a steep fall in the price of the dumped imports" would occur, which would "lead to an increase in exports to Korea and weaken the price competitiveness of [domestic] [l]ike products" in their final determination.

28. Japan understands that Article 3.2 does not directly apply to sunset reviews. However, an analysis of the causal nexus between the expiry of the anti-dumping duties and the continuation or recurrence of injury to the domestic industry would logically require an assessment of the volume and price effects of the dumped imports, as is required for the analysis of the causal link, so as to comply with the requirement of Article 3.1 as well as the fundamental principles of Article VI of the GATT 1994, which are confirmed and embodied in Article 11.3. Comparability of imported products with the domestic products, which is required for analysing the volume and price effects of the dumped imports under Articles 3.1 and 3.2, also constitutes an important part of factual context to establish a proper causal nexus under Article 11.3, even if the specific method or manner in which they must be examined may differ between original investigations and sunset reviews. In virtually every case, comparability will be a key part of the positive evidence that should underlie the analysis of the likelihood of injury by the investigating authority as framed by Article 3.1. This is because, if the dumped imports are not comparable with the domestic like products, i.e., if the dumped imports do not interact or compete in the market with the domestic like products, the expiry of the anti-dumping duty against those dumped imports would not logically lead to the continuation or recurrence of injury to the domestic industry from those dumped imports.

29. Korea also tries to justify the Korean Investigating Authorities' statement above, arguing that "if the anti-dumping measure is continuing to affect the volume and price of the dumped imports, it is reasonable and adequate to assume that the volume and the price of the dumped imports will increase and decrease, respectively, upon removal of the measure" and that the record showed that the measure was continuously having an effect on the product under investigation.

30. However, this is a mere assumption without any factual basis and not consistent with the record evidence. Since the imposition of the anti-dumping duties, the market situation has changed

substantially in terms of several factors, including (i) changes in the product mix of the product under investigation which is imported into Korea from Japan, (ii) changes in third country imports into Korea which mean that other countries are now exporting higher volumes of products which compete with the domestic like products, and (iii) changes in the prices of materials. Korea's argument is based on an incorrect presumption that the same market actors would act exactly the same way upon the expiry of dumping as they did prior to the imposition of duties 15 years ago, despite the changes in market conditions.

31. Japan also notes that the Korean Investigating Authorities' assessment of the record evidence that forms the basis for the findings of price and volume effects was non-objective and unreasonable, and always directed to affirmative determination.

4. The Korean Investigating Authorities' Findings and Analysis of Production Capacity Do Not Comport with the Requirements of Article 11.3

a. Examination of the Production and Export Capacities Alone Does Not Suffice as an Analysis of Conditions of Competition

32. To avoid the issues with the Korean Investigating Authorities' price effect and volume effect analysis, Korea argues that the KTC's alleged conditions of competition analysis instead focused on the production capacity of the subject countries' stainless steel bar industries. However, the examination of production capacity and export capacity considers only the supply side of the market, and thus, such examination alone cannot suffice as an analysis of conditions of competition. The Korean Investigating Authorities should have examined the demand side of the market as well, which may include whether certain products are substitutable with other products in the market.

b. The ISSF's Data Was Neither Suitable Nor Reliable for the Sunset Review at Issue

33. In any event, the Korean Investigating Authorities' production capacity analysis cannot be considered reasonable and adequate because it was based on data which was not suitable for the calculation of the production capacity and capacity utilization rate of the product under investigation.

34. The production capacity data from the International Stainless Steel Forum ("ISSF"), which the Korean Investigating Authorities relied upon in making their finding regarding the production capacity of the Japanese producers that responded to the review ("Japanese Respondents"), is not suitable to be used as the production capacity for the product under investigation because the scope of products included within the data includes products other than stainless steel bars, and because both the method of calculation and the source of the data are unknown, all of which do not apply for the Japanese Respondents' data.

35. The ISSF's data was overbroad in that it captured products separate from the product under investigation, namely stainless steel sections. Although Korea argues that the production capacity for products other than the product under investigation should be counted in the production capacity because the capacity is allegedly convertible to that of the product under investigation, such analysis is not reflected in the Korean Investigating Authorities' records and is therefore an *ex post* argument. Such premise for expanding the product coverage to calculate the production capacity was not addressed to the Japanese Respondents in the review procedure either.

36. Furthermore, as mentioned in connection with the Korean Investigating Authorities' analysis of price effects and volume effects, the Korean Investigating Authorities did not examine whether the Japanese Respondents had any incentive to produce additional quantities of the product under investigation because they did not examine whether there was any additional demand that such additional quantities could meet. Additionally, the Korean Investigating Authorities did not analyse whether it was commercially feasible for the Japanese Respondents to convert their facilities which are dedicated to other products.

37. The ISSF's data was further rendered unsuitable by the fact that the Korean Investigating Authorities chose production volume data from another source, the Japan Stainless Steel Association, the product scope of which did not match that of the ISSF's data. Thus, the calculation of the capacity utilization rate involved misalignment between the numerator (i.e. production volume) and the denominator (i.e. production capacity). However, the Korean Investigating Authorities did not consider this or attempt to compensate for it.

38. At the same time, the Korean Investigating Authorities rejected the Japanese Respondents' own data regarding their production capacities, which was specifically calculated to show their capacity to produce the product under investigation. As the Japanese Respondents themselves are the primary source of information about their own production capacity, their information should naturally have been used. However, the Korean Investigating Authorities rejected the data on vague and insufficient bases (which were addressed in Japan's first written submission), and none of the arguments Korea is presenting in the current proceeding in an attempt to explain the rejection is reasonable, as discussed below in section V.B regarding Japan's claims under Articles 11.4 and 6.8 and Annex II. Also as explained in that section, the Korean Investigating Authorities' allegation, that the ISSF's data was necessary because countrywide data was required, is unfounded.

c. The Japanese Respondents Did Not Have Incentives to Utilize the Unused Production Capacity to Increase Their Exports of the Product Under Investigation to Korea

39. Furthermore, even assuming that the conclusion that the Korean Investigating Authorities reached regarding the production capacity had been reasonable and adequately supported, the Korean Investigating Authorities failed to consider whether or not any unused production capacity may actually be used for products to be exported to Korea, because they did not assess whether or not the Japanese Respondents had any incentive to use that production capacity to produce additional quantities of the product under investigation, or whether the Japanese Respondents had any incentive to export additional quantities of the product under investigation to Korea.

40. The incentives of the Japanese Respondents must be examined, in order to connect the production capacity to the likelihood of injury, because if the Japanese Respondents do not produce or ship to Korea additional quantities of the product under investigation, then it could hardly be said that the potential to produce additional quantities alone (with no actual additional production or exporting ever taking place) could lead to the continuation or recurrence of injury to the domestic industry.

41. In this respect, Japan cites as examples of factors which should have been considered, considering the evidence that was before the Korean Investigating Authorities: the fact that the vast majority of the product under investigation which is produced by the Japanese Respondents is consumed in Japan and Japanese demand for the product under investigation is growing; whether there is any demand in Korea for additional quantities of the higher-priced product under investigation that the Japanese Respondents produce; and whether the Japanese Respondents' product under investigation could compete with other products which could also meet that additional demand, such as the imports from China and Chinese Taipei.

IV. Article VI:6(a) of the GATT 1994

42. In its first written submission, Korea takes issue with Japan's claims under Article VI:6(a) of the GATT 1994, arguing that Japan's panel request does not specify which of the obligations under Article VI:6(a) would be violated and accordingly, that the claim is not within the terms of reference of the Panel. Korea's second written submission merely repeats the arguments of its first written submission with no further elaboration.

43. Japan disagrees with Korea's position. Article 6.2 of the DSU provides only that a panel request must "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly" and that Japan's panel request specifies the relevant paragraph of Article VI of the GATT 1994 as "6(a)", and states that "Korea is levying the antidumping duties without establishing that the effect of the dumping is such as to cause or threaten material injury to an established domestic industry", such that the issue is clear and Japan's claim meets the standards.

V. Articles 11.4 and 6.8 and Annex II of the Anti-Dumping Agreement

44. Korea makes multiple arguments as to why the Korean Investigating Authorities' determination did not present any problems under Article 11.4 and 6.8 and Annex II. First, Korea puts forth several arguments as to why the provisions of Article 11.4 and 6.8 and Annex II do not apply. Second, Korea argues that even if the Korean Investigating Authorities had resorted to facts available, they did so properly. However, these arguments are not meritorious.

A. The Provisions of Articles 11.4 and 6.8 and Annex II Apply

45. Korea argues that the provisions of Articles 11.4 and 6.8 and Annex II apply only when the necessary information is specific to interested parties and that, in the present case, the necessary information was the countrywide production capacity of Japan. However, first, there is no textual basis in Article 6.8 or Annex II for any change in the applicable requirements for the use of facts available depending on the type of information at issue. Second, during the sunset review, the Korean Investigating Authorities never indicated that they were seeking or examining information on countrywide production capacity. Rather, the Korean Investigating Authorities' questionnaire to the Japanese Respondents explicitly requested the individual exporter's own production and purchase volume of the product under investigation.

46. With regard to Korea's argument that the provisions of Article 6.8 are not mandatory, Japan explained that Article 6.8 does not indicate that compliance with its provisions are optional, if the investigating authorities have chosen to use facts available. The choice presented to investigating authorities is to either use direct evidence provided to it *or* to use facts available *and* comply with the provisions of Article 6.8 and Annex II.

47. Nor could the Korean Investigating Authorities escape from the requirements of Article 6.8 and Annex II by simply avoiding the term "facts available" in discussing their analysis. The inquiry is not governed by the label that the investigating authorities attach to their actions. Here, where the Korean Investigating Authorities have rejected the data of the Japanese Respondents regarding their production capacity in order to use the production capacity data provided by another source, the provisions of Article 6.8 and Annex II apply.

B. There Were No Faults with the Japanese Respondents' Data Such as to Allow Its Rejection in Favour of Facts Available

48. Korea argues that the information provided by the Japanese Respondents was not "verifiable", was not "submitted so that it [could] be used without undue difficulties", and was not supplied in a timely fashion, for various reasons, and that as a result, the use of the ISSF's data is consistent with Articles 11.4 and 6.8, and Paragraph 3 of Annex II, of the Anti-Dumping Agreement. In its second written submission, Japan explained why each of these reasons is not a justification for the use of facts available, in addition to the fact that most of them were never mentioned by the Korean Investigating Authorities during the sunset review proceeding or in their written reports and are therefore impermissible *ex post* explanations.

49. First, Korea has not shown why the countrywide production capacity was critical information separate and distinct from the production capacity data it requested from the Japanese Respondents. The Japanese Respondents represented the production of the overwhelming majority of the product under investigation, with only a small fraction being produced by other producers. The figures for countrywide production capacity and the Japanese Respondents' aggregated capacity would not have been particularly different. Thus, the limited remaining production capacity of other producers can be either disregarded or extrapolated from other existing information.

50. Second, although Korea argues that "raw data" was not provided, the Japanese Respondents answered each request for data made by the Korean Investigating Authorities, although the Korean Investigating Authorities did not explain the precise content and nature of the allegedly necessary "raw data". The record does not show that the Korean Investigating Authorities expressed dissatisfaction with the data they received.

51. Third, the Japanese Respondents submitted their information within a "reasonable period", giving the Korean Investigating Authorities sufficient time to examine the submitted data.

52. Fourth, the difference between the ISSF's data and the Japanese Respondents' data is likely to have derived from the difference in product coverage between the two datasets, and the ISSF's data is less reliable. In addition, the alleged variations in the methodologies for the production capacity calculation applied by each of the Japanese Respondents do not undermine the reliability of their data. Stainless steel bar production involves a standard process which always includes secondary processing, but the specific type of secondary processing may vary from company to company. The Japanese Respondents' data simply reflected this reality, and the Japanese

Respondents thoroughly explained this to the Korean Investigating Authorities with the formulas used in each company's calculation.

53. Lastly, the Japanese Respondents were fully cooperative with the Korean Investigating Authorities' requests for information regarding their production capacity and acted to the best of their abilities. Contrary to Korea's argument, they never prevented or objected to on-site verification.

C. The Korean Investigating Authorities Based Their Finding on Secondary Source Information Without Special Circumspection

54. Korea argues (i) that the Japanese Respondents' data is not "primary source" information in terms of the countrywide production capacity of Japan and (ii) that the ISSF's data is not "secondary source" information, and the information was relevant, reliable, and the best information. Korea asserts that, accordingly, the Korean Investigating Authorities' use of the ISSF's data is consistent with Paragraph 7 of Annex II of the Anti-Dumping Agreement.

55. In this regard, Japan points out that information from the Japanese Respondents is the most probative information. What is ultimately important is the source's proximity to the original source of the relevant information, and thus, the primary source of information about industry capacity is data from the individual firms that make up that industry, rather than the ISSF. Korea's assertion that the ISSF is reliable as an institution does not substantiate the reliability of the production capacity data compiled by the ISSF to be used in the sunset review at issue.

VI. Articles 11.4 and 6.9 of the Anti-Dumping Agreement

56. The main points of Korea's arguments are (i) that the legal standard under Article 6.9 allows the disclosing party to meet the disclosure obligations by providing a narrative description of the facts, and that such obligations are limited by the confidentiality obligations set out in Article 6.5, (ii) that the Korean Investigating Authorities disclosed the essential facts sufficiently in KTC's Resolution of Final Determination and OTI's Final Report which were issued before the final determination, and (iii) that the Japanese Respondents' right to a defense has not been violated because Japan has not brought a claim under Articles 6.2 or 6.4 of the Anti-Dumping Agreement.

57. However, where the Korean Investigating Authorities provided narrative descriptions of the redacted information at issue, those descriptions were not sufficient to allow the Japanese Respondents to understand the content of the redacted information sufficiently to defend their interests. In addition, the Korean Investigating Authorities often did not provide any such narrative description.

58. Furthermore, the confidentiality obligations under Article 6.5 do not limit the disclosure obligations under Article 6.9. Rather, as the Appellate Body confirmed in *Russia – Commercial Vehicles*, in an instance where confidential information constitutes essential facts, it need not be directly disclosed, but the investigating authorities must instead disclose sufficient non-confidential summaries of that information.

59. Additionally, the alleged disclosure of the essential facts through the reports of the Korean Investigating Authorities was not sufficient because it was not made before the "final determination", but rather the reports Korea refers to actually comprise the final determination. Moreover, even if the final determination issued by the KTC could be considered a part of the disclosure of the essential facts, OTI's Final Report and KTC's Resolution of Final Determination do not sufficiently disclose essential facts regarding: the alleged recurrence of dumping; unused production capacity and export capacity; the Korean Investigating Authorities' use of facts available; the Korean Investigating Authorities' use of cumulative assessment; the effect of third-country imports on the price of the domestic like products; the effect of the product under investigation on the price and volume of the domestic like product sales; the trends in the capacity utilization rates; operating profit ratio of the domestic industry; and market share of third-country imports. Accordingly, OTI's Final Report and KTC's Resolution of Final Determination cannot remedy the failure to disclose essential facts.

60. Finally, the absence of a claim under Article 6.2 or 6.4 of the Anti-Dumping Agreement does not have any bearing on whether or not an investigating authority has met its disclosure obligations

under Article 6.9. A country is not obligated to bring every claim that it has. Furthermore, past findings of panels and the Appellate Body distinguish the obligations of the investigating authorities under Articles 6.2 or 6.4 from those under Article 6.9.

VII. Articles 11.4, 6.5, and 6.5.1 of the Anti-Dumping Agreement

A. The Korean Investigating Authorities Treated Certain Information as Confidential Even Though There Was No Good Cause Shown

61. Korea argues that the Korean Investigating Authorities did not fail to ensure that good cause for confidential treatment of information was shown, because under the general practice of anti-dumping investigations in Korea, the submission of redacted information is deemed to be an implicit assertion by the submitter that the redacted information constitutes "confidential information" which falls within one of the five categories of information that must be treated as confidential specified in Article 15 of the Enforcement Rules of the Customs Act of Korea ("Enforcement Rules"), a domestic Korean law, and that such is a sufficient showing of good cause.

62. This does not suffice to satisfy the obligations under Article 6.5 regarding a showing of good cause, for several reasons. First, it is for the party requesting confidential treatment of its information to furnish reasons justifying such treatment to the investigating authority. Therefore, whether the wording of the Enforcement Rules suggests any good cause for confidential treatment is irrelevant unless the party explicitly relies on such wording to justify confidential treatment of its information. Second, some of the categories of information set forth in Article 15 of the Enforcement Rules are too general to indicate good cause, and as a result, even if the Applicants' mere act of redacting data was intended to indicate a claim that it fell within one of the categories listed in Article 15 of the Enforcement Rules, such an indication alone could not demonstrate good cause. Third, there is nothing in the record of the present case demonstrating that the Korean Investigating Authorities analysed the question of which one of the categories set forth in Article 15 of the Enforcement Rules the redacted information would fall within.

B. The Korean Investigating Authorities Failed to Require the Submitters of Redacted Information to Furnish Adequately Detailed Non-Confidential Summaries

63. In the Applicants' submissions in the sunset review at issue, the allegedly confidential figures have been: (i) completely deleted without any ranges or percentage rates that sufficiently summarize the redacted figures; (ii) replaced with a narrative which does not provide any meaningful indication of the redacted information; or (iii) redacted with a yearly percentage change which does not sufficiently summarize the substance of the redacted information. By not requiring the Applicants to furnish non-confidential summaries of those allegedly confidential figures "in sufficient detail to permit a reasonable understanding of the substance" thereof, the Korean Investigating Authorities failed to satisfy their obligations under Articles 11.4 and 6.5.1.

VIII. Articles 12.3, 12.2, and 12.2.2 of the Anti-Dumping Agreement

64. Korea is mistaken in its understanding regarding Japan's argument when Korea argues that Japan demands a second disclosure of the same facts that had been disclosed pursuant to Article 6.9. Japan is not arguing that all underlying data that was considered by the KTC must be disclosed in the public notice, but rather argues that all "relevant" information was not provided in "sufficient detail".

65. Under Articles 12.2 and 12.2.2, when there is a matter that must necessarily be resolved by the investigating authority to be able to reach a determination in the course of imposing a definitive anti-dumping duty, such matter is "material" and has "led to the imposition of final measures", and the investigating authority is required to include its findings and conclusions, as well as all relevant information, regarding such matter in the public notice.

66. Japan has pointed out that although Korea states that the Korean Investigating Authorities' published reports provided sufficient disclosure, Korea did not explain how the documents did so. Korea has not provided any new arguments regarding these Articles in its submissions after the first written submission.

ANNEX B-4

SECOND INTEGRATED EXECUTIVE SUMMARY OF
THE ARGUMENTS OF KOREA

I. INTRODUCTION

1. This dispute concerns Korea's third sunset review of the anti-dumping measures on imports of stainless steel bars ("SSBs" or "dumped imports") from Japan, India, and Spain.

2. The original anti-dumping measures were taken by the Ministry of Finance and Economy (a predecessor of the Ministry of Strategy and Finance) on 30 July 2004. The imposition of the anti-dumping duties was extended by the Ministry of Strategy and Finance ("MOSF") firstly in February 2010 and secondly in October 2013, through the first and second sunset reviews, respectively. On 2 June 2017, in the third sunset review, the MOSF decided to extend the imposition of the anti-dumping duties for a period of 3 years ("Final Determination").

3. The MOSF's Final Determination was based on the Final Resolution of the Korea Trade Commission ("KTC") and the Final Report of the Office of Trade Investigation ("OTI"), a subsidiary organ of the KTC.

II. PRELIMINARY RULING REQUEST PURSUANT TO ARTICLE 6.2 OF THE DSU

4. Korea submits that Japan's request for the establishment of a panel ("RFE") is inconsistent with the requirements of Article 6.2 of the DSU since it fails to identify the "specific measures" challenged and includes claims that were not covered by its request for consultations.

5. In the RFE, Japan refers to "the measures" by Korea, but never identifies the specific measures in accordance with Article 17.4 of the Anti-Dumping Agreement. However, it is well-established that a panel request must identify, as the specific measure at issue, one of three types of anti-dumping measures, namely either a definitive anti-dumping duty, the acceptance of a price undertaking, or a provisional measure. A panel request that only identifies a sunset review under Article 11 must fail to meet this obligation.

6. In Korea, the sole authority to impose anti-dumping duties is vested with the MOSF, and it is the MOSF's final determination that constitutes both the 'final determination' and 'decision to apply definitive measure' under Article 6.9 of the Anti-Dumping Agreement. Proper weight must be given to the DSU Article 6.2 requirement to identify "the *specific* measures at issue", which was intentionally worded differently from the DSU Article 4.4 requirement to simply identify "the measures at issue". Accordingly, Korea submits that Japan's Panel Request fails to identify the specific measures at issue in accordance with Article 6.2 of the DSU and 17.4 of the Anti-Dumping Agreement and, on that basis, all of Japan's claims are outside the Panel's terms of reference. In the alternative, among others, Korea submits that the RFE unduly expanded on matters identified in its request for consultation, and thus includes claims for which no proper consultations were held in violation of Articles 4.4 and 6.2 of the DSU and Article 17.3 of the Anti-Dumping Agreement.

III. LEGAL STANDARDS

7. The applicable disciplines in sunset reviews are set forth in Articles 11.3 and 11.4 of the Anti-Dumping Agreement. It is well-established that the 'nexus' (but not the 'causal' nexus as falsely contended by Japan) that needs to be demonstrated under Article 11.3 by the authority is between the *removal* of the anti-dumping measure, on the one hand, and the *likelihood* of injury and dumping, on the other. Thus, while factors relating to a past period (e.g., POR) carry indicative value, the authority's task in a sunset review is to examine whether there is a sufficient factual basis to conclude there is a likelihood (or "probability") of *future* continuation or recurrence of injury *upon removal of the anti-dumping measure* based on the totality of the relevant facts and substantiated arguments. In addition, authorities are only required to examine and respond to arguments by the interested parties that are properly substantiated, and not merely assertions or allegations.

8. Where, as here, the anti-dumping measure has immediately and continuously exerted remedial effect by suppressing the volume and inflating the price of the dumped imports throughout the course of the measure's imposition, then it is only reasonable and adequate to assume that the volume and the price of the dumped imports will increase and decrease, respectively, upon removal of the current measure. Tellingly, neither the Japanese respondents nor Japan has addressed this important element in the Korean authorities' likelihood-of-injury determination. Japan's only argument is that the Korean authorities neglected to consider the market change since the original measure, but this naked assertion is belied by the authorities' express finding that the competitive environment in the Korean market remained largely unchanged since the original investigation and the second sunset review. In contrast, other than by relying on the demonstrably arbitrary and groundless distinction between the "special" and "general-purpose" steels, Japan has totally failed to refute this specific and important finding by the Korean authorities.

9. In contrast to Article 3 of the Anti-Dumping Agreement, under which various methodological guidance is provided with respect to each step of injury-analysis, Article 11.3 does not prescribe *any* specific methodology for making a "likelihood-of-injury" determination, and it does not identify particular factors that must be taken into account in such a determination.

10. It is also worth noting that the causal link between the dumped imports and the domestic industry that was established in the original investigation need not be established anew in the sunset review. Indeed, the Appellate Body has underscored that original investigations and sunset reviews are distinct processes with different purposes, and thus, "it is reasonable to assume that … the causal link between dumping and injury, established in the original investigation, would exist". It follows that all of the "building blocks" for the causal link, i.e. the volume, price effect (including the price comparability), and impact on domestic industry analyses, need not be established anew in a sunset review. It naturally also means that the price developments during the past period cannot be determinant for the projection of the *future* price effect in the "forward-looking" analysis, where fundamental changes in pricing matrix is destined to occur upon termination of the current measure.

11. In addition, the Appellate Body has consistently found that cumulation is not the exception, but is rather what would "normally" happen in injury proceedings. Further, the Appellate Body in *US – Oil Country Tubuluar Goods Sunset Reviews*, while rejecting the notion that Article 3.3 applies to Article 11.3, essentially held that cumulation is permitted in a sunset review as long as products from different sources are in the same market together and competes with the like domestic product. Japan's claim on cumulation is flawed in every way.

12. Next, Korea recalls an important WTO jurisprudence under which a breach of Article 11.3 cannot be found based on certain intermediate findings of the investigating authority, but may be found only when it has been clearly established that the authority's overall likelihood-of-injury determination, when holistically reviewed based on the totality of circumstances, cannot be sustained. Indeed, WTO jurisprudence confirms that, where determinations are based on multiple considerations, any alleged errors must be sufficiently material to undermine the objectivity of the entire assessment. This is all the more true in the context of Article 11.3, which does not require any specific intermediary findings, but simply requires that there be a sufficient factual basis for the likelihood determination.

13. It goes without saying that the burden to establish a *prima facie* case that an error is sufficiently material to the overall determination rests *entirely* upon the complaining party.

14. Regarding the burden of proof, Korea must stress that such burden also attaches to the complainant (especially) whenever they raise the flag of *ex post* rationalization. Whether such argument is raised against a piece of evidence or certain reasoning submitted by the responding party, the complainant bears the burden of proof, which can only be met upon establishing a *prima facie* case. The Panel, as an objective reviewer of the case, must not apply double standard of proof by being lenient with the complainant's argument and strict with the responding party's argument. If anything, the Panel must respect the responding party's entitlement to the presumption of good faith compliance.

15. Finally, Article 17.6 of the Anti-Dumping Agreement highlights that the panel is not the trier of fact in anti-dumping disputes but is only to review whether the determination of the investigating authority was objective and unbiased. It importantly specifies that if the evaluation was unbiased

and objective, the evaluation shall not be overturned, even though the panel might have reached a different conclusion.

16. Put differently, the Panel's task is *not* to determine whether it *would* have reached the same result as the Korean authorities. Rather, the Panel's task is to determine whether a reasonable, unbiased authority, looking at the same evidences presented before the Korean authorities, "could have" – *not* "would have" – reached the same conclusion that the Korean authorities reached in the underlying review. Thus, the Panel must not substitute the authorities' findings with that of its own, or review the reasonableness of the authorities' findings through a prism of its own creation.

IV. RELEVANT CONTEXT OF THE UNDERLYING THIRD SUNSET REVIEW

17. Korea originally imposed anti-dumping measures on SSBs from Japan in 2004 and these duties were extended twice through the first and second sunset reviews. In these prior proceedings, similar issues were raised and they were addressed in the same manner as in the underlying review, without challenge by Japan. The third sunset review, therefore, was derived from and part of a string of connected and sequential determinations. Therefore, factual and analytical findings from prior proceedings lend important contextual support to the authorities' findings in the underlying review.

18. It must be noted that the Korean authorities are under a statutory obligation to confirm the competitive relationship not only between the dumped and domestic products, but also among the dumped imports before proceeding to assess the impact of the dumped imports cumulatively. Thus, the authorities expressly stipulated in their previous investigative reports that the competition exists between the dumped and domestic products, and among the dumped imports. In the underlying review, the Korean authorities also complied with this statutory obligation and expressly found that the competitive environment remained unchanged since the original investigation or second review.

19. In arriving at such finding, the Koran authorities properly conducted extensive analysis based on various factors such as customer survey, customer evaluations, grade specification under internationally-recognized certification standards, manufacturing processes, distribution channels, price, functions and purported uses, etc. Japan attempts to unduly limit such extensive analysis as the basis for the Korean authorities' findings on the "likeness" exclusively, and argue that a competitive relationship cannot be presumed based on the finding of "likeness" only.

20. As a preliminary matter, a finding of "likeness" necessarily establishes a presumption of competitive relationship between the products that are alike. The Panel must not fall into the trap of inadvertently conflating the Article 3.2 requirement to ensure the price comparability with the presumption of competition, which are two distinct concepts. More importantly, the Korean authorities did not base their "finding" on the "competitive relationship" on their "likeness finding" as mischaracterized by Japan. Rather, as *expressly* and *separately* described by the investigative reports from the original investigation, the first, second, and the underlying third sunset reviews, the Korean authorities rendered an *independent finding* on the "competitive relationship" as specifically required under its own applicable laws. Japan's only argument in this regard is that the authorities erred by finding the "competitive relationship" based only on their finding of "likeness", which is clearly misplaced. The authorities did not presume, but explicitly found, the required competitive relationship through extensive analysis based on various factors.

21. This is not to mention that denying such competitive relationship would contravene the prevailing reality. Indeed, SSBs are internationally traded commodities, which share physical similarities and fungibility in use (thus the market competition). SSB products are a special-purpose steel grade among steel bars (not the arbitrary "special" steel distinction alleged by Japan), and SSBs products generally compete with each other on the basis of their grades or specifications. Because SSBs is an internationally traded commodity, traders rely on internationally-recognized designation standards when placing orders. Thus, SSB orders are placed based on designated grades or specifications, and as long as the ordered products are certified for that certain grade or specification, the fungibility between the products are presumed and the products are deemed to be in a competitive relationship.

22. In addition, SSB production facilities have high adaptability for a wide-range of steel products, without a need for further investment in or alternation of the facilities. It is well known that SSB production facilities not only can produce all kinds of SSB products with different grades, but can also produce other steel products that require similar surface treatment almost immediately upon

order. The industrial practice for SSB is to maintain only minimal amount of inventory, as vast majority of SSB sales are produced upon order. The Japanese respondents explicitly confirmed that this was their case as well, i.e. that SSB products were manufactured and supplied to Korean customers on an 'on-demand basis', and thus that they do not maintain inventory in principle. A corollary of this undisputed fact is the high adaptability of SSBs production facilities, where production can be tailored to customer demand and specifications. In other words, SSB producers can modify easily and quickly their facilities to produce any grade of SSB as long as there is demand. Japan's refusal to accept (while not being able to deny) this prevailing reality is revealing.

23. Moreover, the Japanese respondents' participation in the underlying review was highly selective. Even Japan is forced to admit that the Japanese respondents refused to participate in the dumping proceeding. In the injury proceeding as well, the Japanese respondents submitted various unsubstantiated allegations that were also self-contradictory. In fact, most, if not all, of the allegations by the Japanese respondents that are being examined by the Panel in this dispute were unsubstantiated and/or internally inconsistent. Korea has also demonstrated how every attempt by Japan at explaining or *post hoc* justifying such fundamental inconsistency and errors fatally fails. Such a general lack of veracity must not be exonerated or otherwise disregarded by the Panel.

24. Finally, Korea has demonstrated that the decision to extend the SSB measure in the third sunset review was based on a sufficient factual record and involved an objective examination of the record facts. Specifically, the Korean authorities' determination of a likelihood-of-injury was reasonable, in line with standard practice, and based on *multiple considerations* which together formed the basis for the determination. However, Japan builds its entire claim under Article 11.3 on a few elements of these multiple considerations *in isolation*, namely in particular (i) the distinction between the so-called "general-purpose" and "special" steel, and (ii) the use of ISSF data over the respondents' data.

25. These isolated allegations are neither legally relevant nor supported by the record facts. Nor has Japan demonstrated that they are material to the validity of the overall likelihood-of-injury determination. Clearly, Japan *did not even attempt* to show such materiality in this dispute.

V. LEGAL ARGUMENT

V.1. CLAIM 1: JAPAN'S CLAIM THAT KOREA ERRED IN ITS DETERMINATION THAT THE EXPIRY OF THE SSB DUTIES WOULD LIKELY LEAD TO RECURRENCE OF INJURY IS WITHOUT MERIT

26. Japan advances four specific arguments in support of its claim under Article 11.3 that the authorities' likelihood-of-injury determination is flawed. However, all four such arguments are without merit.

V.1.1. WHETHER THE AUTHORITIES' CUMULATIVE ASSESSMENT WAS IMPROPER

27. Korea considers that this claim is without merit. In the absence of any specific legal requirement in Article 11.3 in respect of cumulation in sunset reviews, Japan fails to demonstrate that there was an insufficient factual basis for Korea's decision to cumulate imports, or that the decision did not rest on positive evidence and an objective examination. Rather, there was a sufficient factual basis for Korea's decision to cumulate imports from Japan, India, and Spain.

28. Indeed, the Appellate Body in *US – Anti-Dumping Measures on Oil Country Tubular Goods* clearly found that cumulative assessments in sunset reviews is permissible provided such a decision is supported by positive evidence and has a sufficient factual basis that the imports are essentially 'in the market together and competing against each other'. The authorities found that all dumped imports, regardless of origin, are in competition with each other and with the like domestic products. The covered products were produced by all of the subject countries as well as Korea, were fungible, were present in the Korean market during the review period, and used the same distribution channels.

29. During the underlying review, the Japanese respondents essentially argued that the dumped imports from Japan must be assessed separately because they are not in competition with the imports from India or the like domestic products, which in turn was based on their allegation that the dumped imports from Japan was predominantly composed of *higher priced* "special" steel,

whereas the Indian imports and the like domestic products are composed of *lower priced* "general-purpose" steel.

30. First, a price differential between two products does not *ipso facto* deny the competitive relationship. Accepting such a misguided premise would be tantamount to denying the prevailing reality in *any* market, where corresponding products with different prices *always* compete with each other over the same *market share*. Also, price differential is not even an element for the Article 3.3 "condition of competition", a requirement that does not even apply to sunset reviews under Article 11.3. Simple price differential, without more, cannot refute the competitive relationship that was explicitly found to exist. This is all the more so given that a likelihood-of-injury determination in a sunset review must be based on a forward-looking analysis, under which authorities are required to draw a reasonable speculation as to a future scenario when the prices would *necessarily drop* due to the removal of the anti-dumping duties, probably followed by further price drop triggered by influx of subject imports and heightened competition that follows. As such, current price differential is even less meaningful in a sunset review than in an original investigation.

31. Second, the Korean authorities considered that the products are in competitive relationship based on various factors such as "physical characteristics, manufacturing process, distribution channel, purpose of use, consumer's evaluation, etc." between the dumped and domestic products. The authorities also confirmed that the ratio of "special" and "general-purpose" steels from Japan and India, and those produced by the domestic industry, remained at similar proportion since the second POR. The authorities thus reasonably considered that the "competitive market environment at the time of the second sunset review has not changed", and concluded that such differences in proportion cannot be a basis to find lack of "competitive relationship" between the products.

32. Third, the Japanese respondents' self-serving allegation that they have shifted away from producing "general-purpose" steel was unsubstantiated, and was refuted by the record fact. The respondents argued without any evidence that they (and all Japanese SSB producers, for that matter) no longer produce or sell "general-purpose" steels to Korea, alleging that they had exported [[***]] tons of "general-purpose" steels to Korea in 2015. This unsubstantiated allegation was proven to be false by the official customs clearance data of Korea, as their sale of "general-purpose" steel actually increased between 2014 and 2015, even after giving maximum benefit of doubt to their allegation by treating all unclassifiable imports as "special" steel. Thus, the respondents' another groundless assertion that they have shifted away from producing and selling "general-purpose" steels to Korea also lost any merit. At the same time, even if the respondents' allegations were true (*quod non*), that in and of itself does not establish that they cannot or will not resume selling the "general-purpose" steels to Korea even after the anti-dumping measure is lifted and incentives are thus presented.

33. Fourth, the respondents' distinction between the so-called "general-purpose" and "special" steels was simply groundless; to make matters worse, the respondents unduly changed the definition of "general-purpose" steel three times during the review, without any justification. Their alleged export volume in 2015 also changed at least twice (again without any justification), and this was *not* due to the change in definition as they had alleged higher export volume of "general-purpose" steel when they defined only grade 304 as "general-purpose" (i.e., [[***]] tons) than when they defined both grade 304 and 316 as "general-purpose" (i.e., [[***]] tons). Their alleged export volume was proven to be false, and when asked for justification, the respondents simply withdrew the allegation about ceasing to export "general-purpose" in 2015, again without providing any justification. The disingenuous nature of the respondents' responses in the underlying review is further confirmed by their own subsequent statement to the USITC that the U.S. market is not their target, as their SSB export is focused on the Asian markets with Korea being their top three SSB export markets.

34. Fifth, it must be noted that Japan's arguments before the Panel have been inconsistent and ever-changing. Originally, Japan argued that the cumulation was flawed because the imports from Japan was predominantly composed of higher-priced "special" steel, whereas the Indian and domestic products were predominantly composed of lower-priced "general-purpose" steel. Upon learning that the "special" steels are actually lower-priced than "general-purpose" steels, and learning that the respondents' (eventually abandoned) allegation about the [[***]] export volume in 2015 contradicts the official customs clearance data, Japan quickly changed the course. Japan is now basically arguing that the imports from Japan are priced higher anyways so there can be no competition, and that the authorities' improperly treated the respondents' allegation about the

"general-purpose" steel. Certainly, such unsubstantiated and self-serving allegations must necessarily be rejected.

35. Korea recalls that Japan's latest arguments are developed opportunistically based on the Panel's relevant questions. But Korea has already demonstrated that price differential alone cannot disprove the competitive relationship, and the authorities have nonetheless found the competitive relationship based on an extensive analysis of various factors, as required by the applicable Korean laws. Also, the respondents' allegations about the "general-purpose" steel were unsubstantiated, inconsistent, and eventually abandoned by the respondents themselves. Most importantly, Japan provides no substantiated argument whatsoever, let alone establishes a *prima facie* case, against the authorities' decision to cumulatively assess the imports from Japan, India, and Spain for the underlying review.

36. To conclude, Japan's arguments against the authorities' decision to cumulate are entirely meritless.

V.1.2. WHETHER THE AUTHORITIES' CAPACITY UTILIZATION FINDING INVALIDATES THE OVERALL LIKELIHOOD-OF-INJURY DETERMINATION

37. Japan argues that authorities' likelihood-of-injury determination was flawed because it was based on, among others, the allegedly erroneous finding that Japan's SSB industry had sufficient additional production capacity for exports. Japan argues that this finding was not based on an objective examination of positive evidence because the authorities rejected "direct evidence" submitted by the respondents and instead relied on the ISSF data. Japan's claim is without merit.

38. First, Japan fails to substantiate, let alone establish, how such alleged flaw in the authorities' finding on the capacity utilization necessarily results in violation of Article 11.3. Indeed, the authorities' likelihood-of-injury determination rested on numerous other considerations, such that even without the authorities' finding on capacity utilization, the overall likelihood-of-injury determination that largely followed the *classic* likelihood-of-injury analysis would properly stand. Indeed, it is well-established that errors in intermediate findings do not render the overall likelihood-of-injury determination inconsistent with Article 11.3, especially if the determination is supported by other factors. That is because a violation of Article 11.3 can be established only upon proving that the authorities' overall likelihood-of-injury determination is flawed. Thus, Japan's challenge against the Korean authorities' specific finding on the capacity utilization, even if successful (*quod non*), cannot invalidate the overall likelihood-of-injury determination.

39. Second, at any rate, the Korean authorities' more directly relevant intermediate finding that the Japanese SSB industry has the capacity to increase production and export of the covered product to Korea upon removal of the anti-dumping measure must remain valid. As explicitly confirmed through the case of one of the Japanese producers, secondary processing can be simply outsourced if desirable. Thus, the notion that the SSB producers are bound by their current production capacity is factually incorrect; as long as incentive arises upon removal of the current measure, current capacity utilization would not pose meaningful restriction on increasing the SSB export to Korea. Next, the Korean authorities confirmed that the Japanese respondents were continually making investments on the new facilities, indicating that their overall production capacity will increase.

40. Third, even if the respondents' unsubstantiated, inconsistent and entirely self-serving numerical allegation about their production capacity is accepted "as is", the authorities' relevant intermediate finding *still* remains valid. That is, the authorities considered that, even assuming *arguendo* that the unsubstantiated capacity utilization as alleged by the respondents is legitimate, the respondents alone had the spare capacity to produce a significant additional amount of the covered products in 2015, which amounted to a major portion of the total domestic sales of the like domestic product.

41. Therefore, the Korean authorities' finding that the Japanese SSB industry has the ability to increase production and export of the covered products to Korea upon removal of the measure must remain valid at any rate. In turn, the Korean authorities' overall likelihood-of-injury determination remains unaffected by any flaw in the authorities' numerical finding on the capacity calculation.

42. Fourth, the authorities' finding about the capacity utilization was reasonable. Korea submits that the authorities' selection of both the numerator (the JSSA data) and denominator (the

ISSF data) for their calculation of the capacity utilization was reasonable, duly reflecting the high-adaptability of the SSB production facilities. The ISSF data were eminently objective, reliable, and credible, and the data's scope was reasonably limited so as to allow proper calculation of the capacity utilization. Any perceived misalignment between the numerator and the denominator does not undermine at all the overall reasonableness of selecting the ISSF data as the denominator. In any case, the outcome of such alleged misalignment has only negligible impact on the capacity utilization calculation.

43. Fifth, very importantly, the Japanese respondents' alleged production capacity was both unsubstantiated and unreliable because it lacked any sort of supporting materials and the respondents failed to respond to the authorities' repeated requests for verifiable information. In fact, the respondents refused to provide the requested overall production capacity data and the proportion of SSB products that are being manufactured through the same production facilities, etc., while only providing the same, unsubstantiated and self-contradictory numerical allegation over and over again.

44. To make the matters worse, the respondents provided conflicting explanations as to the *scope* and *source* of their numerical allegation. In light of the fact that the respondents never provided any sensible justification for such blatant changes in course, and the fact that their alleged production capacity differed so significantly from the ISSF data, the respondents' unsubstantiated numerical allegation simply could not have been accepted as their actual combined production capacity.

45. Finally, Japan has failed to establish any flaw in the Korean authorities' findings through its unsubstantiated and constantly changing arguments.

46. Japan's original argument about the capacity utilization was that the Korean authorities used capacity for 'primary processing', which was squarely refuted by the record evidence. Japan then moved on to argue that capacities for "SSB" and "sections" are distinctive. Korea then demonstrated, based on the Japanese respondents' own catalogues and the structure of the ISSF data, that the same capacity can be used to produce both "SSB" and "sections".

47. Japan now argues that sections are not subject to 'peeling processing'. But not only does that new allegation runs counter to the respondents' own catalogue, but it also disregards the fact that the secondary processing capacity found by the authorities were not limited to 'peeling' only, but also 'grinding, peeling, and drawing'. In this regard, Japan ignores the fact that the covered products included not only 'round bar', but also 'square bar', 'hexagonal bar', and 'flat bar'; secondary processing capacities used for producing sections can readily be used for producing various types of covered products, even accepting *arguendo* Japan's argument that 'peeling capacity' cannot be used for producing 'round bar'. At the same time, to the extent that Japan maintains that the respondents' alleged production capacity was in fact limited to "peeling" process only, Japan's own argument profoundly tarnishes the legitimacy of the Japanese respondents' numerical allegation, as the alleged number may then cover "round bars" only, but not other "shaped" *covered products*.

48. Korea has pointed out several of Japan's disingenuous representations of basic facts in this dispute, which should carry at least some weight in the Panel's assessment of the matter before it.

V.1.3. THE AUTHORITIES' FINDING THAT REMOVAL OF DUTIES WOULD *LIKELY* TRIGGER INCREASE OF IMPORTS AND DECREASE OF PRICE FOR THE DUMPED IMPORTS

49. Japan argues that the Korean authorities violated Article 11.3 of the Anti-Dumping Agreement because the determination of a likelihood of recurrence of injury was based on the erroneous finding that imports from Japan would increase if duties expired and that domestic prices would significantly decrease. Japan asserts that this is speculative and that the Japanese industry has shifted its focus away from the price competitive "general purpose" SSBs that dominate the Korean market. However, Japan's assertions are not supported by the facts on the record which reasonably supported the Korean authorities' contrary findings.

50. As an initial matter, Japan attempts to recycle its arguments against the authorities' cumulative assessment of the imports from Japan, India, and Spain. But once the cumulation is deemed valid, all subsequent review must be conducted on that cumulative basis. Thus, Japan's claims in this regard are largely misplaced and must summarily be rejected.

51. Next, the finding that dumped imports were likely to increase if duties expired was based on, *inter alia*, a recent increase in their volume and market share (despite the imposition of duties), in combination with the fact that such volumes were still well below pre-measure levels, suggesting further increases upon removal of the measure were probable. In addition, the authorities found that there was considerable spare production capacity in *all* subject countries to increase the production and export of the covered products.

52. Furthermore, the authorities' examination of prices showed that the dumped imports on cumulative basis continued to undercut prices of the like domestic product throughout the POR, and that the average import and resale prices of the dumped imports were considerably lower than the average resale price of the like domestic product at the end of the POR. Thus, even with the imposition of anti-dumping duties, the average sales price of the dumped imports undercut the average price of the like domestic product. The logical conclusion, therefore, was that expiry of the duties would exhort additional price pressure on domestic prices. This finding was supported by analysis of the above-referenced price data and related explanation. The authorities also expressly pointed to the fact that the removal of the duties on imports from Japan would make these imports more price competitive putting additional pressure on domestic prices.

53. Finally, the Korean authorities also examined the likely impact of other factors, especially third-country imports, material costs, and domestic demand. This analysis showed that there were no reasons why such other factors would refute a finding of likely increase in volume and decrease in domestic prices if duties were removed. For example, the volume and market share of third-country imports remained stable over the review period, and their market share had only increased slightly.

54. In sum, the Korean authorities' determination of a likely increase in the volume of dumped imports and a drop in domestic prices if duties were to expire was firmly grounded in the facts on the record and was based on reasonable projections about future events.

V.1.4. JAPAN'S CLAIM THAT KOREA FAILED TO PROPERLY EXAMINE THE LIKELY IMPACT OF OTHER FACTORS IS WITHOUT MERIT

55. Japan argues that the Korean authorities' determination of a likelihood of recurrence of injury is inconsistent with Article 11.3 because the authorities failed to examine properly the likely injury caused by "known factors other than the dumped imports". However, first, as a legal matter, Article 11.3 does not require a causation and non-attribution analysis based on the effects of dumped imports on injury as separated and distinguished from the effects of other known factors, as is the case in original investigations under Article 3.5. In any case, second, as a factual matter, the authorities' determination involved an objective examination of positive evidence, and rested on a sufficient factual basis, that allowed the authorities to make a reasoned and adequate conclusion on the likelihood of recurrence of injury if the duties were removed even in the light of other factors.

56. As part of this analysis, although not legally required, the Korean authorities considered the effects of factors other than the dumped imports, such as third-country imports, material costs, and demand. The Korean authorities found that there was no basis to consider that these other factors played an important role in determining the likelihood of recurrence of injury if the anti-dumping duties were removed. For example, regarding the volume of third-country imports, the authorities found that the volume and market share of these imports remained stable over the review period, and trended similarly to the dumped imports and the like domestic product. In addition, material costs declined and demand increased in the review period. These two factors could not be a separate cause of recurrence of injury if the duties were removed.

V.2. CLAIM 2: JAPAN'S ERRONEOUS CLAIM THAT THE ALLEGED USE OF FACTS AVAILABLE VIOLATED ARTICLES 11.4, 6.8 AND PARAGRAPHS 3 AND 7 OF ANNEX II

57. Japan claims that the authorities acted inconsistently with Articles 11.4, 6.8, and paragraphs 3 and 7 of Annex II of the Anti-Dumping Agreement because they rejected information submitted by the Japanese respondents and allegedly resorted to facts available for calculating the SSB production capacity in Japan based on ISSF data. However, Japan errs when it argues that the authorities resorted to the use of facts available, and in any case fails to demonstrate that the authorities acted inconsistently with Article 6.8 and paragraphs 3 and 7 of Annex II in the underlying review.

58. First, the Korean authorities did not resort to the use of facts available due to missing necessary information in the third sunset review. They simply attached more weight to the reliable ISSF data. The authorities had the necessary information that most reliably represented Japan's countrywide capacity and production from reputable public sources, e.g. the ISSF data. Article 6.8 and Annex II simply do not apply to a likelihood-of-injury determination where investigating authorities seek to examine, as one of many factors, the availability of excess production and export capacity in a country of export. While actual data about producers' prices and costs are "necessary" to be obtained from the producers themselves in order to make a determination of dumping, the same is not the case for a likelihood-of-injury determination. Such a determination includes an analysis of a country's production capacity and capacity utilization with a view to evaluating the likely future increase in the volume of imports, as one of many factors that is examined. In this case, there was no missing information, as there was reliable and objective data available from the ISSF. In addition, the specific information from the cooperating exporters did not constitute "necessary" information, as such data was only producer specific. There was thus no gap to fill that would have required the authorities to resort to facts available under Article 6.8.

59. Second, in any case, and should the Panel find that the authorities resorted to facts available (*quod non*), every condition under Article 6.8 was satisfied and, thus, the authorities were justified to use facts available. Indeed, Korea has already explained how the respondents constantly refused to comply with the authorities' repeated requests for detailed information by submitting the same self-contradictory number over and over again, without providing any supporting materials that would have allowed verification. Importantly, the respondents provided conflicting explanations about the *scope* and *source* of their numerical allegation of production capacity, rendering it even more impossible to verify the allegation, at least without "undue difficulties", to say the least. Thus, the respondents more than significantly impeded the underlying third sunset review, failed to act to the best of their abilities, and their submitted information was neither verifiable, nor appropriately or timely submitted so that it could be used without undue difficulties by the Korean authorities.

60. Third, there is no basis for Japan's claim that the Korean authorities acted without special circumspection when using the ISSF data. Korea notes that the ISSF data did not constitute "secondary source" information. As there was no *primary* source of information for the finding on capacity available in Japan as a whole, the ISSF data could not constitute *secondary* source information. In any event, the Korean authorities assessed the relevance and reliability of the ISSF and JSSA data for the question concerning production capacity and capacity utilization in Japan. It found that the ISSF data represented useful and reliable data on this issue, as it was collected from various producers and national associations involved in the SSB industry, and that the data was frequently relied on in anti-dumping investigations of other WTO Members.

61. In contrast, Japan has *never even attempted* to argue that more reasonable replacement than the ISSF data was available to the Korean authorities, but only argued that the respondents' data was more reliable. In fact, Japan repeatedly confirmed that it is not challenging the reliability of the ISSF data. Simply put, Japan has failed to establish a *prima facie* case in relation to its paragraph 7 claim.

62. In sum, the Korean investigating authorities did not resort to the use of facts available, as they had relevant and appropriate information on production and exports of SSBs in Japan from reputable public sources. Assuming, *arguendo,* that Article 6.8 and Annex II of the Anti-Dumping Agreement even apply, all conditions for resorting to facts available were met. Japan's claim is to be rejected.

V.3. CLAIM 3: JAPAN'S BASELESS CLAIM THAT KOREA FAILED TO DISCLOSE THE ESSENTIAL FACTS BEFORE THE FINAL DETERMINATION IN VIOLATION OF ARTICLES 11.4 AND 6.9

63. Japan claims that Korea violated Articles 11.4 and 6.9 of the Anti-Dumping Agreement, as the KTC allegedly failed to inform all interested parties of the essential facts under consideration that formed the basis for the decision to extend the anti-dumping duties. This claim is baseless, as the authorities disclosed the essential facts that constituted the basis for the MOSF's Final Determination in the non-confidential versions of the KTC's Final Resolution and the OTI's Final Report.

64. In Korea, the MOSF has the sole authority to decide the "substance" and "imposition" of anti-dumping measures. Whenever the KTC makes recommendations by way of delivering its resolution to the MOSF, the MOSF always conducts objective assessment of the

KTC's recommendations, and reaches its own determinations. Given that the MOSF has reversed or otherwise changed almost 20% of all final resolutions adopted by the KTC thus far, the MOSF's review process is not formalistic at all, and only the MOSF's final determination is both the decision to impose anti-dumping duties and the final determination within the meaning of Article 6.9 of the Anti-Dumping Agreement in Korea.

65. Also, even prior to the KTC's adoption of its Final Resolution based on the OTI's Final Report, various disclosures that sufficiently disclosed the essential facts were made. Indeed, long before the KTC's Final Resolution, the OTI not only provided the respondents with the Interim Report that contained most of the findings included in the Final Report, but also provided a Revised Interim Report reflecting the arguments and opinions of the interested parties on the Interim Report.

66. In addition, all of Japan's allegations under this claim are either groundless or concern facts that were not significant in the process of reaching a decision to extend the measure – they were thus not "essential" facts that warranted disclosure. Where actual data was redacted for protection of confidential information, the narrative in the published reports provided the relevant information through a non-confidential summary, allowing the interested parties to exercise their rights of defense. Importantly, neither the Japanese respondents in the underlying review nor Japan brings a claim under Articles 6.2 and 6.4 of the Anti-Dumping Agreement, thus confirming that the respondents' rights to defend their interests were fully respected in the underlying review.

67. In sum, the essential facts for the decision to extend the application of the anti-dumping measures on imports of SSBs were clearly disclosed to the interested parties in accordance with Articles 11.4 and 6.9, enabling them to defend their interests with respect to the key facts supporting the determination.

V.4. Claim 4: Japan's Baseless Claim that Korea Failed to Treat Properly Confidential Information in Violation of Articles 11.4, 6.5, and 6.5.1

68. Japan claims that Korea violated Articles 11.4, 6.5, and 6.5.1 of the Anti-Dumping Agreement because the Korean authorities afforded confidential protection of certain information without a showing of "good cause", and because they failed to require sufficient non-confidential summaries of the confidential information. Japan's claims of violation of these provisions are baseless.

69. In Korea, every interested party in anti-dumping investigations submits non-confidential summaries by designating what information is to be treated confidential. It does this by deleting the relevant information. By doing so, the provider of the information asserts that such deleted information falls within the categories of "confidential information" specifically set forth in the relevant laws in Korea. Every interested party, including the respondents, was aware of this established practice.

70. The authorities proceeded to assess objectively whether there was "good cause", i.e. whether the deleted information indeed fell within a category of confidential information enumerated in the relevant Korean laws. Moreover, all interested parties the underlying review provided the "non-confidential summary" of their confidential information by way of providing a public version of the document that contains the confidential information. Non-confidential summaries are not required under Article 6.5.1 for every single figure and piece of data included in the parties' submissions, regardless of the relevant context. Thus, authorities are entitled to a reasonable degree of deference in accepting or rejecting summaries. In the underlying review, the applicants provided summaries for all confidential information that they submitted. Such summaries were in sufficient detail to permit reasonable understanding of the substance of the confidential information.

71. In sum, Korea's treatment of confidential information in the underlying third sunset review was consistent with Articles 11.4, 6.5, and 6.5.1. Moreover, Japan did not include a claim under Articles 6.2 and 6.4 of the Anti-Dumping Agreement – thus confirming the respondents' rights to defend their interests were fully respected in the underlying review.

V.5. Claim 5: Japan's Claim that Korea Failed to Provide Sufficient Detail of Findings and Conclusions in Violation of Articles 12.3, 12.2, and 12.2.2

72. Japan claims that Korea acted inconsistently with Articles 12.3, 12.2, and 12.2.2 of the Anti-Dumping Agreement because of a failure to provide in sufficient detail the findings and conclusions reached on all issues of fact and law that the investigating authorities considered material. However, when the MOSF published its final determination, it disclosed the full public version of the OTI's Final Report and the KTC's Final Resolution by attaching them as the final determination's annexes. Given such full disclosure, Japan's claims under Article 12 are entirely without merit.

V.6. Claim 6: Japan's Consequential Claim is Unfounded

73. Japan claims that Korea acted inconsistently with Article VI:6(a) of the GATT 1994 because of the alleged inconsistencies with Article 11.3 of the Anti-Dumping Agreement. Japan's claim is entirely consequential of its Article 11.3 claims. Moreover, Japan's Panel Request fails to specify which of the obligations under GATT Article VI:6(a) would be violated as a consequence of the alleged inconsistencies with Article 11.3. Therefore, this claim should be rejected in its entirety.

VI. CONCLUSION

74. For the reasons stated in this executive summary, Korea respectfully requests the Panel to reject all of Japan's claims that the Korean authorities' determination to extend the anti-dumping measure on imports of SSBs from Japan, India, and Spain is inconsistent with the Anti-Dumping Agreement.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE
ARGUMENTS OF THE EUROPEAN UNION

I. INTERPRETATION OF ARTICLE 11.3 OF THE ANTI-DUMPING AGREEMENT

A. Legal obligations under Article 11.3 of the Anti-Dumping Agreement

1. Article 11.3 of ADA[1] requires that definitive anti-dumping duties are to be terminated not later than five years after their imposition (or the last review, when that review covered both dumping and injury) unless a positive determination is made after a review procedure that the expiry of the duty would likely lead to continuation or recurrence of dumping and injury. It is in this sense that the termination of the anti-dumping duty after the time period provided for in Article 11.3 ADA is the default, while the continuation is the exception.

2. The substantive question which the investigating authority must assess when making a determination under Article 11.3 ADA is whether the termination of a specific anti-dumping duty previously imposed will likely "*lead to*" the continuation or recurrence of dumping and injury in the future.

3. As the Appellate Body has found, the determination under Article 11.3 ADA has to be made on a "*sufficient factual basis that allows the investigating authority to draw reasoned and adequate conclusions*".

B. Cumulative Assessment under Article 11.3 of the Anti-Dumping Agreement

Permissibility of cumulative assessment under Article 11.3 ADA

4. Article 3.3 ADA specifically provides for the cumulative assessment of imports from several countries under certain conditions. Article 11.3 ADA does not refer to Article 3 ADA and the Appellate Body has stated that investigating authorities are in principle not mandated to follow the provisions of Article 3 ADA when making a determination under Article 11.3 ADA.

5. The EU[2] submits however that the rationale underlying the use cumulative assessment justifies using such assessment not only in the original investigations and determinations but also in review determinations under Article 11.3 ADA: the substantive test of Article 11.3 ADA concerns a (prospective) nexus, namely between the termination of the duty and the continuation or recurrence of dumping and injury and a cumulative assessment may be appropriate in determining this nexus.

Conditions for applying a cumulative assessment in an Article 11.3 ADA review

6. The EU submits that the guiding principle for the appropriateness of a cumulative assessment is to be found in the rationale for such assessment as described by the Appellate Body in *EC – Tube or Pipe Fittings* and which the Appellate Body specifically found to be applicable both in original as well as in review procedures.

7. It is clear from the Appellate Body's finding in *EC – Tube or Pipe Fittings* that the rationale for cumulative assessment lies in the fact that a country-specific assessment may not be able to reflect the effects on the domestic industry of the imports of dumped products from several countries. What a cumulative assessment is therefore meant to overcome is the specific difficulty which an investigating authority may face that the imports of dumped products from any one country are not sufficient to injure the domestic industry (or not injure sufficiently) while it remains an economic fact that a domestic industry is impacted by all imports in a cumulative fashion.

[1] The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "ADA" or "the Anti-Dumping Agreement").
[2] The European Union ("the EU").

C. Country-wide or company-specific data on capacity

8. Country-wide data on spare capacity is in principle an appropriate and permissible benchmark when assessing spare capacity in likelihood of dumping and injury determinations under Article 11.3 ADA.

D. Definition of "injury"

9. With regard to the relationship between the meaning of "*injury*" as reflected in footnote 9 ADA and the meaning of "*injury*" in Article 11.3 ADA, the definition of injury in footnote 9 is applicable to the entire Anti-Dumping Agreement, including in the application of Article 11.3 ADA.

E. Injury partially due to dumped imports

10. It is sufficient for a determination under Article 11.3 ADA that the injury which is found to be likely to be experienced by the domestic industry is only partially due to the expiry of the duty. The fact that the domestic industry is likely to experience injury also from other sources at the same time does not exclude making a finding under Article 11.3 ADA.

F. Recurrence and continuation of injury

11. The EU agrees with the position that stating that there is a "*recurrence*" of injury means that the domestic industry is not currently (that is: while the duties in question are being applied) experiencing injury from dumping. However, the EU's view is not that the case of "*recurrence*" necessarily means that the domestic industry experiences no injury at all prior to the expiry of the anti-dumping duty previously imposed.

12. Given the fact that Article 11.3 ADA requires a determination of likelihood of recurrence or continuation of both dumping and injury, it is more appropriate to understand the notion of "*recurrence*" as covering not only the situation where the domestic injury does not suffer any injury at all prior to the expiry of the duty, but also the situation that the domestic industry experiences injury from another cause than dumping.

13. Similarly, a determination of "*continuation*" of injury is not prevented by the consideration that the domestic industry may be experiencing injury from other sources as well.

14. In the EU's view, the determination under Article 11.3 ADA is essentially a forward-looking one. The fact that the text of that article refers to both "*recurrence*" and "*continuation*" simply reflects the desire to cover the whole range of possible situations of the domestic industry while the anti-dumping duties are applied.

II. USE OF FACTS AVAILABLE (ARTICLE 6.8 ADA AND ANNEX II TO ADA)

A. Use of "facts available" mandatory or discretionary?

15. The use of "facts available" under Article 6.8 ADA is a matter of discretion of the investigating authority, once the conditions of that article are fulfilled.

B. When does the authority have recourse to "facts available"?

16. Given the mandatory nature of Article 6.8 ADA and Annex II to ADA, the applicability of the provisions of Annex II to ADA cannot depend on whether the investigating authority specifically refers to the concept of "*facts available*". If that were the case, an investigating authority could evade the discipline of Article 6.8 ADA and of Annex II to the Anti-Dumping Agreement simply by not calling what it does the use of "*facts available*".

17. In the EU's view, therefore, the key factor which triggers the applicability of Article 6.8 ADA and of Annex II to the Anti-Dumping Agreement is what the investigating authority does, rather than how it calls its actions.

18. In a situation where the investigating authorities reject the information supplied by the respondents upon request because of the reliability and the usability of that information, the investigating authorities are only allowed to do so under the conditions provided for in Article 6.8 ADA and paragraphs 3 and 7 of Annex II to ADA.

C. The notion of "necessary" information

19. The EU considers that the substantive assessment of the rule which is being applied defines the broad scope of the information needed in the investigation and that what is "*necessary*" is then primarily defined by the investigating authority. Article 6.8 ADA and Annex II to the ADA reflect a procedure in which this authority is under an obligation to define the information it seeks early and in a clear manner.

D. Presenting a claim based on Article 6.8 ADA

20. A Member can argue that Article 6.8 ADA does not apply in a specific situation, and also argue – in a subsidiary manner – that even if Article 6.8 ADA were to apply, its requirements would not be fulfilled and it would therefore not be violated. Nothing in the DSU prevents a member from presenting a full case or a full defence and that may well entail making primary as well as subsidiary arguments – for instance by stating that a particular provision does not apply, but even if it were to apply it would be infringed (or not).

III. CLAIM UNDER ARTICLES 6.5 AND 6.5.1. OF THE ANTI-DUMPING AGREEMENT

21. Article 6.5 ADA specifically provides that information shall be treated as confidential "*upon good cause shown*". Article 11.4 ADA provides that the provisions regarding evidence and procedure in Article 6 ADA shall be applicable in a review procedure pursuant to Article 11.3 ADA.

22. The EU does not consider that the use of pre-determined categories of information is as such contrary to Article 6.5 ADA, provided that the categories are sufficiently precise and cover only information which can in fact be considered as by its nature confidential. Under these conditions, such categories can indeed be considered to be a tool by which an "implicit" claim and motivation ("good cause") for confidential treatment by the submitter is made.

23. It is more problematic that these categories are administered by the authority in such a way that information falling into their scope is automatically treated as meriting confidential treatment. Only the use of such categories which are sufficiently precise and circumscribed so as to clearly only entail information where confidential treatment is justified would satisfy the requirements of Article 6.5 ADA. The use of overly broad categories would fall foul of the requirement that the authority objectively assess the claim made by the submitter.

IV. REQUIREMENT FOR AN INVESTIGATING AUTHORITY TO SPECIFICALLY ADDRESS A MATTER RAISED BY A RESPONDENT

24. If an interested party raises a relevant matter with sufficient evidence and argumentation in a sunset review under Article 11.3 ADA, the investigating authority is in principle required to address it explicitly in its determination.

25. There is no single factor which determines whether an interested party has adduced enough evidence and argumentation on a given matter to warrant an explicit consideration. Rather, a case- by-case assessment is in order.

V. CHALLENGE OF A CERTAIN FACT BY THE RESPONDENT

26. The EU considers that the fact that an interested party does not challenge a certain matter does not, as such, influence the legality of the authority's determination. However the fact that a certain aspect has not been challenged or not challenged with sufficiently precise evidence or argumentation can influence whether the authority must address a particular argument explicitly.

VI. FAILURE TO CHALLENGE "LIKE PRODUCT DEFINITION" AND ARGUMENTS ABOUT THE CONDITIONS OF COMPETITION

27. Given the fact that a "like product definition" can lead to a range of relevant products, a failure to challenge this definition cannot be a legal bar to validly advancing arguments concerning "conditions of competition". The substantive argument which is being made (i.e. that certain types of steel bars do not effectively compete with the domestic industry and cannot therefore have led to injury to that industry) is independent of the "like product definition".

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE
ARGUMENTS OF THE UNITED STATES

EXECUTIVE SUMMARY OF U.S. THIRD PARTY ORAL STATEMENT

I. CUMULATIVE ASSESSMENT IN SUNSET REVIEWS PURSUANT TO ARTICLE 11.3 OF THE ANTI-DUMPING AGREEMENT

1. Japan suggests that an investigating authority may be required to consider certain differences between imports and the domestic like product in evaluating their competitive relationship to justify a cumulative assessment in a sunset review consistent with Article 11.3 of the Anti-Dumping Agreement and Article VI of the GATT 1994.

2. Article 11 of the Anti-Dumping Agreement concerns the duration and review of anti-dumping duties, or sunset reviews. In particular, Article 11.3 requires an order to be terminated five years after its imposition, unless a Member conducts a review to determine whether revocation would be likely to lead to continuation or recurrence of dumping and injury. If a Member in conducting a sunset review concludes that revocation would be likely to lead to continuation or recurrence of dumping and injury, then the Member may continue the order.

3. Unlike Article 3 of the Anti-Dumping Agreement (Determination of Injury), which explicitly provides certain preconditions for making a cumulative assessment in the context of original investigations, Article 11.3 does not prescribe the methodology by which a sunset review must be conducted. Nor does Article VI of the GATT 1994 require any specific analysis for the assessment of injury in sunset reviews.

4. Consistent with the applicable standard of review in Article 17.6 of the Anti-Dumping Agreement and Article 11 of the DSU, the Panel need only consider whether the Korean investigating authority's evaluation of the facts was unbiased and objective. Article 17.6 provides that a panel:

> [S]hall 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 …

5. What is adequate will depend on the facts and circumstances of the case, recognizing that an investigating authority may have to consider conflicting arguments and evidence. The Appellate Body recognized in *US – Anti-Dumping Measures on Oil Country Tubular Goods* that because "Article 11.3 does not prescribe any particular methodology to be followed by an investigating authority in conducting a sunset review", investigating authorities need only "arrive at a reasoned and adequate conclusion" with respect to cumulation, which may "in certain cases" require "an examination of whether imports are in the market together and competing against each other".

6. Consequently, an investigating authority may make a cumulative assessment in a sunset review so long as the decision to cumulate is based upon an unbiased and objective evaluation of the facts.

II. EVALUATION OF PRODUCT DIFFERENCES IN SUNSET DETERMINATIONS

7. The United States will next address Japan's argument that the Korean investigating authority acted inconsistently with Article 11.3 of the Anti-Dumping Agreement by not analyzing "the effects of the product under investigation on the domestic like products ... on a type-by-type basis" including

"a comparison of prices and other factors between the product under investigation and the domestic like products for general-purpose steel and special steel in separate analyses".

8. The United States understands that the Korean investigating authority defined a single domestic like product, as well as a single domestic industry corresponding to the domestic producers "as a whole" of the like products.

9. Given its definition of a single domestic industry, the Korean investigating authority was only required to make a single determination as to whether revocation of the orders was likely to result in the continuation or recurrence of injury to the industry.

10. As explained by the panel in *EU – Footwear (China)* in the context of material injury, "consideration of the performance of a particular type as opposed to other types within one like product is not necessarily relevant" because "the industry is defined as producers of the like product, and the determination to be made is whether the industry as a whole is materially injured by dumped imports".

11. However, depending on the facts and circumstances, an analysis of different types of merchandise produced by a single domestic industry may be appropriate in the context of a sunset determination. For example, if an investigating authority assesses the significance of likely price undercutting by comparing the average unit values (AUVs) of subject imports to the AUVs of the domestic like product, and the AUVs are based on baskets whose product mixes are not comparable, an investigating authority may control for differences in physical characteristics affecting price comparability.

12. Investigating authorities may also need to consider the degree of competitive overlap between subject imports and the domestic like product where the "differentiation of goods ... affects the competition between them in ways that have an impact on the assessment of" likely injury.

EXECUTIVE SUMMARY OF U.S. THIRD PARTY RESPONSES TO QUESTIONS

I. THE PROPER INTERPRETATION OF ARTICLE 11.3 OF THE ANTI-DUMPING AGREEMENT

13. Japan suggests that the Korean investigating authority failed to address certain evidence presented by the interested parties in the underlying investigation. Whether an investigating authority must address an interested party's argument in its public notice of an affirmative sunset review determination, continuing an anti-dumping duty order, will depend on whether the party's argument is "relevant" and "considered material by the investigating authorit[y]" within the meaning of Article 12 of the Anti-Dumping Agreement, which applies to reviews pursuant to Article 11.

14. Article 12.2.2 requires investigating authorities to issue a public notice of final affirmative determinations containing "the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters or importers". The chapeau of Article 12.2 requires investigating authorities to "set forth" in such notices "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities". Therefore, Article 12 does not require investigating authorities to address in their public notices of final determinations each and every argument raised by interested parties over the course of an investigation or review, but only those arguments that are relevant and considered material by the investigating authority.

15. Accordingly, the panel in *EU – Footwear (China)* rejected the view that whether information and reasons for the acceptance or rejection of arguments must be provided should be judged from the perspective of the interested parties. The panel explained that arguments "of importance to individual interested parties" may not be "'material' within the meaning of Article 12.2.2". Similarly, in *China – GOES*, the Appellate Body reasoned that "[t]he obligation of disclosure under Article [ ] 12.2.2 … is framed by the requirement of 'relevance', which entails the disclosure of the matrix of facts, law and reasons that logically fit together to render the decision to impose final measures".

16. In sum, an investigating authority need not address an argument made by an interested party that the authority deems not relevant or material to its determination, irrespective of the importance of the argument to the interested party or the amount of evidence and argumentation it has adduced with respect to the argument.

17. With respect to the Korean investigating authority's decision to cumulate in the sunset review at issue, Korea observes that Japan has not challenged the definition of the like product in this dispute, and suggests that the Japanese interested parties should have raised objections to the like product definition in the underlying investigation. The fact that a complaining party could have raised an additional claim would not itself prevent a panel from making a finding of inconsistency with a claim that has been raised. Further, interested parties need not necessarily object to or challenge a matter in a sunset review proceeding to preserve a Member's right to claim in dispute settlement proceedings that an investigating authority acted inconsistency with respect to Article 11.3. However, if interested parties have failed to raise particular issues during the underlying investigation, the Panel could take such failure into an account in evaluating whether the determination by the investigating authority contains a sufficient degree of detail in reaching conclusions on the issues of law and fact. For example, if certain issues were not raised by interested parties during the investigation, an explanation regarding certain aspects of the determination may be less detailed than in a situation when interested parties have raised arguments regarding such issues before the investigating authority.

18. With respect to an investigating authority's examination under Article 11.3, the definition of "injury" in footnote 9 of the Anti-Dumping Agreement is applicable for the whole Anti-Dumping Agreement (unless otherwise specified), including in the context of sunset reviews pursuant to Article 11.3. Footnote 9 provides:

> Under this Agreement the term 'injury' shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of [Article 3].

19. While the definition of "injury" in footnote 9 provides that the term "shall be interpreted in accordance with the provisions of [Article 3]", it does not follow that an investigating authority must comply with the requirements for original investigations set out in Article 3, including the obligation to consider "other known causes" of injury under Article 3.5.

20. The Anti-Dumping Agreement distinguishes between original determinations of injury pursuant to Article 3 and determinations of the likelihood of continuation or recurrence of injury pursuant to Article 11.3. Thus, the applicability of the definition of "injury" in footnote 9 of the Anti-Dumping Agreement to the term as used in Article 11.3 does not suggest an obligation for investigating authorities to follow the requirements of Article 3, including the requirement in Article 3.5 to consider "any known factors other than the dumped imports which at the same time are injuring the domestic industry".

21. The Appellate Body in *US – OCTG Sunset Reviews* also rejected the view that the applicability of the definition of "injury" in footnote 9 has the effect of extending all obligations applicable to original investigations under Article 3 to sunset reviews under Article 11.3. As the Appellate Body explained, "[g]iven the absence of textual cross-references, and given the different nature and purpose of these two determinations, we are of the view that, for the "review" of a determination of injury that has already been established in accordance with Article 3, Article 11.3 does not require that injury again be determined in accordance with Article 3".

22. Further, Article 11.3 of the Anti-Dumping Agreement provides that an investigating authority must determine that the "expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury". The text of that provision does not require investigating authorities to establish that the *entire* likelihood-of-injury to the domestic industry is attributable to subject imports. Therefore, it is possible for an investigating authority to render an affirmative determination under Article 11.3 even where factors other than subject imports render a domestic industry vulnerable to the continuation or recurrence of material injury after revocation such that subject imports would not be the sole cause of an industry's distress.

II. THE INTERPRETATION AND APPLICATION OF ARTICLE 6.8 OF THE ANTI-DUMPING AGREEMENT IN THE CONTEXT OF SUNSET REVIEWS

23. The use of the word "may" in Article 6.8 indicates that, while authorities have the ability to use facts available under appropriate circumstances, they are not required to do so. Other provisions of Article 6 of the Anti-Dumping Agreement that provide mandatory obligations on authorities, such as Articles 6.3, 6.4, 6.5, 6.9, 6.10, 6.12, and 6.13, all use the word "shall". The permissive nature of Article 6.8 is further confirmed by the guidance in Annex II, which provides in non-mandatory terms that investigating authorities "will be free" to make determinations on the basis of the facts available.

24. In resorting to "facts available" under Article 6.8, the missing information must be "necessary". The use of the term "necessary" as a qualifier carries significance because it ensures that Article 6.8 is "not directed at mitigating the absence of 'any' or 'unnecessary' information, but rather is concerned with overcoming the absence of information required to complete a determination". If such "necessary" information is absent, "the process of identifying the 'facts available' should be limited to identifying replacements for the 'necessary information' that is missing from the record".

25. When an investigating authority must rely on "facts available" under Article 6.8, "[t]here has to be a connection between the 'necessary information' that is missing and the particular 'facts available'" on which a determination is based.

26. The application of "facts available" under the circumstances described by Article 6.8 is at the discretion of the investigating authority. Where that authority has been exercised, the requirements of Article 6.8 and Annex II will apply. An investigating authority may reject information because it is not relevant or inaccurate. Article 6.8 further permits an investigating authority to reply on facts available where the respondent party has been non-cooperative and where the information requested is necessary and the information provided is either deficient or unreliable.

27. A claim under Article 11.3 must be assessed on its own merits and does not formally relate to an evaluation under Article 6.8. In analyzing likely injury, an investigating authority may rely on any source of data available to it, so long as the investigating authority's analysis is based on positive evidence and an objective examination. Therefore, the task of the Panel would be to determine whether the investigating authority's findings with respect to the likelihood of continuation or recurrence of injury were supported by the record evidence such that a reasonable and unbiased authority could have reached the same conclusion. This evaluation will depend on the particular facts and circumstances of the case, including, for example, the findings made by the authority with respect to the reliability and probative value of the evidence.

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